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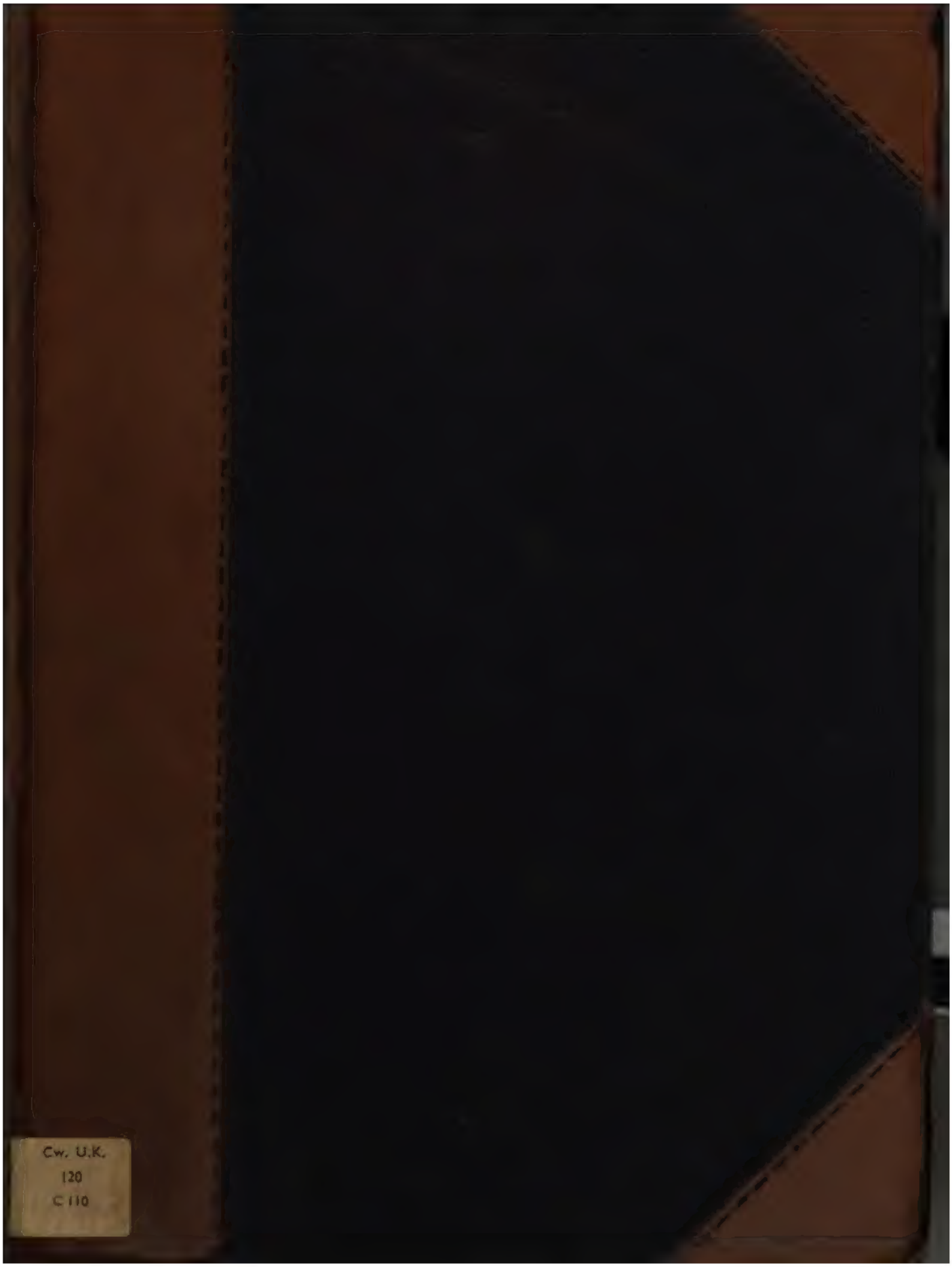
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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

EDITED BY

EDWARD WILLIAM COX,

Serjeant-at-Law, Recorder of Portsmouth.

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REPORTS OF ALL THE CASES

DECIDED BY THE

Superior Courts

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS, and J. SHORTT, Esqrs., Barristers-at-law.

Saturday, Jan. 21, 1871.

REG. *v.* AVES; REG. *v.* THE SAME.

Summary conviction—Plea of guilty by an attorney in the absence of the defendant—Want of authority.

The defendant, residing in London, was summoned before justices at Hastings to answer to two informations for maliciously injuring a window and maliciously injuring a bell-pull. Being unable from illness to attend, he admitted to his father that he had broken the window, but had not done it intentionally, and that there ought to be compensation. The father thereupon went to Hastings and communicated with an attorney there, who, under all the circumstances, recommended that he should appear and plead guilty. Accordingly on the day of hearing the attorney pleaded guilty, and the justices thereupon convicted the defendant and sentenced him to a term of imprisonment. From the affidavits it appeared that the defendant had given neither to his father nor to the attorney any authority whatever to plead guilty, nor did it appear that he was aware that his father intended to employ an attorney:

Held, that as the defendant had not authorised any attorney to appear and plead guilty, the conviction was bad.

Quære, whether it is competent to justices to convict upon a plea of guilty by an attorney in the absence of the defendant?

THESE were two rules to quash two convictions which had been returned upon writs of *certiorari*.

It appeared that on the 31st Dec. 1869 an information was laid against the defendant before a justice of the borough of Hastings, for malicious injury to a window, the property of Dr. Blundell, to the amount of 15*s.*; and that on the 4th Jan. following, another information was laid against him for malicious injury to a bell-pull, the property of Ellen Wynne, to the amount of 4*s.* The summons issued upon the first information was served personally upon the defendant on the 1st Jan. 1870, at 114, Leadenhall-street, London, which summons was returnable on the 6th of the same month at the Town-hall, Hastings, and upon being so served he said, "I admit all that is in this summons except the word 'wilfully;' can't you take 5*l.* and settle it?" He was then informed by the officer who served him that there would probably be another summons issued against him for another offence, and inquired if in that event he would consent to such summons being sent to him in London by post, so as to save the expense of a constable going to London on purpose to serve him with it? To which he consented, telling the officer to send it to him at that place. Accordingly, on the 4th Jan., such second summons was sent by post, addressed to the defendant at 114, Leadenhall-street, London, returnable upon the 6th of the same month. Upon the return day of the summonses (according to the affidavit of the clerk to the justices), and upon the cases being called on, Mr. Wm. Savery, of St. Leonards, an attorney, appeared on behalf of the defendant, and on the information being read over, he stated that the defendant was unable to attend by reason of a serious illness; that he had a medical certificate which the defendant's father, who was present, could prove, and that his son, the defendant, was unable to travel, but that he, the said William Savery, was instructed to and would, on behalf of the said Charles Aves, plead guilty to both charges, and he expressed a hope that the justices would not require his personal attendance; that after some discussion the justices determined to proceed; that the said William Savery, in the name and on behalf of the said Charles Aves and as his attorney, and also in the presence of the person whom he represented as the father of the said defendant, then formally pleaded "guilty" to both charges without any objection on the part of the said father; that a short statement of the facts having been made to the bench by the superintendent of police, Mr. Savery addressed the bench in mitigation of punishment, and ultimately the bench convicted the defendant upon both informations, and directed him to be imprisoned in the house of correction at Lewes for fourteen days in respect of the conviction for damaging the bell-pull, and passed a like sentence of seven days for damaging the window, to commence at the expiration of the former sentence.

The rules in the present case were obtained upon the affidavits of Mr. Savery, Mr. Edward Leopold Aves, and the defendant. Mr. Savery stated that he was instructed on the 5th Jan. 1870 by Mr. Edward Leopold Aves, the father of the defendant, without any communication, direct or indirect, otherwise than by the said father, in consequence of the ill health of the accused, whom he had never seen, and considering it a matter in which a fine would have been imposed, and also the age of the accused, and being the first offence, he advised that a plea of guilty should be pleaded, to which the said father assented; that he accordingly pleaded guilty to the said charges; that when the case was called on no evidence was given in support of the complaints, and that if he had thought that imprisonment would have been inflicted, he would have applied for an adjournment of the hearing, so that the accused might have instructed him personally as to the real facts of the case. Mr. Edward Leopold Aves, the father of the defendant, stated that previous to instructing Mr. Savery he conferred with his son, a youth of nineteen years only, as to the charge made for breaking the window, and to the best of his belief he did not confer with him as to the other charge, and he was not aware that he was ever served with a summons for that complaint; that his son was then lying dangerously ill at his house in Greenwich, in Kent; that the result of such conversation was that compensation should be made, his son having admitted that he did the injury to the window, although he denied having done it maliciously or intentionally; that he accordingly proceeded to Hastings on the 5th Jan. 1870, his son continuing too ill safely to undergo so long a journey, and that in the evening he saw Mr. Savery, and that after some discussion Mr. Savery thought that, looking at the age of the lad, the period of the year, and the first offence, that a fine only would be imposed, advised a plea of guilty; that he acceded to his advice, and Mr. Savery pleaded guilty accordingly, but excepting as to be inferred from general conversation between a father and his child, he never had any authority to plead guilty, nor had he in consequence of the illness of his son that full opportunity of discussing his guilt or innocence that he otherwise should have had.

The defendant himself in his affidavit stated that only one summons was served upon him, or came to his knowledge, namely, that for the injury to the window; that he did not authorise Mr. Savery, or any other person, to appear or to plead on his behalf to that or any other summons, and that he never in any way communicated with the said Mr. Savery, and that he did not give anyone any authority to appear or plead for him to the said summons or information before the said magistrates; and further, that at the time of the hearing of the said complaint, and for some days previous, he was confined to his bed with fever, and too ill to give any authority or instructions on the subject, and did not in fact do so.

This application was made upon the three following grounds:—First, that upon a proper construction of the 11 & 12 Vict. c. 43, s. 13, justices may proceed *ex parte* in the absence of the defendant, or if he appears by counsel or attorney they may proceed to hear the case, but that they can have no authority to adjudicate upon a plea of guilty, unless pleaded by the defendant in person; secondly, that an infant cannot appoint or appear by an attorney; thirdly, that upon the facts as disclosed by the affidavits the defendant had given no authority to any attorney to appear and plead for him.

As the judgment of the court proceeded upon the third ground only it will be unnecessary to give the arguments upon the other two.

Thesiger appeared in support of the convictions. —The father would seem to have the authority from his son to act for him. He knew that his father was going to Hastings to do the best he could, and he does not say in express terms that he never authorised his father to act for him. The father and the attorney did the best they could, and, thinking that a plea of guilty would be advisable, it was pleaded accordingly.

Sir *J. Karslake*, Q.C., *Woollett* with him, appeared in support of the rule.—The affidavits of Mr. Savery, the father and the son, go clearly to show that there was no authority from the son to appear and plead guilty. Mr. Savery had had no communication whatever with the defendant, and all that the father says is, "I conferred with my son, a youth of the age of nineteen years only, as to the charge made for breaking the window. The result of such conversation was that compensation should be made to Dr. Blundell, my son having admitted that he did injury to the window of that gentleman by breaking the window, although he denied having done it maliciously or intentionally." And further on he says, "But I say, excepting as is to be inferred from general conversation between a father and his child, I never had any authority to plead guilty, nor had, in consequence of the illness of my son, that full opportunity of discussing his guilt or innocence that I otherwise should have had." The affidavit of the son is most explicit and conclusive upon the subject. [MELLOR, J.—It seems that the first idea of pleading guilty came from the attorney. BLACKBURN, J.—If there was any authority at all, it was given to the father to go down to Hastings and do the best he could.] The son was quite ignorant as to what had been resolved upon by his father and the attorney.

COCKBURN, C. J.—When we look at the facts of the case it becomes quite unnecessary for us to express any opinion upon the very important legal points that have been discussed. I am very far from saying that a defendant may not appear and plead by an attorney; but without giving any opinion upon the law upon the subject, we are of opinion that the father had no authority to appear and plead. All that appears is, that he had some conversation with his son as to the charge of breaking the window whilst the son was lying ill, the son telling his father, "True it is I broke the window, but not intentionally, and there must be compensation." The father thereupon goes down to Hastings with the intention of coming to a settlement. He sees an attorney, who, under the circumstances, advises that a plea of guilty should be pleaded; and so it is arranged. Then, considering that the son says that he did not break the window intentionally, it can hardly be inferred that he authorised his father to employ an attorney, still less to plead guilty to an offence which might subject him to imprisonment. I think, therefore, that the facts fail to show that the father had any authority to employ an attorney.

BLACKBURN, J.—I am entirely of the same opinion. There is no doubt that upon the defendant failing to appear the justices may have pro-

ceeded *ex parte*, and have convicted. But that they did not do, but they acted upon the plea of guilty without hearing the evidence. It is most likely that the defendant being very ill, and not able to go to Hastings, wished his father to go for him, and the father accordingly went down and did as he thought the best for him. The evidence, however, seems to show that the son gave the father no authority either to employ an attorney or to plead guilty.

MELLOR, J.—There is no doubt that the justices convicted upon the plea of guilty, and that there was no authority from the son for pleading in that way. The first idea of so pleading emanated from the attorney; the son himself denied that he did the act complained of maliciously. It would be very strange, under these circumstances, to infer that he really intended to plead guilty.

HANNEN, J.—I quite concur with the rest of the court.

Convictions quashed.

Attorneys for the defendant, *Stocken* and *Jupp*.

SECOND COURT.

Wednesday, Jan. 25, 1871.

(Before MELLOR and LUSH, JJ.)

LEWIS (app.) *v.* ARTHUR AND ANOTHER (resps.).

Salmon Fishery Act 1865, *ss.* 33, 36 — *Licensed persons having the assistance of persons who are not licensed.*

Under the provisions of the 28 *&* 29 *Vict. c.* 121, *a licence may be granted to a person for the use of a net for catching salmon, and a penalty is imposed upon any person for using a net without such licence.*

A. and B. had each a licence for the use of a net, and on a certain day they and the two respondents were together using two coracle nets, each of which required the assistance of two persons. A. and B. were using one net, and the two respondents, who had no licence, were using another. The justices (upon an information against the two respondents) found that no fraud was intended, and as one of the licencees would have conferred the right to the assistance of one of the respondents, and the two licences therefore would have protected all four of the parties, they dismissed the information:

Held, that they were right.

THIS was a case stated under the 20 & 21 Vict. c. 43, upon a dismissal by justices at petty sessions of an information for an offence under the Salmon Fishery Act 1865, as follows:—

At a petty sessions of Her Majesty's justices of the peace of the county of Carmarthen, in and for the Carmarthen petty sessional division in the said county, the 30th July 1870, Henry Arthur and Evan Harris, fishermen, the respondents, were charged upon information laid by Thomas Lewis, water-bailiff, the appellant before us, the undersigned, four of Her Majesty's said justices, for having, on the 19th July 1870, at or near Cynastanog, in the parish of Llangunnor, in the said county of Carmarthen, unlawfully used a coracle net for catching salmon in the river Towy, within the Carmarthen Bay fishery district, without then and there having a proper licence for the same, contrary to sect. 36 of the Salmon Fishery Act 1865.

The respondents used together, it is admitted, a coracle net, which is a net that can only be used by or between two persons at the same time in coracles, and a licence of the value of 1*l.* 10*s.* is required to so use a coracle net in the said district. It appeared that there were fishing at the same time and place as respondents two other men, named Lewis and Evans, who each held a licence in his own name of the value of 1*l.* 10*s.* Thus Lewis and Evans had two licences, while the respondents had none, at least not in their own names at the time, but it was also proved that Evans's licence was obtained and paid for by Arthur, with whom he had been accustomed to fish, and it was admitted that had Arthur been fishing with him or Lewis, or had Harris been fishing with Evans or Lewis, that no offence had been committed contrary to the penal enactment in the section referred to, as the licences granted in the names of Lewis and Evans to use each a coracle net with a partner or assistant, would have respectively protected the partner or assistant from incurring any penalty.

Considering, therefore, that if Evans's licence had been granted to Arthur who obtained it, it would have exonerated Harris; that there were but two nets used; that there were two licences with two of the fishermen authorizing the use of coracle nets, and that there was in fact no fraud by the use of an extra net or otherwise, we dismissed the information against the respondents, who we held were legally assisting two licensed persons to use two coracle nets. Whereupon the said appellant being dissatisfied with our determination as erroneous in point of law, has duly applied to us in writing to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of Her Majesty's Judges of the Court of Queen's Bench, which we hereby state and sign accordingly.

Given under our hands this 6th day of August 1870, at the Shire Hall, Carmarthen.

JAMES JOHN HAMILTON, Bart.
ISAAC HORTON.
ROBERT BARRETT.
E. M. DAVIES.

By the 28 & 29 Vict. c. 121, the Salmon Fishery Act 1865, sect. 33, a licence is to be granted in fishery districts to the person named therein in respect of all fishing weirs, fishing mill-dams, putts, putchers, nets, or other instruments or devices, except rods and lines, whereby salmon are caught; and by the 36th section a penalty not exceeding 20*l.* is imposed upon any person for a violation of such section.

McIntyre appeared for the appellant. The licence is a personal one, and the name of the party is inserted in it. [LUSH, J.—He may have an assistant.] That is so, as it is necessary that there should be two persons in order to use the net. But although a licensed person may have the assistance of a non-licensed person to assist him with the net, he cannot authorise an unlicensed person to use a net. There must always be a licensed person with the net. [MELLOR, J.—There were four persons fishing with two nets, two of the persons having licences. The justices may have thought that there was a sufficient number of licences.] But it is not clear that they were all acting in concert. [LUSH, J.—The finding of the justices must be taken to establish that they were so acting. Certainly we cannot say that

there was no evidence of the fact. Two licensed men take hold of one net, and two unlicensed men take hold of another instead of one licensed and one unlicensed man to each net. [MELLOR, J.—The justices really so state it in their finding.] They find it, as a conclusion of law, as legally assisting. [MELLOR, J.—They could not have been legally assisting unless they were actually together.] They were not shown to have been in partnership.

No one appeared for the respondents.

MELLOR, J.—There really is nothing to negative the conclusion to which the justices have come. They thought that all were acting in the same enterprise, and they negative fraud.

LUSH, J., concurred.

Judgment for the respondents.

Attorneys for appellant, *Holder* and *Kirkbanks.*

WATTS (app.), *v.* LUCAS (resp.)

Salmon Fisheries Acts—24 & 25 *Vict. c.* 109—28 & 29 *Vict. c.* 121 — *Fixed engine—Engine not intended to catch salmon.*

The using of a net which is of itself bonâ fide not an instrument used peculiarly for catching salmon, and which is not fixed for the purpose, but which is fixed to the soil in tidal waters within the limits of a salmon fishery district, does not come within the penalty of the 24 & 25 *Vict. c.* 109, *s.* 11. Lyne *v.* Leonard, *L. Rep.* 3 *Q. B.* 156; 18 *L. T. Rep, N. S.* 55; 16 *W. R.* 562, *distinguished.*

THIS was a case stated under the 20 & 21 Vict. c. 43, upon a refusal by justices to convict. The case stated that at a petty sessions holden at Wareham, in the county of Dorset, an information preferred by Charles Dawswell Watts, of Holme Bridge, in the county of Dorset, water bailiff of the river Frome salmon fishery district (hereinafter called the appellant), against William Lucas, of Stoborough, in the county of Dorset, labourer (hereinafter called the respondent), under sect. 11 of the 24 & 25 Vict. c. 109, intituled An Act to amend the Laws relating to Fisheries of Salmon in England, charging "for that he, the said William Lucas, on the 25th July last, at the parish of Arne in the said county, was then the owner of certain fixed engines, to wit, two nets, which were then unlawfully placed for catching salmon and fish in certain water there, called the estuary of the river Frome, and the same engines were so placed for several hours, contrary to the statute in such case made and provided," was heard and determined by us, the said justices, the said parties respectively being then present, and upon such hearing we dismissed the information.

Upon the hearing of the information it was admitted by the respondent that he fixed into the mud with poles two nets, one four feet deep and forty-six feet long, the other two feet deep and thirty-six feet long, with meshes of about one and a half and one inch, one net being placed higher up the stream than the other, and that the place was within the tidal waters, as stated in the information. But it was alleged by the respondent that the nets were so placed for the purpose of catching mullet and other fish not of the genus salmon; and no evidence of a contrary character was tendered by the appellant. It was contended by the attorney for the appellant, that the mere fixing of any description of net in a fishing district was of itself illegal, and that the 28 & 29 Vict. c. 121, s. 39, enacting, "fixed engines shall in this Act and the Salmon Fishery Act 1861 include any net or other implement for taking fish fixed to the soil," was made to amend the 24 & 25 Vict. c. 109, by using the word "fish" instead of salmon, and the case of *Lyne* v. *Leonard*, (16 W. R. 562; 18 L. T. Rep. N. S. 55), was quoted. The magistrates decided that if the instrument used had been one of those named in the 28 & 29 Vict. c. 121, s. 36, as requiring a licence, as a putt, putcher net, or other instrument or device for catching salmon, it would have been clearly illegal to use it without a licence, though there may be no further proof of intention to catch a salmon; but that if the fixed engine be *bonâ fide* not an instrument peculiarly meant for catching salmon, in order to bring its use within the operation of the 24 & 25 Vict. c. 109, there must be some sort of evidence that the fixed engine (such as the net now in question) was placed for the purpose of catching salmon.

The question of law upon the above facts is, whether the using of a net, which is of itself *bonâ fide* not an instrument used peculiarly for catching salmon, and which is not fixed for that purpose, but which is fixed to the soil in tidal waters within the limits of a salmon fishery district, comes within the operation of the 24 & 25 Vict. c. 109, s. 11.

By the 24 & 25 Vict. c. 109, s. 11, it is enacted that—

> No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall for each day of so placing or using the same incur a penalty not exceeding 10*l.*; and for the purposes of this section a net that is secured by anchors or otherwise temporarily fixed to the soil shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of fishing as practised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage: Provided always, that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams.

By the 28 & 29 Vict. c. 121, s. 36, it is enacted that—

> From and after a time to be appointed as aforesaid, in a fishery district, any person using within that district any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same, shall be liable to a penalty of not less than double the amount to be paid for the requisite licence, and not exceeding 20*l.*

The 39th section enacts that—

> Fixed engine shall in this Act and the Salmon Fishery Act 1861, include any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill dam.

Pinder appeared for the appellant.—The justices were wrong in declining to convict, for the respondent came within the meaning of the 11th section of the 24 & 25 Vict. c. 109 and sect. 39 of the 28 & 29 Vict. c. 121, as using a net, which is a fixed engine. [LUSH, J.—You must take the whole of the interpretation in the 11th section of the 24 & 25 Vict. c. 109, "no fixed engine of any description shall be placed or used for catching salmon." This net was not used for that purpose.] The 36th section of the 28 & 29 Vict. c. 121 is general in its application, and the 39th section

makes a net a "fixed engine." [MELLOR, J.—That only defines what is a "fixed engine." LUSH, J.—The offence consists in the purpose for which the net is used.] The decision in *Lyne* v. *Leonard* (L. Rep. 3 Q. B. 156; 18 L. T. Rep. N. S. 55; 16 W. R. 562) is in point. There it was held that the bare use of instruments and devices for catching salmon, enumerated in sect. 36, is sufficient to render an unlicensed person using them liable to the penalty, without evidence that they were used for the purpose of taking salmon. [MELLOR, J.—We must take it from the finding of the justices, that the net was not intended to catch salmon.] Then it must be taken not to be within the 11th section. [MELLOR, J.—We must not read it as prohibiting the use of all nets, but merely those which are intended to catch salmon. The 39th section of the 28 & 29 Vict. c. 121, does not enlarge the offence, but the articles whereby it may be committed.] The net was capable of catching salmon, and is within the mischief of the statute.

No counsel appeared for the respondent.

MELLOR, J.—Although I have entertained some doubt upon the case, upon the whole I have come to the conclusion that upon the facts the justices came to the right conclusion. The offence is created by the 11th section of the 24 & 25 Vict. c. 109, which enacts that no fixed engine of any description shall be placed or used for catching salmon. Then we have the 36th section of the 28 & 29 Vict. c. 121, which enacts that from and after a time to be appointed any person using within a fishing district any net, &c., for catching salmon, without having a licence is to be liable to a penalty; and then the 39th section further defines the meaning of a "fixed engine." Now I do not think that this latter enactment was intended to alter the character of the offence, but only to put an end to any doubt as to what was to be considered to be a "fixed engine." We must, I think, regard the words "for catching salmon." This case is distinguishable from the one cited, for there the instrument was really calculated to catch salmon, though made to act otherwise. The case is somewhat imperfectly stated, but I think the justices were right.

LUSH, J.—I am of the same opinion. I think that the case of *Lyne* v. *Leonard* is distinguishable from the present one. The 33rd section of the 28 & 29 Vict. c. 121 provides for the granting of licences; then the 36th section provides the penalty for using a net without a licence. In the case cited, the defendant put down seventy putts, but alleged they were for shrimps and flat fish only. He alleged that he had placed some circles of wire in them to prevent salmon from passing into them, and which he could put in at any moment. The justices in that case refused to convict, because they thought that he did not intend to catch salmon. This court, however, said that such evidence was not necessary. I take it that in the present case the justices have found that the net in question was not such a net as is within the 39th section—that it is not such a one as requires a licence. This, not being a net for the purpose, but capable of taking salmon, the question is, were the justices right? That brings us to the 36th section of the 28 & 29 Vict. c. 121. The offence there consists in the purpose for which the net is used. Now I think we must read this section with the 39th. The offence itself is left as it was before. If the Legislature had intended to have excluded all nets which might be capable of catching salmon, they would so have expressed themselves. I think, therefore, that, according to their finding of the facts, the justices were right in their decision.

Judgment for the respondent.

Attorneys for the appellant, *Sole, Turner*, and *Turner*.

Saturday, Jan. 28, 1871.

THE WEST LONDON EXTENSION RAILWAY COMPANY (apps.) *v.* THE ASSESSMENT COMMITTEE OF THE FULHAM UNION AND THE OVERSEERS OF THE POOR OF THE PARISH OF FULHAM (resps.)

Order of reference—12 *&* 13 *Vict. c.* 45, *s.* 13 (*Baines's Act*)—*Award*—*Costs.*

An appeal against a poor rate having been entered and respited, the sessions ordered, with the consent of the parties, that "the matter in dispute" should be referred to the Queen's Counsel named to inquire into and arbitrate thereon.

Pending the award, the "hearing and determining the appeal" was formally adjourned from sessions to sessions. The arbitrator awarded that "the appeal be dismissed and that the appellants do pay to the respondents their costs of the said appeal." The Court of Queen's Bench on a motion of the appellants granted a rule directing the arbitrator to strike out the part of his award relating to costs, on the ground that the order of reference conferred no power upon him to give them. An application to the sessions to order the payment of the respondents' costs was refused, and a rule having been obtained for a mandamus commanding the sessions to give such costs as they might think fit:

Held, that the reference was in fact ordered under Baines's Act (12 *&* 13 *Vict. c.* 45, *s.* 13), *that the sessions, having parted with their jurisdiction to the arbitrator, had no power to add to or alter his award, but that their judicial functions were at an end, and they had merely the ministerial duty to perform of entering the amended award as their judgment.*

Reg. *v.* The Justices of the West Riding of Yorkshire, 12 *L. T. Rep. N. S.* 380, *followed.*

AN appeal, entered at the Middlesex Quarter Sessions, by the West London Extension Railway Company, against a rate for the relief of the poor of the parish of Fulham, was respited from time to time until the 20th Feb. 1869, when the sessions made an order, the material part of which was as follows:

It is . . . . ordered that the hearing and determining the matter of an appeal between the . . . . appellants, and respondents, touching a certain rate or assessment made on the 1st May 1868 . . . . do stand further adjourned until the next general quarter sessions of the peace, to be holden . . . . on Monday the 5th April next. And it is further ordered by and with the consent of counsel on both sides, that the matter in dispute between the appellants and respondents herein shall be referred to John Gray, Esq., ... one of Her Majesty's counsel learned in the law, to inquire into and arbitrate thereon, the said several parties agreeing and consenting to abide the report of such his arbitration. . . . . And it is further ordered that notice in the mean time be given unto the assessment committee of the Fulham Union and the churchwardens and overseers of the poor of the parish of Fulham, that they, and all persons concerned do attend the court at the . . . . Guildhall, Westminster, on Friday, the 30th April next, at the hour of ten in the forenoon of

the same day, to hear and abide the judgment and determination of the said court touching the said appeal.

The "hearing and determining the matter of the appeal" was adjourned from sessions to sessions by successive formal orders, and on the 28th Jan. 1870, the arbitrator made his award, which contained the usual recitals and concluded thus: "Now I do make my award of and concerning the premises as follows:—I do award and order that the said appeal be dismissed, and that the appellants do pay to the respondents their costs of the said appeal, to be taxed by the proper officer of the court of quarter sessions in the usual manner. In witness," &c.

This award was sent back to the arbitrator by the Court of Queen's Bench, to be amended, on the ground that the sessions had not given him authority to award costs in their order of reference: (*The West London Extension Railway Company* v. *The Assessment Commitee of the Fulham Union, &c.*, 22 L. T. Rep. N. S. 523; L. Rep. 5 Q. B. 361.) The amendment was made accordingly by striking out so much of the award as gave costs. After further regular adjournments of the appeal, an application was made on the 14th May by the respondents to the sessions, to adopt the award, and that as the appellants had entirely failed in their appeal the court would, in accordance with its invariable rule and practice, order the payment of the respondents' costs of the said appeal to be made by the appellants. The question as to costs having been argued by counsel on both sides, the sessions, after another adjournment, decided that their remaining duty was ministerial only, ordered that the award should be enrolled as the judgment of the court, and refused the application on the part of the respondents as to the costs of the appeal.

A rule was afterwards obtained calling on the justices to show cause why a *mandamus* should not issue, commanding them to enter continuances upon the said appeal, and at the next general quarter sessions to proceed to consider, award, and order such costs, as by the justices in their discretion should be thought reasonable, to be paid by the appellants to the respondents.

Against this rule,

Field, Q.C., *Poland* with him, showed cause.—The case was undoubtedly referred under Baines's Act: (12 & 13 Vict. c. 45 (*a*.) Before that enactment there was no power to refer: (*Thorp* v. *Cole* 2 C. M. & R. 367.) It was deemed to be a reference under Baines's Act when the former rule was argued in this court: (*The West London Extension Railway Company* v. *The Assessment Committee of the Fulham Union* (*sup.*) It is, however, now suggested by the respondents, that the award of the arbitrator was but a report. Yet they applied to the sessions to enrol "the award." Moreover the appellants made the order of sessions a rule of court under sect. 13 of the above Act, and no objection was made. Next a rule *nisi* was obtained to strike out such part of the award as related to costs, and this court made the rule absolute, on the ground that power had not been given to the arbitrator to award them. The court then called on

Huddleston, Q. C., and *Castle*, in support of the rule.—There were successive adjournments, the quarter sessions continuing seised of the appeal. If this had been a reference under sect. 13 of Baines's Act alone there would have been no necessity to adjourn, for it has been held that from the time when a reference under that section is ordered the court of quarter sessions has only a ministerial duty to enter the judgment: (*Reg.* v. *The Justices of the West Riding of Yorkshire*, 12 L. T. Rep. N. S. 380; 6 B. & S. 531.) When the matter was referred to Mr. Gray, it might have been referred under the old system. [BLACKBURN, J.—But you cannot construe this order as a conventional agreement such as you allude to.] In *Rex* v. *Harding* (2 Salk. 477), the court held that "a judge of Nisi Prius, by consent of parties, may make a rule to refer a cause, but the sessions cannot do so though by consent. They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other," and the same proposition is laid down in Nolan's Poor Law (4th edit., vol. 2, p. 547). Now here they adjourned the appeal, and referred "the matter in dispute," the parties agreeing to "abide the report," the very words used in *Rex* v. *Harding* (*sup.*). [BLACKBURN, J.—If the question referred had been one of figures only they might have referred it to an accountant, but they refer it as a matter of law to "John Gray, Esq. . . . . one of Her Majesty's counsel learned in the law."] It may be that the sessions thought it convenient that a legal arbitrator should apply the law to the facts, and report thereon, but kept their jurisdiction over the subject-matter of the appeal. [MELLOR, J. But the arbitrator orders the appeal "to be dismissed."] There may have been an omission of the sessions to insert a power as to costs in the order; but they can now remedy the hardship resulting therefrom by giving costs. They had a power to deal with the report when it came back to them. The award was made by the arbitrator, then at the next sessions counsel for the appellants applied to the court to "adopt the report," and the court "further adjourned the appeal to the next quarter sessions, and ordered that the parties should attend to hear and abide by the judgment and determination of the said court touching the said appeal." In *Reg.* v. *The Justices of the West Riding of Yorkshire* (*sup.*), Cockburn, C.J., says: "I do not agree with the respondents' counsel that the court of quarter sessions may respite the appeal from sessions to sessions, and then take into consideration the matters already referred to arbitration, and affirm and annul such part as they think right. There is no provision of that sort; the

(*a*) Sect. 13. It shall be lawful for any court of general or quarter sessions of the peace before which any appeal, with certain exceptions, shall be brought to order, with the consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms as the said court shall think reasonable and proper; and such order shall be made a rule of the Court of Queen's Bench on the application of either party; and the award of the arbitrator or arbitrators, or umpireage of the umpire, may, on motion by either party, at the sessions next or next but one after such award or umpireage shall have been finally made and published, or after the decision of the Court of Queen's Bench, on any motion for setting aside the same, be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court: Provided always, that the Court of Queen's Bench may, if it thinks fit, on application within the term next after the making and publication of such award or umpireage, either refer the case back again to the same arbitrator, arbitrators, or umpire, or wholly set aside the award or umpireage already made, and may in the latter event order the court of general or quarter sessions to enter continuances and hear the appeal.

award or umpirage having been made at the next sessions, or next but one, the court is to be moved not to make any order respecting it, but to enter it as the judgment of the court of quarter sessions before whom the appeal came on to be determined." Where the sessions retain their jurisdiction to hear and determine the matter, as they have done in this instance, they have power when the report comes back to deal with it. Suppose they had said in express terms, "We do not intend this to be a reference under Baines's Act?" If they have not reserved jurisdiction over the appeal, they have reserved it over the question of costs by respiting from time to time. In *Reg.* v. *The Justices of the West Riding of Yorkshire* (*sup.*), "the appeal" was referred; but here only "the matter in dispute," and there is a distinction. Nor in this case are the sessions asked to exercise any discretion or to do more than to make the usual order according to their practice, that the costs shall follow the event.

BLACKBURN, J.—I think it is quite clear that this rule must be discharged. The moment it is understood what the order of quarter sessions really was, the case is plain. Now before Baines' Act the quarter sessions had no power to refer a matter at all. They might, by agreement, say that some question of fact, or even of law, might be referred to an individual who should report to them, and whose judgment they would take as their own, they making their award accordingly. But they could make no reference, and therefore the arbitrator could not be brought before this court for what he did. The whole matter must have been done privately. Then Baines' Act (12 & 13 Vict. c. 45) by sect. 13 enacts, that the court of quarter sessions may make an order with the consent of the parties that the matter of an appeal "be referred to" any arbitrator, and the award of the arbitrator . . . may on motion by either party at the sessions next or next, but one after such award . . . shall have been finally made and published, or after the decision of the Court of Queen's Bench on any motion for setting aside the same be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court." Nothing can be clearer when one reads that section, even without reference to cases, although *Reg.* v. *The Justices of the West Riding of Yorkshire* (*sup.*), and the former decision of the court in the present appeal, are both express authorities on the point, that where there is a reference of this kind it may be brought before the Queen's Bench but after it has been altered all the quarter sessions have to do is to enter it, and they cannot vary it. Taking it that the quarter sessions did make the order whereby they said they adjourned this matter to a future day—that might have been necessary, but would do no hurt—and then they proceed, and it is further ordered ". . . that the matter in dispute . . . shall be referred to John Gray, Esq. . . . to inquire into and arbitrate thereon, the said several parties agreeing and consenting to abide the report of such his arbitration." That one word "report" formed the basis of an argument which Mr. Huddleston endeavoured to urge upon us. It seems to me that is not sufficient, and that the quarter sessions intended to refer the whole matter to Mr. Gray, and thereby parted with their jurisdiction.

MELLOR, J.—I am of the same opinion. I am satisfied that all parties considered it an absolute reference by the quarter sessions to Mr. Gray, and it is only because he had assumed power over costs which their order did not give him, that they have changed their decision. Now I think *Reg.* v. *The Justices of West Riding of Yorkshire* (*sup.*), the case used for the respondents, is a dscided authority against their argument. In it Cockburn, C.J. says: "Here the original order gave no power to any subsequent court as to costs; and under sect. 13 it can do no more than enter on record the award or umpirage. Therefore, on the true construction of this section, the court of quarter sessions which made the original order is *functus officio* as to these costs, and no subsequent court has authority to deal with them." Now that seems to me directly in point and conclusive. I think, therefore, the rule should be discharged.

LUSH, J.—No one can doubt the intention of the parties that this should be a reference under Baines's Act; indeed, if it were not so, the court would have had no power to do what they did when the case was before them. It was conceded on both sides that it was a reference under the Act. That being so, I am clearly of opinion that the quarter sessions had no power to add to or alter the award; so soon as they made the order of reference under the Act their judicial functions were at an end, and the duty only remained of entering the award when made. The case of *Reg.* v. *The Justices of West Riding of Yorkshire* (*sup.*) is directly against the respondents' argument. There the quarter sessions had referred a question of law in a rating case to this court, the parties agreeing that on our judgment being given the question of fact should be referred to an arbitrator; therefore, the judgment on the law was that of the quarter sessions. The arbitrator on the facts had made his award, and the court of quarter sessions confirmed his award, with costs to the respondents. On taxation of costs the clerk of the peace refused to allow so much of the costs as related to the reference, on the grounds that the sessions had no power to give them; and the Court of Queen's Bench held that he was right in so doing. That was the only point decided and is expressly against this application.

Rule discharged.

Attorney for the appellants, *W. Haggerty.*
Attorney for the respondents, *J. Alley Jones.*

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Thursday, Jan. 26, 1871.

SIMPSON (app.) *v.* SMITH (resp.)

Metropolis Local Management Acts Amendment Act 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*General line of buildings—Line fixed by architect—Powers of magistrate.*

Under sect. 75 *of the Metropolis Local Management Acts Amendment Act* 1862, *it is a necessary preliminary to the jurisdiction of the magistrate that the superintending architect of the Metropolitan Board of Works for the time being should have fixed the general line of buildings for the street in which the person against whom proceedings are taken under the section is alleged to have built beyond the general line; but the magistrate, before*

convicting such person under the section, is bound to receive evidence as to what is the general line of buildings, and to decide for himself whether the general line as fixed by the architect is the true general line.

Bauman *v.* The Vestry of St. Pancras (36 *L. J.* 127, *M. C.*; *L. Rep.* 2 *Q. B.* 528), *commented on, and* St. George's, Hanover-square *v.* Sparrow (10 *L. T. Rep. N. S.* 504; 16 *C. B., N. S.*, 209; 32 *L. J.* 118, *M. C.*) *upheld.*

ON appeal from a metropolitan police magistrate, the following case was stated:

2. On the 21st Oct. 1869, complaint was made before me as one of the police magistrates for the metropolis, sitting at the police court of Marlborough-street, in the county of Middlesex, within the metropolitan police district, by the respondent, on behalf of the vestry of the parish of St. George's, Hanover-square, for that the said appellant, on the 10th Aug. 1869, in the said parish and county, and within the said district, did unlawfully erect a certain erection, to wit a bay-window, without the consent in writing of the Metropolitan Board of Works, beyond the general line of buildings, in a certain street, called Stratton-street, in the said parish, county, and district, the distance of such line of buildings not exceeding 50ft. from the highway, contrary to the statute in such case made and provided, and a summons was thereupon issued by me requiring the appellant to appear on the Thursday then next, at two o'clock in the afternoon, at the police court, before me or such other magistrate of the said police court as might be then there, to answer to the said complaint.

3. On the 28th Oct. 1869, being the day so fixed as aforesaid, and at the time in the said summons mentioned, the respondent and appellant appeared before me respectively at the said police court, to support an answer to the said complaint.

4. It was proved before me, and I find as follows:—That the appellant carried on the business of a builder at No. 241, Tottenham-court-road, and that he did on the said 10th Aug. 1869, on certain premises situate on the west side of Stratton-street aforesaid, in the said parish and county, within the said district, erect a bay-window without the consent in writing of the Metropolitan Board of Works, such consent having been applied for by the appellant and refused; secondly, that George Vulliamy, who was the superintending architect to the Metropolitan Board of Works, as such superintending architect, had pursuant to the Metropolitan Management Amendment Act 1862, by his certificate, bearing date the 5th Oct. 1869, decided the general line of buildings on the west side of Stratton-street aforesaid; thirdly, that the distance of the general line of buildings so decided as aforesaid from the highway, did not exceed 50ft., and that the said bay window was beyond the said general line of buildings so decided as aforesaid; fourthly, that the appellant (who was not represented by counsel or attorney) gave no evidence as to the general line of buildings so decided as aforesaid, and I, considering myself bound by the decision in the case of *Bauman* v. *The Vestry of St. Pancras* (L. Rep. 2 Q. B. 528), to act on the superintending architect's certificate, decided accordingly against the appellant.

5. The appellant having subsequently applied to me under the stat. 20 & 21 Vict. c. 43, to state and sign a case setting forth the facts and grounds of such determination for the opinion of your Lordship's court, and having duly entered into such recognisance, and paid such fees as by the said statute in that behalf are required, I submit to your Lordships the question whether or not I was right in so determining such complaint on the decision of the superintending architect as to the general line of buildings.

6. If your Lordships should be of opinion in the negative then the case is to be remitted to me to decide the general line of buildings so decided as aforesaid; if your Lordships should be of opinion in the affirmative, then my determination is to stand, and the case is to be remitted to me to make such orders as by the statute in that behalf are required to be made.

The following were the appellant's points of argument: First, that the magistrate was not bound by the decision of the superintending architect as to the general line of buildings; secondly, that the magistrate was bound to judge for himself as to the true general line of buildings.

The following were the respondent's points: The respondent will contend that the certificate of the superintending architect as to the general line of buildings being valid in form, and no evidence being given to show that such certified line was not the true line, the magistrate was bound by such certificate, at all events that he was right under the circumstances in acting on it.

Field, Q.C. (*A. Thesiger* with him), for the appellant.—The question here turns on the construction of sect. 75 of 25 & 26 Vict. c. 102, and the case raises the question whether the architect of the Board of Works has power to fix the general line of buildings, so as to be binding on all persons living in a street, or whether the magistrate, when the case comes before him under the section, has power to hear evidence on the subject, and disregard the line fixed by the architect, if it appear to him not to be the general line. The case of *St. George's, Hanover-square* v. *Sparrow* (10 L. T. Rep. N. S. 504; 16 C. B., N. S., 209; 33 L. J. 118, M. C.), is an authority directly in favour of the appellants; but the case of *Bauman* v. *The Vestry of St. Pancras* (36 L. J. 127, M. C.; L. Rep. 2 Q. B. 528), which has since been decided in the Court of Queen's Bench, was supposed by the magistrate to have overruled *St. George's, Hanover-square* v. *Sparrow*, and to oblige him to consider the line as fixed by the architect final and conclusive. The comments made by the court of Queen's Bench in *Bauman's* case on the judgment of this court in *Sparrow's* case certainly tend to discredit the latter; but it was not necessary for the decision of the former case to decide the point raised in the latter, nor is the actual decision in *Bauman's* case necessarily conflicting with that in *Sparrow's* case. [BOVILL, C. J. The learned judges in the Court of Queen's Bench are reported to have said that we overlooked the fact that it is the line fixed by the architect that gives the magistrates jurisdiction; that, however, is not so, as appears especially from the report of the case in 16 C. B., N. S. pp. 216 and 218.] If the architect's certificate be final and conclusive, the magistrate has nothing to do but to measure the building to see whether it comes beyond it. Moreover, the line may be fixed at any time before the hearing before the magistrate (*Bauman* v. *The Vestry of St. Pancras*), and it is obviously unjust that a man, who has built before the

line is fixed, should be liable to have his building pulled down without any appeal against the architect's decision. That could not have been the intention of the Legislature. [M. SMITH, J.—It is confessedly the decision of the architect that gives the magistrate jurisdiction; the magistrate then has power under the section to order the demolition of so much of the building as may be beyond the general line so fixed. Suppose, then, that, yielding to your contention, the magistrate takes upon himself to fix a line different from that fixed by the architect and finds that the building in question goes one foot beyond the line so fixed by him, but ten feet beyond the line fixed by the architect. Would he be bound under the section to order the demolition of the ten feet? WILLES, J.—No; the part is included in the whole; if he has power to order the demolition of ten feet, he may order the demolition of one.] In *Wandsworth Board of Works* v. *Hall* (19 L. T. Rep. N. S. 641; L. Rep. 4 C. P. 85), this court seems to have been inclined to uphold its ruling in *St. George's Hanover Square* v. *Sparrow*, but it was not necessary there to raise this precise point, as in that case the respondent had built beyond the line decided by the magistrate as well as the architect, to be the general line. The expression "general line" is substituted in sect. 75 of 25 & 26 Vict. c. 102 for the expression "regular line" in 18 & 19 Vict. c. 120, s. 143. But it was held that even the latter expression was not to be construed too strictly: (*Tear* v. *Freebody*, 4 C. B., N. S., 228); whereas if the contention of the respondent be correct, the magistrate would have no option but to pull down every inch that went beyond the line fixed by the architect.

Huddleston, Q. C. (*Streeten* with him), for the respondent.—The magistrate had before him the evidence of the architect on one side, and no evidence at all on the other; under these circumstances he was quite right in regarding the evidence of the architect as uncontradicted, and therefore conclusive. [BOVILL, C. J.—I cannot for a moment think that that is the question submitted to us; the real question is, whether the magistrate had power to decide the line for himself and against the opinion of the architect.] He had no such power; the Act makes the architect's decision final and conclusive. The interpretation of the 75th section given by the Queen's Bench in *Bauman* v. *The Vestry of St. Pancras*, is the right one. The essence of the offence created by the section is acting contrary to the decision of the architect, and without the consent of the authorities.

Field, Q. C. in reply.

BOVILL, C. J.—It seems to me that the point which Mr. Huddleston contends is left to our decision is not the point which the magistrate really required us to decide. The magistrate arrived at the decision which he made, because he thought he was bound by the authority of *Bauman* v. *The Vestry of St. Pancras*, to which he has referred in the case, and he says that he decided against the appellant accordingly, and the question for us to decide is, whether he was right in so determining, in other words, whether he was bound by that decision to take the course he did. That appears from the 6th paragraph of the case, where it says, "If your Lordships should be of opinion in the negative, then the case is to be remitted to me to decide the general line of buildings as aforesaid." The real point, then, is whether the certificate of the architect was final and conclusive, so that the magistrate was bound to act upon it, or whether the magistrate was at liberty to exercise his discretion in the matter. There is no doubt great difficlty in construing the Act, and in discovering its true intention as to the effect of the architect's certificate. The case, however, of *St. George's Hanover Square* v. *Sparrow*, decided in this court, is a direct authority upon the point raised in the present case. The decision in that case was arrived at after a long argument and discussion, and the point was very carefully considered. That case is undistinguishable from this, and is in favour of the appellant. In *Bauman* v. *Vestry of St. Pancras*, the precise point now under discussion did not arise, because it was there agreed on all hands that the building was beyond the general line, and no question was raised as to whether it was beyond the architect's line or not. The first point there raised was as to the form of the summons, and the second, as to whether the certificate given by the architect after the erection of the building, but before the summons was taken out, gave the magistrate jurisdiction. It was assumed on all hands that the certificate of the architect was necessary to give the magistrate jurisdiction; indeed, it is obviously so, as the magistrate may order the demolition of all the building beyond the architect's line. Therefore, it being assumed and admitted that the decision of the architect was necessary to give the magistrate jurisdiction, the only point decided in that case was that this essential matter might be given at any time before the hearing. No doubt the Court of Queen's Bench proceeded to take into consideration the general scope of the Act; but the precise point that we have to determine was not before them. Cockburn, C.J., and Mellor, J., both put a general construction upon the 75th section, which was at variance with our decision in *St. George's Hanover Square* v. *Sparrow*, but Shee, J., thought that their decision was not inconsistent with ours, nor was it. Cockburn, C.J., in his judgment said, "it appears to me that the learned judges in the Court of Common Pleas, in holding that it was competent to the magistrate to fix and determine a general line different from that determined by the architect, overlooked the important fact, that it is the line fixed by the architect which gives the magistrate jurisdiction to determine whether or no the erection of the building is an offence, and that the magistrate has no jurisdiction except with reference to that line." But on reference to the report of our decision, I find that the fact was not overlooked, but it was referred to by my brother Byles on the argument, and the attention of the counsel on both sides was called to it. Further, there is the case of the *Wandsworth Board of Works* v. *Hall*, where, though it was not necessary to decide the point, this court adhered to the views expressed in *St. George's Hanover-square* v. *Sparrow*. In this state of the authorities, the decision in the latter case being directly in favour of the appellant, our attention is directed to the case of *Bauman* v. *The Vestry of St. Pancras*, and the language of the Act. It is impossible to deny that the language is very obscure. If it had been intended that the line fixed by the architect

should be final and conclusive on all parties, I should have expected to find an express provision to that effect. The Act speaks of the line being decided by the architect, but it does not say that his decision shall be final and conclusive, and indeed the general scope of the Act seems to exclude such a notion, for the section provides that, in a certain event, proceedings shall be taken before a magistrate. Why was the magistrate introduced? Could it have been intended, that he should be a mere ministerial officer, whose only functions should be to measure so as to see whether the buildings complained of transgressed the architect's line? I cannot adopt such a view. I think it must have been intended, that the magistrate, having the matter before him, should decide the real question between the parties, especially as there is no provision in the Act for enabling the parties affected to be heard before the architect, or to exercise any control over his decision. It is revolting to common sense to suppose that there should be no appeal against such a decision. For these reasons, I think it must have been intended that there should be an appeal from the architect's decision to the magistrate. Again, if it had been the intention of the Legislature to make the architect's decision final, the Act would have said, in common fairness, that public notice must be given of the architect's decision, so that people might know what it was; and if the architect were empowered to lay down an absolute line, I could understand that, if, after such a line had been fixed and notice given, a man built beyond the line without the consent of the proper authorities, he would be held responsible for his conduct. But both this court and the Court of Queen's Bench have decided that the architect's decision may be given at any time before the hearing of the complaint by the magistrate, so that the result of our adopting the contention of the respondent might be that different certificates might be given at different times by different architects, and that a man, who had taken care to build within the line laid down at the time of his building, might, if another architect came and subsequently laid down a different line, be condemned to pull down all that part of his building that transgressed this line. It must be remembered that this is a very penal Act. It restricts a man's right of building upon his own land; it should, therefore, not be extended by construction to subject a man to have his property destroyed for doing an act lawful at the time, but subsequently made unlawful. Unless compelled by the language of the Act, we should be loth to adopt such a construction. The fact that the architect's decision may be given at any time before the proceedings are taken seems to me to show that it cannot be final and conclusive. Again, if no line has been fixed, how is a man who wants to build to know whether he is to apply for consent to the authorities or not? How is he to apply except with reference to what the Act says as to the general line? There is nothing to guide him except the general line in point of fact. It may be that, after he has built legally and properly, a question may arise as to whether he has transgressed that line. The architect's decision, is then, good evidence until contraverted. Such a construction satisfies the words of the statute; but if it be sought to stretch these words further, and say that the architect's decision, given after the building is finished, without hearing the parties and without giving any notice, shall be without appeal, that is a proposition so monstrous that I shall not affirm it unless compelled to do so by the express words of the Act. Again, the decision is to be given by the architect "for the time being." It is consistent to hold that this means at the time that it is wanted, *e.g.*, at the time that a prosecution is being commenced. Supposing that an architect at another time has given a different decision, there is then no way of determining the question, except by inquiring whether the buildings transgress the general line in point of fact; and before a man is made responsible to the law, the magistrate must determine whether the line last fixed by the architect is that general line. He must no doubt take the architect's decision into account, but he must not exclude all evidence as to what is the general line. It seems to me that there is no view which does not present great difficulty, but, on the whole, I prefer to abide by the construction put upon the Act by this court in *St. George Hanover-square* v. *Sparrow*. My judgment is therefore for the appellant.

WILLES, J.—I am of the same opinion. At the time that *Tear* v. *Freebody* (4 C. B., N. S., 228) was decided, we had to determine on the meaning of the words "the regular line," which was the expression used in 18 & 19 Vict. c. 120, s. 143, for which the expression "the general line" was substituted in 25 & 26 Vict. c. 102, s. 75, no provision having been made in the former Act for a decision to be given by the architect. It was laid down in that case that "regular" did not mean straight, but that it meant the general line, *i.e.*, the line that would preserve a general appearance of uniformity. It was made a question of substance, not a mere matter of inches or feet. When the certificate of the architect was introduced as decisive, the language was altered from "regular" to "general;" but I do not understand that the Legislature meant to overrule the decision in *Tear* v. *Freebody*, but rather to adopt the view there expressed, and to enact that small departures from geometrical straightness of line should not have the effect of exposing a man to penalties as for a nuisance, but only such a departure as would cause an eyesore, and that there should be some latitude allowed to the judge who had to deal with the question, to decide whether the transgression was a petty matter to which the law would not apply, according to the maxim *de minimis non curat lex*, or a substantial departure from the general line of uniformity. This consideration is most material when we look at the decision upon the 75th section in *St. George's, Hanover-square*, v. *Sparrow*, where the departure had no substantial effect on the uniformity of the buildings, and was one which no jury would have found was beyond the regular line. But it is contended that the architect of the Metropolitan Board of Works has power to decide that the structure, which there was held innocent, is beyond the general line; but the effect of making his decision conclusive against the opinion of the magistrate would be to override the decision of this court, which held that the magistrate might exercise his discretion. I think that a wholesome decision. I see no reason why the court should go out of its way to pronounce the architect's decision final and conclusive, instead of holding it to be a

decision in the first instance, and subject to the control of the general officer, before whom the matter is to go. I think it far better to hold that the architect's decision is a decision *pro re nata*, and, being so, that it is subject to the decision of the magistrate, so far as it affects a person whose agent the architect is not. To take an analogous case, it was held in *Barraclough* v. *Greenhough* (14 L. T. Rep. N. S. 889; L. Rep. 1 Q. B. 1), that where the probate of a will was made by statute, under certain circumstances, sufficient evidence, it should be considered as conclusive evidence of the validity of the will; but that decision was reversed in the Exchequer Chamber: (L. Rep. 1 Q. B. 612.) I hope I should be ready to refer on all occasions to the better opinion of the learned judges in the Queen's Bench if I thought their judgment showed that I had been wrong. But, in the present instance, it seems to me that the validity of our decision in *St. George's, Hanover-square* v. *Sparrow*, has not been successfully impugned either by the Court of Queen's Bench or at the bar.

M. SMITH, J.—The construction of this obscure clause presents great difficulties, and if the matter had been *res integra*, I think that I might hesitate in agreeing with my learned brethren. The ground upon which I feel doubt is, that it seems to me a question whether the Legislature did not intend to make the architect's decision final, leaving the other questions to be decided by the magistrate. But the question is not *res integra*, there being an express decision of this court in *St. George's, Hanover Square* v. *Sparrow*, and that being so, I do not feel sufficient doubt as to the true construction of the statute, to dissent from the opinion expressed by this court then and now. Any construction presents difficulties; but though I entertain a view upon the subject, which seems to me clearer than it does to others, I do not wish to dissent from the opinions expressed by my learned brethren.

BRETT, J.—I assume that the magistrate in this case considered that the architect's decision was conclusive, and that he was precluded from going beyond it. That being so, it must be contended by the respondent that, though what is the general line is a question of fact, and the certificate in the present case is wrong, and can be proved to be so, and although it was given after the erection of the building, and without hearing the parties, yet the magistrate was conclusively bound by it. The respondent must be prepared to go to this length, because argument on the question is futile, unless the appellant is prepared to prove that the decision of the architect was wrong. I think it is not a true proposition to say, that a certificate so final and conclusive may be given after the building is finished and after the dispute at law has commenced. Yet both the Court of Queen's Bench and this court have held that the certificate may be given at any time before the hearing before the magistrate. A further proposition is involved, that it may be given without hearing the parties; because when the Legislature wishes that the parties shall be heard, it makes provision to that effect, and it says nothing of the kind when speaking of the decision of the architect in this case. Of course, if the statute clearly affirmed the proposition as I have stated it, I should feel bound to decide accordingly; but if it does not, I do not think that this court ought to affirm a proposition so at variance with the ordinary rights of property and so revolting to justice. The affirmative of the proposition involves this consequence, that a man who has bought a piece of ground, and built up to the extreme limit of it (which it is his common law right to do), may be forced to pull down part of the building and leave his ground unoccupied on the architect giving a certificate, which, on the hypothesis, is wrong. That in any case seems revolting to justice, and all the more so, if it may happen without the man having a right to be heard. The question, therefore, for us to decide is whether the statute is clear in affirming such a proposition. The section begins with a prohibition, and if we take only the beginning of the section down to the words "between the line of buildings and the highway," the general line spoken of may mean the actual general line. Afterwards, when the section comes to speak of the mode of dealing with the supposed offence, it says that if any building be erected, &c., without consent of the Metropolitan Board of Works (which is only required when the building goes beyond the general line) it shall be lawful for the vestry &c. to make complaint before a justice of the peace. If I am right in saying that the complaint must be that the person complained of has built beyond the general line and without consent, that complaint must be proved. If so, is this enactment that a certain matter shall be decided by a magistrate, controlled by the provision in another part of the section, as to a decision being given by the architect. No doubt by saying "decided by the architect," the Legislature may have meant "conclusively decided;" but the provision as to the decision of the architect is not made any part of the prohibitory clause, but is only introduced to show what is a necessary point to be proved before the magistrate. The question then arises whether "decided by the architect" means "conclusively decided" or only decided in the first instance. I cannot think that the Legislature has distinctly provided that it shall mean "conclusively decided," and as, in my view, such a provision would be, as I have said, contrary to the common rights of property and revolting to justice, I think the Legislature cannot have meant "conclusively decided," but only "decided in the first instance." If that be so, I do not feel pressed by the argument, that the Legislature afterwards, in the same section, gives the magistrate power, in case he shall consider the complaint proved, to order the demolition of so much of the building as transgresses "the said general line so fixed as aforesaid." Even if the question were *res integra*, I should come to these conclusions; but I further think that we are bound by the decision of this court in *St. George's, Hanover Square* v. *Sparrow*, which has not been expressly overruled.

Judgment for the appellant.

Attorneys for the appellant, *Markby* and *Tarry*.

Attorneys for the respondent, *Capron*, *Dalton*, and *Hitchins*.

Friday, Jan. 27, 1871.

WHINCUP *v.* HUGHES

Apprenticeship, indenture—Master's death—Action for return of premium—Money had and received.

In an action by an apprentice for money had and received against his master's executor, the master having died within a year from the commencement of the service which was to have been for six years:

Held that, in the absence of any express provision to that effect in the indenture of apprenticeship, no portion of the premium could be recovered.

THIS was an action tried in the Salford Hundred Court, when a verdict was entered for 15*l.*, and leave was reserved to the defendant to move for a nonsuit.

The action was brought for the whole or part of the premium, 25*l.*, paid by the plaintiff on apprenticing his son to the defendant's testator, a watchmaker. The term of apprenticeship was six years, and at the end of the first year the master died. The instruction of the apprentice by the testator ceased on the 14th July, 1869.

The first two counts were framed upon the indenture of apprenticeship, and the residue of the declaration was for money had and received for the use of the plaintiff and for accounts stated.

The indenture was made the 26th Nov. 1868, between George Whincup the younger of the first part, the plaintiff of the second part, and Thomas Rogers Hughes, of Manchester, watchmaker and jeweller (the defendant's testator), of the third part, and witnessed the apprenticeship of George Whincup the younger to T. R. Hughes (the master) for the term of six years, to be computed from the 31st July then last past. The plaintiff, George Whincup the elder, for himself, his heirs, executors, and administrators, covenanted that he, his executors, or administrators, should and would, on the execution of the indenture, pa to the said master the sum of 25*l.*, as by way of a premium on the indenture of apprenticeship, and should and would during the said term find and provide for the said apprentice good and sufficient, respectable, suitable, and proper meat, drink, washing, lodgings, clothes, and wearing apparel, also medical and surgical aid and medicines and attendance in case of sickness or accident. "And in consideration of the due and faithful services to be performed by the said apprentice, and of the covenants of the said George Whincup the elder hereinbefore contained, and also in consideration of 25*l.* sterling on the execution hereof, paid by the said George Whincup the elder to the said master, the receipt whereof is hereby acknowledged, he the said master doth hereby for himself, his heirs, executors, and administrators, covenant with the said George Whincup the elder, his executors and administrators, and also with the said apprentice, that he the said master shall and will during the said term teach and instruct, or cause to be taught and instructed, the said apprentice in the said trade or business of a watchmaker and jeweller, in all its various branches as carried on by the said master, according to the best of his skill and ability. And also that he the said master shall and will (except during such time as the said apprentice shall be absent from the service of the said master by reason of sickness or from any other cause) pay unto the said apprentice weekly, as and for his hire, wages during" the first year, 4*s.* a week; during the second, 5*s.*; during the third, 6*s.*; during the fourth 7*s.*; during the fifth, 9*s.*; and during the last year 10*s.* a week.

The learned judge at the trial said, "The question which remains for decision is whether the plaintiff can recover from the defendant, as executrix to one Hughes, with whom the plaintiff was serving as apprentice at the time of his death, a portion of the premium paid to Hughes by the plaintiff. I think he can. It was contended on behalf of the defendant that as the plaintiff received some part of the consideration for which the premium was paid, although not the larger part, he could not recover the money paid for it, for in order to entitle him to do so the failure of the consideration must be complete; but I think it was hardly denied that where the consideration is severable, complete failure of part may form a ground for recovering a proportionate part of the money paid for it. Now, although it cannot be denied that there is considerable difficulty in severing the consideration in such a case as this, it does not appear to me to be impossible to do so, and I think the plaintiff may recover such part of his premium as a jury may think he is entitled to. I think, too, I am concluded by the authority of Cottenham, L.C. (see *Hirst* v. *Tolson*, 19 L. J. 441, Ch.), who seems there to have decided this very question. There will therefore be a verdict entered for the plaintiff; and as the question of amount was by consent left to me, I think the verdict should be for 15*l.* The defendant will have leave to move one of the superior courts to set aside the verdict and to enter a nonsuit."

G. B. Hughes accordingly obtained a rule *nisi* calling upon the plaintiff to show cause why this verdict should not be set aside and a nonsuit entered, on the ground that neither the premium paid at the commencement of the apprenticeship, nor any part of it, is recoverable back, the consideration for its payment not having failed either wholly or as to any apportionable part.

J. W. Mellor showed cause against the rule.—There are many cases in which attorneys and their executors have been ordered to pay back part of a premium under circumstances of this kind, *e. g.*, *Ex parte Prankerd* (3 B. & Ald. 257). In another case, *Hirst* v. *Tolson* (2 M. & G. 134, and 19 L. J. 441, Ch.), although the master was an attorney, Lord Cottenham expressly based his decision on common law principles applicable to all apprentices. The duty to instruct was made by the deed here to continue throughout the apprenticeship; and the increased advantage obtained by the master generally in the later years is compensated by the agreement for an increase of wages. [BRETT, J.—Would it be the same if the apprentice had died?] No; the master would then have still continued to be ready and willing to carry out his part of the contract:

Atwood v. *Maude*, L. Rep. 3 Ch. App. 369;
Astle v. *Wright*, 23 Beav. 77;
Cooper v. *Simmons*, 7 H. & N. 707; 5 L. T. Rep. N. S. 713.

Hughes supported his rule.—There is no case to be found of an ordinary apprenticeship to which this action has been held to apply. In *Hirst* v. *Tolson* the decision was founded on a mistake, and in all the other cases in which attorneys have been ordered to return part of a premium, it has been admitted that no action would lie:

***Hunt* v. *Silk*, 5 East. 449;**
***Blackburn* v. *Smith*, 2 Ex. 783;**
Park on Insurance, "Premium," p. 585;

Ex parte Bayley, 9 B. & C. 691; *Re Thompson*, 1 Ex. 864.

BOVILL, C.J.—This action was brought to recover back as money had and received to the plaintiff's use, part of the premium paid to his master upon his apprenticeship. The consideration for the premium was the master's promise to instruct and keep him during the term; this must be governed by the ordinary rule concerning contracts of this kind. Where there is no fault on the part of the person who makes the promise, and he partly performs his contract, none of the consideration can be recovered. There may be exceptions with regard to contracts which can be severed; as, for instance, if a man purchase and pay for ten sacks of corn at so much per sack, and six sacks only be delivered, he can recover clearly the price of four sacks under any circumstances, because the contract can be severed as to each sack. Here, however, one contract was made for the whole period of the service, and the premium was paid for the whole of that term at the commencement of the apprenticeship. The master received and taught the boy according to the covenants of the deed for about a year, when the teaching was put an end to by the master's death. Personal instruction was necessarily terminated, and unless some express stipulation were contained in the deed to the contrary, the whole contract was at an end by the act of God. In the same way the permanent illness of the apprentice has been considered a sufficient conclusion of the contract. There is no right of action here upon the contract itself, for there is no provision as to what should happen upon the death of either party; that being so, the usual consequence must follow, viz., the end of the contract. It has been said that there is an equity against the executor for the return of part of the premium under the circumstances of this case. There is no principle, however, upon which such a return could be apportioned. The services of an apprentice are at first but of little value, and the duties of the master are at the same time more burdensome. This is to some extent recognised by the scale of wages agreed to be paid to the apprentice, but it is impossible to say how far that scale represents the relative value of the respective duties. There is no instance that I am aware of in which an action has been brought successfully upon an ordinary apprenticeship under circumstances like the present. Sometimes, however, an application for return of premium has been made upon attorneys' articles of clerkship. In *Ex parte Bayley* (9 B. & C. 691) a clerk had been articled to one of two partners, and the application was made for a return by the surviving partner of part of the premium paid to the deceased. The amount found by the master was ordered to be refuunded, but Lord Tenterden was careful to state his opinion that the case was not to be decided by any strict rule of law. The court came to that conclusion with reference to their special jurisdiction over attorneys, and also in consequence of the Act of Parliament which prohibits attorneys from having more than a certain number of clerks. On the other hand, *Re Thompson* (1 Ex. 864) is an instance of the refusal of a court to order the repayment of any portion of a premium by an attorney whose articled clerk died within a month after he was articled for five years. It was admitted that no action would lie, and Pollock, C. B. stated that it was an application to the equitable jurisdiction of the court. They declined to order the return of any part of the premium. There could not be a stronger case than this against the contention on the plaintiff's behalf in this case. Notwithstanding the general jurisdiction of the court over its officers, they refused to exercise it in opposition to the law as it related to apprenticeships of an ordinary description. We have then an express decision of the Exchequer confirming the absence on the plaintiff's side of any claim, either in justice or at law, for the return of this premium. The master and the apprentice must each do all he undertakes, and should be stopped only by the act of God, as, for instance, the death of either of them. We have been pressed with the case of *Hirst* v. *Tolson* (19 L. J. 441, Ch.). There the Vice-Chancellor had referred to the master to inquire what proportion of the premium ought to be returned by the executors of a solicitor to a clerk who had been articled to him for a term of five years. The solicitor died about two years after the clerk was articled. Lord Cottenham upon appeal affirmed the decree, but he did so upon the notion that there existed a debt at law due to the clerk upon the partial failure of the consideration for the premium. As the ground of his decision he relied upon the case of *Stokes* v. *Twitchen* (8 Taunt. 892); that case, however, decides no such point, nor can it be so inferred from it. The plaintiff there sought to recover the whole premium on the grounds of the indenture being void, and the failure of the whole consideration. The plaintiff was nonsuited, because she did not come into court with clean hands, and there is no allusion in the judgment of Gibbs, C. J. to the plaintiff's right to recover part of the premium if the consideration should partially fail. Lord Cottenham's judgment therefore, as far as it is based on that case, was a mistake. Independently of that case, he referred to two other cases as to the jurisdiction of courts of equity in a matter of that kind. I find on reference to the first of these cases, *Soam* v. *Bowden* (Finch's Reps. 396), that the executors there expressed a willingness to pay back part of the premium after the satisfaction of the specialty debts, or to carry out their testator's covenant, as the court should direct. And in the other case, *Newton* v. *Rowse* (1 Vern. 460), the grounds of apportionment, which Lord Cottenham thought were difficult to discover, are probably explained in the note to Raithby's 3rd edit. of Vernon, as mentioned in 1 Story's Equity Jurisprudence, s. 472. According to the pleadings, the case seemed to have been decided on the ground of mutual mistake or misrepresentation. It seems, therefore, that the cases on which the Lord Chancellor relied in *Hirst* v. *Tolson*, failed to support the proposition which he laid down. That decision is, therefore, very unsatisfactory, and the case in the Exchequer is an authority directly the other way. Upon principle, too, it seems to me that there are no grounds for the decision of the present case arrived at in the court below. The rule will be made absolute.

WILLES, J.—I am of the same opinion. The court cannot assume a jurisdiction to overrule the contract between the parties. The contract in this case is clear, that in consideration of the premium the master entered into a bargain between himself and the apprentice; he was to instruct the apprentice, and the apprentice was to serve him for six years, provided that they should both so long live. I put

out of consideration the obligation to clothe and feed the apprentice, sometimes added to that of teaching, which, according to 2 Williams on Executors, 6th edit. 1631, might survive against the executors. It would be extraordinary if, upon the contract as it is, the master should have to pay back the premium, or part of it, because one of the parties should die. It is a well known rule of law that the introduction into a contract of terms which the law assumes to be part of the contract, has no effect upon the contract. If the apprentice died, could the master be called upon to return the premium? Certainly not; but there is no greater reason for the return by executors upon the master's death, unless it be by the custom of the place. By the passage I have alluded to in Williams on Executors, there seems to have been a custom in London binding executors to get an apprentice of their testator into another place of the same trade; and probably this might to some extent explain the decision of the case in Finch. With regard to the case of *Hirst* v. *Tolson*, besides concurring in the observations of the Lord Chief Justice, I think the case very unsatisfactory, although I desire to speak of it with great reserve as an equitable decision. I prefer the course of common law, which is clear. Except by authority of the paternal, or, I should rather say masterful, jurisdiction of the Superior Courts over attorneys, there is no case of interference at common law under circumstances of this kind. I observe at 312 n.(*a*) of 1st Wms. Saunders the case of *Cuff* v. *Brown*, cited from 5 Price, 297. There the Court of Exchequer held that where the apprentice ran away after a short time, and enlisted as a soldier, and the master on his return refused to take him back, the court could not compel any return of the premium. The note goes on to say, "However, in the case of an attorney's clerk the Court of King's Bench decided otherwise, considering that they had a more extensive authority over their own officers: (*Ex parte Prankerd*, 3 B. & Ald. 257.) I think that the nonsuit should here be entered not merely as a matter of law, but also because as a matter of business a watchmaker would probably be at a loss, amounting to the whole of this premium, in the first year of an apprentice's service.

SMITH, J.—I am of the same opinion. Independently of the rule of law that an action for money had and received can, with very few exceptions, only be brought upon a total failure of consideration, the defendant is not here liable upon the written contract between the parties; the intention was that there should be no return of the premium. The master was to teach for six years upon the condition necessarily implied that both the master and apprentice should so long live. I cannot imply from the terms of the contract that in case of death any part of the premium should be returned. If that had been the intention, it might have been easily provided for in the written covenants. The parties must have known the possibility of the death of either within the term of service. If the boy had died before the expiration of the six years it might be a loss to the master greater than the amount of the premium, yet it is not suggested that he could have a remedy. It has been held that he could not recover if the boy were disabled by permanent illness: (*Boast* v. *Firth*, 19 L. T. Rep. N. S. 264; L. Rep. 4 C. P. 1.) It also seems to me that this action cannot lie where the contract has been partly performed on both sides, for the further reason that in order to arrive at an equitable return of the proportion of the premium lost by the apprentice it would be necessary to consider the comparative usefulness of the apprentice to the master at the various periods of the service, the degree of improvement acquired by the apprentice at the master's death, and various other circumstances. The measure of injury incurred cannot be obtained merely from the proportion of time. The only way in which such a claim as this could be made would be by a special action upon an implied contract, which cannot here be found. Neither can the plaintiff obtain any assistance from the authorities. It is certainly a strong circumstance against his claim that no case of an action for return of a premium is to be found in the books. The only attempts to obtain any return have been made under the special jurisdiction of the courts in respect of attorneys; and in one of them the court refused to interfere, on the ground that the matter was full of difficulties. The only common law authority which at first sight appeared to be in the plaintiff's favour is that mentioned in *Hirst* v. *Tolson*. My Lord has shown that Lord Cottenham entertained a mistaken view of the case upon which he relied, and has thereby disposed of the argument founded upon that authority.

BRETT, J.—This seems to me to be a clear case. The sum of money paid to the master as premium was in respect of a continuing consideration, that is to say, a duty to be performed by the master throughout six years if both lived for that time. The master's duty was to instruct the apprentice personally, and death was no breach of the contract on his part. It is said that without any breach of his duty, which was the consideration for the money he received, his executors are to return the premium or part of it. There was no total failure of the consideration, nor was there any rescission of the contract. The case, therefore, comes within the rule that there can be no recovery of any part of a specific sum paid for a specific consideration of which there has been a merely partial failure. The cases cited from Chancery do not affect this point, and the common law authorities in favour of the plaintiff's claim are based upon the special jurisdiction of the courts over their officers.

Rule absolute.

Attorney for plaintiff, *Burton*, for *E. S. Bent*, Manchester.

Attorney for defendant, *W. A. Holcombe*, for *T. E. Jones*, Manchester.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 21, 1871.

(Before KELLY, C.B., CHANNELL, B., KEATING and BRETT, JJ., and CLEASBY, B.)

REG. *v.* DUNNING.

Perjury—Indictment.

An indictment for perjury committed at quarter sessions alleged "that at," &c., "a certain indictment for misdemeanor, in which A. was prosecutor and B. and C. defendants, came on to be tried in due form of law, and was then and there tried by a jury, &c., upon which said trial the now defendant appeared as a witness, and was then duly sworn before the justices," &c.

Held, upon an objection that the court before which the perjury was committed had no jurisdiction, because the indictment did not show the misdemeanor to be one triable at quarter sessions, that the indictment sufficiently alleged the substance of the offence charged against the now defendant, and that the court had competent authority to administer the oath.

CASE reserved for the opinion of this Court by Pigott, B.

The prisoner Henry Dunning was tried and convicted before me at Shrewsbury, at the last summer assizes, upon an indictment for perjury, which alleged in substance as follows, viz.:

Shropshire. The jurors for our Lady the Queen, upon their oath, present, that heretofore—to wit, at the general quarter sessions of the peace of our Sovereign Lady the Queen, holden for the county of Salop, on the 28th June 1870, at the Shire Hall, in Shrewsbury, in the said county, before Sir Baldwin Leighton, Bart., Sir William Curtis, Bart., and others, their associates, her Majesty's justices of the peace, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county done and committed, a certain indictment for misdemeanor, in which John Davies, of the Bull's Head, Lawley Bank, in the said county, was the prosecutor, and Isaac Rowlands and John Davies were the defendants, came on to be tried in due form of law, and was then and there tried by a jury of the country, in that behalf duly sworn, between the parties aforesaid, upon which said trial Henry Dunning appeared as a witness for and on behalf of the said Isaac Rowlands and John Davies, the defendants in the indictment aforesaid, and was then duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir Baldwin Leighton, Bart., Sir William Curtis, Bart., and others, their associates, so being such justices as aforesaid, that the evidence which he, the said Henry Dunning, should give to the court there, and the said jury so sworn as aforesaid, touching the matter then in question between the prosecutor in the said indictment and the defendants therein, should be the truth, the whole truth, and nothing but the truth.

Then, after averments of materiality, it is further presented, that the said Henry Dunning falsely, &c., deposed and swore, &c.

Whereas, &c. (here follow the negatives and the formal conclusion that Henry Dunning so committed perjury.)

It was proved that the indictment was for an offence against the person under sect. 20 of 24 & 25 Vict. c. 100.

At the conclusion of the case for the prosecution it was objected by counsel for the prisoner that the indictment was bad, in not stating what the misdemeanor was, or that it was one triable at Quarter Sessions.

I reserved this for the consideration of this Court, and accepted bail for the prisoner.

G. PIGOTT.

The Hon. *Evelyn Ashley* for the prisoner.—The conviction cannot be sustained. The indictment is bad for not showing the jurisdiction of the court in which the perjury is alleged to have been committed. The indictment only states that a certain indictment for misdemeanor, to which the defendant was a party, came on to be tried before the court of quarter sessions; it sets out no particulars, and does not show that it was a misdemeanor that the court of quarter sessions had power to try. [KEATING, J.—It alleges that it came on to be tried in due form of law.] That averment would be satisfied by showing that the court had all the usual formalities, such as a judge and proper officers, but it is not a sufficient averment of jurisdiction. The indictment should have set out the ingredients of the offence, so that it would appear that the quarter sessions had jurisdiction to try it. [CHANNELL, B., referred to the 14 & 15 Vict. c. 100, s. 20, which enacts, "in every indictment for perjury, &c., it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath, &c., was taken, &c., without setting forth the indictment, &c., and without setting forth the commission or authority of the court before which such offence was committed.] That provision still requires the substance of the indictment to be set out, and *Rex* v. *Callanan* (6 B. & C. 102) is a decision to the same effect. In *Reg.* v. *Overton* (4 Q. B. 83), where an indictment for perjury alleged that a certain appeal came on to be tried in due form of law before commissioners of assessed taxes, it was held that the indictment did not sufficiently show that it was a judicial proceeding, and that it did not sufficiently state the substance of the offence, according to the 23 Geo. 2, c. 11, s. 1. In *Reg.* v. *Harvey* (8 Cox C. C. 99), it was held that the materiality of the false evidence assigned must be apparent on the face of an indictment for perjury, and that the 14 & 15 Vict. c. 100, s. 20, does not cure the want of it. [CLEASBY, B., referred to *Lavey* v. *The Queen* (5 Cox C. C. 259; 17 Q. B. 496), where an indictment for perjury committed in a County Court only alleged that a certain action came on to be tried before the judge of the said court, and was in due form of law tried, upon which trial Lavey was duly sworn as a witness before the said judge, "then and there having sufficient and competent authority to administer the said oath;" and it was held that, although there was no express averment that the oath was administered in a judicial proceeding over which the court had jurisdiction, the averment was by necessary intendment involved in the allegation that the judge had sufficient authority to administer the said oath.] By the 5 & 6 Vict. c. 38, the court of quarter sessions is restrained from trying a large number of offences, and therefore it was essential to show that the offence, upon the trial of which the perjury was alleged to have been committed, was one within the jurisdiction of the court of quarter sessions; and although it need not be expressly averred that the court had jurisdiction to try the offence, yet it should appear upon the face of the indictment that the offence was one triable at sessions. In *Rex* v. *Dowlin* (5 T. R. 314) it appeared on the face of the indictment that the crime was murder, upon the trial of which the perjury was there committed. The following cases were also referred to:

Reg. v. *Philpot*, 1 Car. & Ker. 112;
Reg. v. *Fellowes*, 1 Car. & Kir. 115;
Stedman's case, Cro. Eliz. 137.

No counsel appeared for the prosecution.

Cur. adv. vult.

CHANNELL, B., delivered the judgment of the Court as follows:—In this case the prisoner was tried and convicted at the last summer assizes held at Shrewsbury before Pigott, B., for perjury committed on the trial at the general quarter sessions of the peace for the county of Salop, of an indictment for misdemeanor against Isaac Rowlands and John Davies for an offence against the person of John Davies under sect. 20 of 24 & 25 Vict. c. 100. The case at the trial was

fully proved in every necessary particular; but it was objected on behalf of the prisoner, and has been argued before us, that the indictment was bad in form, and that the judgment should therefore be arrested and the conviction quashed. The objection taken at the trial was that the indictment did not state what the misdemeanor was, which was alleged to have been tried at the quarter sessions, or aver that it was one triable at quarter sessions, *i.e.*, in other words, did not aver that the court of quarter sessions had jurisdiction to try the misdemeanor. This objection, when developed in argument before us, seemed to fall into two objections, first, that the indictment did not set forth the substance of the offence charged upon the defendant; and, secondly, that it did not either expressly aver or show by necessary inference that the court before which the false oath was taken was a competent authority to administer the same. As to the first objection, the indictment alleges that at the general quarter sessions "a certain indictment for misdemeanor came on to be tried in due form of law," in which one Davies was prosecutor, and Rowlands and Davies were defendants, and was then and there tried by a jury, &c., and that the prisoner appeared as a witness upon the said trial, and was then duly sworn, &c. The indictment then sets out the matter sworn to by the prisoner, avers its materiality, and negatives its truth and truthfulness. The objection taken is, that it does not state the subject-matter of the indictment for misdemeanor which was tried at the sessions. But that seems rather to point out an alleged defect in not stating the substance of the offence charged against the defendants who were tried at the sessions than a defect in not stating the substance of the offence charged against the defendant tried at the assizes. The substance of the offence charged against him is, that in a judicial proceeding he swore to the truth of certain facts which are set forth, which at the time of so swearing he knew to be false. "All that it is necessary to state," says Buller, J., in *Rex* v. *Dowlin* (5 T. R., 311), "is that there was a certain cause, &c., and that it came on to be tried in due form of law, &c." It is true, as pointed out by the counsel for the defendant, that in that case it was alleged that one Kimber was tried upon a certain indictment for murder, &c.; but it seems to us that neither Lord Kenyon nor Buller, J., rely upon the presence of the words, "for murder" in stating the proposition of law, but they mention them only in their relation of the actual facts of that case. In the case of *Rex* v. *Callanan* (6 B. & C. 102), all that was stated was the substance of what the defendant swore that he did, &c., upon affidavit before a commissioner. The indictment did not state the cause for or in respect of which the affidavit was made. Yet Abbott, C. J., says that it set forth "the substance of the matter sworn," using that expression as equivalent to "the substance of the offence charged upon the defendant, and holding the case to be consequently within the statute 23 Geo. 2, c. 11. In *Lavey* v. *The Queen* (17 Q. B. 496) the objection taken was, that it was not shown that the County Court had jurisdiction over the suit in which the alleged false oath was taken, because the nature of the suit was not sufficiently described. "It was argued," says Parke, B., in the judgment, that in setting forth "the substance of the offence," it was not sufficient to state "the substance of the matter sworn to," and aver that it was false, and to allege the authority of the judge to administer the oath; but the indictment was nevertheless held to be sufficient on the ground that it appeared that there was a judicial proceeding, and that the defendant was sworn and stated certain matter which was false, and that the judge had power to administer the oath. The ground of decision is, that the substance of the offence charged upon the defendant sufficiently appeared, and that the court had competent authority to administer the oath. These cases seem to us to be authority for the correctness of the suggestion we have made as to the meaning and construction of the statute, and for holding that in the present case the substance of the offence charged against the defendant sufficiently appears. As to the second point, if the case had depended upon the statute 23 Geo. 2, c. 11, we should have probably thought that the indictment was insufficient. That statute was passed in order to obviate difficulties in the form of indictments for perjury. It states what it shall be sufficient to set forth, viz., the substance of the offence charged upon the defendant, and by what court and before whom the oath was taken, "averring," it says, "such court or person or persons to have a competent authority to administer the same," with the proper averment or averments to falsify the matter charged, &c., without setting forth, &c. After that statute, the question treated by the courts in every case was, whether an indictment contained the averments mentioned in that statute or their equivalents. If it did, it was good without more. But then, by stat. 14 & 15 Vict. c. 100, passed to relax still further technical forms of indictments, it is enacted in sect 20 that [reads it]. It is almost identical in terms with sect. 1 of the 23 Geo. 2, c. 11, except that it omits the words "averring such court or person or persons to have a competent authority to administer the same." This omission seems to us conclusively to show the intention of the Legislature, that this allegation, or its equivalent in the indictment, is a technical strictness which may well be dispensed with, the matter of it being left for proof at the trial. Having then determined that the substance of the offence alleged against the defendant in the present indictment is sufficiently stated, we are of opinion that the indictment contains everything required by sect. 20 of 14 & 15 Vict. c. 100, and is therefore by the express terms of the section sufficient, although it does not contain any express or equivalent averment that the court had competent authority to administer the oath. We are therefore of opinion that the indictment was sufficient, and that the conviction in this case was right, and must be affirmed.

Attorney for prisoner, *Smith*.

Conviction affirmed.

(Before Bovill, C. J., Willes, J., Channell, B., Pigott, B., and Hannen, J.)

Reg *v.* Harris and Cocks.

Lewdness—Exposure in a public place—Urinal.

The prisoners committed a gross act of lewdness in an inclosed urinal, divided into compartments, adjoining to a public footway in a public park. The public had access to the urinal.

***Held*, that the urinal was a public place, and that**

the commission of the indecency therein was indictable as a nuisance.

Case reserved for the opinion of this Court by the Assistant-Judge at the Middlesex Sessions on the 23rd Nov. 1870.

Samuel Harris and Henry Cocks were tried before me upon the following indictment:

Middlesex. The jurors for our Lady the Queen upon their oath present that Samuel Harris and Henry Cocks on the 10th Oct. in the year of our Lord 1870, in a certain urinal frequented and resorted to by many of the liege subjects of our Lady the Queen for a necessary purpose and in a certain open and public place, called Hyde-park, situate in the parish of Saint George, Hanover-square, in the county of Middlesex, and near and adjacent to a certain highway and footpath there situate and in the sight and view of many of the liege subjects of our said Lady the Queen then and there being, and then and there passing and repassing, did meet together for the purpose of committing with each other divers lewd and unnatural practices, and did then and there commit and perpetrate with each other divers such practices as aforesaid, and that he the said Samuel Harris did then and there in such open and public place as aforesaid, and within the sight and view of such persons as aforesaid, unlawfully and wickedly expose. [Then followed a specific averment of the lewd practices.] To the great damage and common nuisance of all the liege subjects of our said Lady the Queen then and there being and then and there passing and repassing, against the peace of our said Lady the Queen, her crown, and dignity.

Complaints having been made to the police of practices at the urinal in question, two police constables in plain clothes were directed to watch the place, and, on the 10th Oct., between three and four o'clock in the afternoon, they found the two prisoners in the urinal. They were standing facing each other, but on seeing the officers, each prisoner retired into one of the compartments in the urinal.

The police officers then went to the further end of the urinal where there were openings enabling them to see into the urinal; they then saw Harris leave the compartment which he had previously entered and go to the compartment in which Cocks then was; Cocks turned round to Harris, and the acts of indecency specified in the indictment were committed.

The officers then ran round to the principal entrance, and took both prisoners into custody in the urinal.

The urinal is open to the public, and is situate in Hyde-park, near to a lodge, the window of which on a first floor commands a view of the urinal, the distance between the lodge and the urinal being 14ft. 6in.

The urinal is approached by a gate opening from the public footpath, and there is also access to it by another gate communicating with a small garden belonging to the lodge.

Harris pleaded guilty to the whole charge, and I told the jury that, for the purpose of the trial, they might, if they believed the evidence, find Cocks guilty upon the first count, but they must be satisfied that the prisoners had the intention imputed to them by the second count, before they could justifiably return a verdict of guilty on that count.

The jury found Cocks guilty on the first count, and not guilty on the second count.

Sentence was postponed that the opinion of this Honourable Court might be obtained, and in the mean time both prisoners were discharged on bail.

The question I have to submit to this Honourable Court is, whether, in point of law, the conviction of Cocks can be sustained?

If this question is determined in the affirmative, the conviction is to be affirmed, and the court of sessions may proceed to pass sentence upon both prisoners; but if otherwise, the conviction of both prisoners, notwithstanding Harris's plea of guilty, is to be quashed.

William H. Bodkin, Assistant Judge.

Giffard, Q. C. (*Moody* with him) for the prisoner Cocks. — No doubt the prisoner committed a gross act of indecency in the urinal, but the question was whether the urinal was such a public place as makes the act an indictable nuisance at common law. This was not a place open to public view, it is divided into compartments and was intended to screen persons from the public gaze. *Reg.* v. *Orchard* (3 Cox, C. C. 248), is in point. There the indecent act was done in an urinal in Farringdon-market, it was an enclosure formed of Portland stone, with divisions or boxes like urinals at railway stations. It was open to the public for certain public purposes, but otherwise enclosed. To render an urinal a public place it must be so open to the gaze of the public as to be a public nuisance. [Willes, J.—Or, in other words, it must be so publicly done as to affect two or more of Her Majesty's subjects.] It is no offence that persons use it for a lawful purpose, and in some sense in every such case that is an indecent act. [Bovill, C. J.—Here I understand from the case that the act was done not in a compartment but in the open part of the urinal. Does a public place cease to be a public place by reason of part of it being partitioned off for a convenient purpose so far as regards the part so partitioned off?] *Reg.* v. *Orchard* is an authority that it does. No doubt this point was reserved to give an opportunity of questioning the soundness of the decision in *Reg* v. *Orchard*.

Harris, for the prosecution, was not called upon.

Bovill, C. J. — If all the facts had been clearly stated in *Reg* v. *Orchard*, and there had been a clear opinion expressed by the Judges, it might have been some authority against a conviction in this case; but the facts are so indefinitely stated, that I cannot understand the case. Whatever construction is to be put on that case, I am of opinion that it has no application to the present. The prisoners are charged and convicted of having committed an offence in an urinal frequented by many of the Queen's subjects, and in a certain open and public place called Hyde Park, and near to a certain highway and footpath, and in the sight and view of many of the Queen's subjects. The only question reserved is whether there was any evidence on which they could be properly convicted. If the learned Assistant-Judge was bound to have told the jury that the urinal was not a public place, the conviction was wrong; but inasmuch as he was not bound to tell them that, the conviction must stand. Upon the case it appears that this was a public urinal adjoining a public footway, from which there was access to the urinal, and there were what are termed divisions or compartments in it. Such of the public as desire to do so may have recourse to it; and it was, therefore, as much a public place as a thoroughfare. Whether it was a place of larger or smaller extent, as, *e.g.*, in a public square or in a court, cannot affect the question whether it was a place of public resort. There is no other point reserved but

whether an urinal can be a public place in which an indecent act of this kind can be committed; and we think it is just the class of place to which the law on this subject applies.

The rest of the Court concurred.

Conviction affirmed.

Attorneys for the prosecution, *C.* and *J. Allen* and *Sons.*

Attorneys for the prisoner, *E. Lewis* and *Co.*

Saturday, Jan. 28, 1871.

(Before BOVILL, C.J., CHANNELL, B., WILLES, J., PIGOTT, B., and HANNEN, J.)

REG. *v.* COOKE.

Larceny—False pretences—Master and servant.

The prisoner, a foreman, by fraudulently misrepresenting that 21*l.* 18*s. was due for wages to the men under him, obtained that sum from his master's cashier. On the pay sheet made out by the prisoner* 1*l.* 10*s.* 4*d. was put down as due to W., whereas only* 1*l.* 8*s. was due, and that amount only was paid to W. out of the* 21*l.* 18*s.; the excess,* 2*s.* 4*d., was appropriated out of the* 21*l.* 18*s. to the prisoner's own use, he intending so to appropriate it at the time he received* 21*l.* 18*s.:*

Held, that the prisoner was guilty of larceny of the 2*s.* 4*d.*

CASE reserved for the opinion of the Court by the Chairman of the Worcestershire Quarter Sessions.

At the Worcestershire Quarter Sessions, held on the 2nd Jan. 1871, the above-named prisoner, Edwin Cooke, was tried before me for stealing certain moneys belonging to his master, one George Hands.

The said George Hands was a currier, at Kidderminster, and in the habit of employing several workmen in his said business.

The prisoner was in and before the month of November last, and continued until the early part of the following month, to be a servant of the said George Hands, being employed at a weekly salary, as a confidential foreman over the workman.

It was part of the duty of the prisoner to engage and dismiss the workmen, as occasion required; and he generally, but not invariably, consulted his master as to such engagement and dismissal, and as to the amount of wages at which such workmen were to be engaged.

The workmen were engaged at so much a week for ordinary time, and they were to be paid after the same proportionate rate for any overtime.

A wages book was kept at the master's counting-house, and was given out to the prisoner on the morning of every Saturday (which was the pay day for the workmen), in order that he might enter on a pay-sheet in the said book the names of the several workmen who had been employed during the week, and to set opposite to each person's name the amount due to him for wages. When this was done, the prisoner, according to the usual practice, brought back the book to the counting-house and gave it to the master's cashier, who generally showed it to the master. The several sums entered in the pay-sheet were then added up and the total amount paid by the cashier to the prisoner, whose duty it would be to pay thereout to the several workmen their respective wages.

Among the workmen so employed under the prisoner in the month of November last was a man named Williams, who had been engaged by the prisoner at 24*s.* a week for ordinary time (overtime, if any, to be paid for in addition at the same proportionate rate). During the week ending the 12th Nov. last, Williams had worked overtime, and the wages due to him for that week, calculated at the rate of 24*s.* a week, amounted to the sum of 1*l.* 8*s.* and no more. The prisoner, however, had before this time fraudulently represented to his master that Williams had been engaged at the rate of 26*s.* a week, and in the aforesaid pay-sheet for the week ending the 12th Nov. last he fraudulently set opposite the name of Williams, instead of the said sum of 1*l.* 8*s.* the correct amount due to him, the sum of 1*l.* 10*s.* 4*d.*, being in fact the amount that Williams would have been entitled to if he had been engaged at the rate of 26*s.* instead of 24*s.* a week.

The total amount of the wages in the said pay-sheet for that week, including the said sum of 1*l.* 10*s.* 4*d.*, so represented to be due to Williams was the sum of 21*l.* 18*s.*, and the said cashier, in ignorance of the fraud practised by the prisoner, and believing that the said pay-sheet was correct, on the same 12th Nov. paid to the prisoner out of his master's moneys the said sum of 21*l.* 18*s.*, in order that he might by means thereof pay the several workmen mentioned in the pay-sheet the wages due to them respectively, and the prisoner was not authorised, either by his master or by the cashier, to apply any part of such moneys for any other purpose.

After obtaining the said sum of 21*l.* 18*s.* from the cashier in manner aforesaid, and on the same day, the prisoner paid thereout to Williams the sum of 1*l.* 8*s.*, being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2*s.* 4*d.*, being the excess of the sum represented in the said pay-sheet to be due to Williams, over the sum actually due, and the prisoner intended, at the time when he obtained the said money from the cashier, to appropriate the said excess to his own use, and to defraud his master of the same.

The appropriation of this excess of 2*s.* 4*d.* was the subject of the first count of the indictment, on which the prisoner was tried. There were two other counts charging the prisoner with stealing moneys belonging to his master, but the facts, except as to the names, dates, and amounts, being exactly similar to those proved under the first count, are not necessary to be stated for the purposes of this case.

It was objected by the counsel for the prisoner that, even if the above facts were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences.

I declined to withdraw the case from the jury on that objection; but a verdict of guilty having been returned, I reserved the point for the consideration of this Court, and judgment was in the meantime postponed, and the prisoner, not having, as I believe, been able to obtain the required bail, is now detained in the Worcester prison.

The question on which I respectfully desire the opinion of the Court is, whether the prisoner, on the foregoing state of facts, was properly found guilty of felony.

(Signed) R. PAUL AMPHLETT,
Chairman of the above Court of Quarter Sessions.

F. T. Streeten (*Self* with him) for the prisoner.—The conviction for larceny was wrong; for the

offence (if any) committed by the prisoner amounts only to obtaining money by false pretences. The cashier had authority from his master to pay the 21*l.* 18*s.* to the prisoner, and he did so intending to part with the money absolutely to the prisoner. The property being parted with by the cashier, the offence was not larceny. In *White* v. *Garden* (10 C. B. 927), Talford, J., said: "There is a very obvious distinction between the cases of goods obtained by felony and fraud, or false pretences. In the one case the owner of the goods has no intention to part with the property; in the other he has." Lord Wensleydale expressed the same view in *Powell* v. *Hoyland* (6 Ex. 70). The same distinction between larceny and false pretences is laid down in—

2 Russell on Crimes, 200, 4th edit.;
Arch. Crim. Plead. 312, 16th edit.; and
2 East P. C. 816,

and the distinction is a substantial and material one, and was upheld in *Reg* v. *Prince* (38 L. J. 8 M. C.; 11 Cox C. C 193). [Bovill, C. J,—Assume that it was not larceny when he obtained the gross sum from the cashier, but when he had paid away all that he ought to have paid away there remained a balance in his hands, whose money was that? Was it not his master's, and if so, does not the case fall within the late Act as one of a fraudulent conversion of the balance to the prisoner's own use, which offence the Act defines to be larceny?] This was not a bailment of the money to the prisoner; there was no specific coin of which the prisoner was a bailee, and bound to restore. The test is, whether at the time the cashier parted with the money to the prisoner, he intended to part with the ownership in it, and it is submitted upon the facts stated that he did. The offence was complete at the time the prisoner obtained the money by the false pretences. In *Reg* v. *Thompson* (32 L. J. 57, M. C.; L. & C. 233; 9 Cox C. C. 222), a merchant's clerk having fraudulently represented to the cashier that a larger sum than 1*l.* 3*s.* was due for dock dues, and obtained it, and appropriated the difference to his own use, was held not to have been guilty of larceny. There Williams, and Wightman, JJ., both pointed out the difficulty there was as to any particular coin having been stolen by the prisoner, as the money was paid over to the prisoner in a lump, and he was justly entitled to a part of what was so paid to him. And Pollock, C. B., said, "No doubt the prisoner obtained the money by false pretences, but it was not larceny." That case proceeded on the same principle decided in *Reg* v. *Leonard* (1 Den. C. C. 304; 3 Cox C. C. 284), where the prisoner was a foreman, and the money was obtained by cheque. The following cases were then cited to show that this was not a case of fraud by a bailee:

Reg. v. *Prince* (*supra*)
Reg. v. *Hassell*, 30 L. J. 175, M. C.;
Reg. v. *George Thompson*, 9 Cox C. C. 222.

Here the money was parted with in the first instance, once for all, and to put it as money stolen after the correct amount for wages was paid is not consistent with the facts. [Bovill, C.J. referred to *Reg.* v. *Goode* (Car. & M. 582), where the master gave the prisoner 3*l.* to pay canal dues, and he paid a part only, and appropriated the rest to his own use, and the prisoner was convicted of larceny.] That case is commented on in a note in *Reg.* v. *Thompson* (L. & C. 233), where, after reviewing all the cases, it is said, "The true distinction to be drawn from these cases appears to be, that if the master delivers money to the servant for a speci ed purpose, with the understanding that the identical coins delivered are to be applied to that purpose, and the servant converts them to his own use with a felonious intent, he is guilty of felony; but if the master delivers to the servant a gross sum of money, to make certain payments out of that sum, not intending that the identical coins delivered shall be applied to any particular payment, but leaves the servant at liberty to make any use he pleases of the specific coin delivered, provided he applies a similar amount of money to the purposes indicated, the master must be taken to have parted with the money, and the servant cannot be convicted of larceny if he convert the money to his own use, although, if he had obtained it by means of a false pretence, he may be convicted of the latter offence." This view of the law is consistent with that adopted in the case of larceny by bailees, with regard to whom it has been held that they cannot be convicted of larceny for converting to their own use money deposited with them in cases where they are only under an obligation to return the amount, and not the identical coin deposited."—[Willes, J. That note is very good law with one qualification, that where, as was said by Lord Wensleydale, money is handed to a servant, the servant must *primâ facie* be taken to hold it as the master's, and for the purpose intended by the master. Bovill, C. J., referred to *Reg.* v. *Watts*, 2 Den. C. C. 14.] If this is larceny it is difficult to see when the offence was complete. *Reg.* v. *Barnes* (2 Den. C. C. 59; 5 Cox C. C. 112) was also cited.

J. O. Griffits (*Montagu Williams* with him), for the prosecution, was stopped by the court.

Bovill, C.J.—The real point submitted to us in this case is whether there was any evidence to go to the jury of a larceny having been committed. The objection raised by the prisoner's counsel was that, even if the facts stated in the case were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences. The point is substantially whether on the facts stated there was any evidence of a larceny that ought to have been submitted to the jury, or whether the case ought to have been withdrawn from them. The facts are that the cashier of the prosecutor, in ignorance of the fraud practised upon him by the prisoner, paid to the prisoner 21*l.* 18*s.* of the moneys of his master, in order that he might by means thereof pay the several workmen mentioned in the pay-sheet the wages due to them respectively, and the prisoner was not authorised either by his master or by the cashier to apply any part of such moneys for any other purpose. After obtaining the said sum of 21*l.* 18*s.*, and on the same day, the prisoner paid thereout to Williams the sum of 1*l.* 8*s.*, being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2*s.* 4*d.*, being the excess of the sum represented in the pay sheet to be due to Williams over the sum actually due, and the prisoner intended at the time when he obtained the money from the cashier to appropriate the said excess to his own use and to defraud his master of the same. The whole foundation, therefore, of the argument of the prisoner's counsel fails, viz., that the jury could not find the identical money misappropriated, because the case states the receipt of the particular sum of the master's money,

and that the prisoner paid thereout 1*l.* 8*s.* to Williams, and fraudulently appropriated thereout to his own use 2*s.* 4*d.*, being the excess of the sum represented in the pay-sheet. On that footing this case steers clear of the difficulty which has arisen in many of the cases, for upon this evidence there was a misappropriation of the very moneys he received from his master. It is now contended that the money was obtained by false pretences in the first instance, but that was a question for the jury. Independently of that, a second point was taken as to the condition of the money at the time of the misappropriation. Was it the property of the master? The money handed over to the prisoner through the hands of the cashier remained the property of the master, and though in the actual possession of a servant, was in the constructive possession of the master. Under these circumstances a servant stands in a different position to a bailee at common law. A bailee is possessed of certain rights over property entrusted to him, but a servant's possession is the constructive possession of his master, and at common law he is guilty of larceny if he fraudulently appropriates his master's property to his own use. In some cases, where a servant received money from third persons on account of his master, it was formerly said there was no constructive possession in the master, and the statutes relating to embezzlement were passed to meet those cases *Reg.* v. *Watts* (2 D. & P. 14) was an instance of that. There the prisoner, being a servant, and the money received being his masters', and constructively in their possession at the time the prisoner appropriated it, the prisoner was guilty of larceny. In this case the money remained in the possession of the prisoner, and then whose money was it? Why, the master's. At the time when the prisoner took possession of the 2*s.* 4*d.* and appropriated that money, whose money was it? I answer, the master's; and therefore it seems to me that the prisoner was guilty of larceny, and that there was abundant evidence in support of this. As to the case of *Reg.* v. *Thompson*, that proceeded altogether on the ground whether there was larceny in the first instance, but that does not touch the second point here. No point was made there as to the effect of the Bailee Act, or that the possession of the prisoner was that of a servant. The moment it is established that it is a misappropriation of money entrusted to a servant, the case falls within *Reg.* v. *Goode* and similar cases. The case of *Reg.* v. *Prince* was not a case of master and servant, and is therefore distinguishable. I therefore think the conviction was right.

Willes, J.—I merely wish to refer, in confirmation of the Lord Chief Justice's judgment, to a passage very much in point in Russell on Crimes, p. 388, where the case of *Reg.* v. *Murray* is stated thus: "So, if money has been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and embezzles it, it is larceny. The prisoner was a clerk in the employ of A., and received 3*l.* of A.'s money from another clerk, that he might pay for inserting an advertisement. He paid 10*s.*, and charged A. 20*s.*, fraudulently keeping back the difference. And upon a case reserved it was held that this was not embezzlement, because H. had had possession of the money by the hands of the other clerk, and Mr. Greaves, in a note, adds, "*ergo*, it was larceny."

The other judges concurred.

Conviction affirmed.

Attorney for the prosecution, *Miller Corbet*, Kidderminster.

Attorney for the defence, *H. Saunders*, junr., Kidderminster.

Reg. *v.* Rugg.

Neglect to provide child with proper food—Ability of parent to provide—Evidence—Indictment.

An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so.

The jury returned a verdict of guilty on the ground that if the prisoner had applied (to the guardians) for relief she would have had it:

Held, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians.

Quære, whether the second count is good in law.

Case reserved for the opinion of this court by the Recorder of the borough of Plymouth.

At the General Quarter Sessions of the Peace for the Borough of Plymouth, held on Friday, 30th Dec. 1870, a bill of indictment was preferred against Florence Rugg in the following form:—

Borough of Plymouth.—The jurors for our Lady the Queen upon their oath present, that Florence Rugg, single woman, of the borough of Plymouth aforesaid, on the 20th Nov. 1870, was the mother of one Mary Jane Rugg, an infant of tender years, to wit, of the age of five years; and that the said Mary Jane Rugg was then and there under the care, dominion, and control of the said Florence Rugg, and wholly unable to provide for herself; and that on the day and year aforesaid, and on divers other days and times, as well before as after that day, it was the duty of the said Florence Rugg to protect shelter and nourish the said Mary Jane Rugg, she, the said Florence Rugg, being able and having the means to perform and fulfil her said duty; and the jurors aforesaid, upon their oath aforesaid, further present that the said Florence Rugg, well knowing the premises and not regarding her duty in that behalf, on the said 20th Nov. 1870, and on divers other days and times, as well before as after that day, in the borough aforesaid, did unlawfully and wilfully neglect and refuse to find the said Mary Jane Rugg with sufficient meat, drink, wearing apparel, bedding, and other necessaries proper and requisite for the sustenance, support, clothing, covering, and resting the body of the said Mary Jane Rugg, by means whereof the said Mary Jane Rugg became weak, sick, and ill, and greatly emaciated in her body, against the peace of our said Lady the Queen, her crown and dignity.

Second count:

And the jurors aforesaid upon their oath present, that the said Florence Rugg on the 20th Nov. 1870, and on divers other days and times, as well before as after that day, in the borough aforesaid, being the mother of one Mary Jane Rugg, an infant of tender years, to wit, of the age of five years, under the care, dominion, and control of the said Florence Rugg, and wholly unable to provide for herself, unlawfully and wilfully did neglect and refuse to find and provide for the said Mary Jane Rugg sufficient meat, drink, wearing apparel, bedding, and other necessaries proper and requisite for the sustenance, support, clothing, covering and resting the body of the said Mary Jane Rugg, by means whereof the said Mary Jane Rugg became weak, sick, and ill, and greatly emaciated in her body, against the peace of our said Lady the Queen, her crown and dignity.

Third count:

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Florence Rugg, on the 20th Nov. 1870, in and upon one Mary Jane Rugg, did make an assault, and her the said Mary Jane Rugg did then beat, wound, and illtreat, and other wrongs to the said Mary Jane Rugg, then did to the great damage of the said Mary Jane Rugg, against the peace of our said Lady the Queen, her crown and dignity.

The grand jury, on delivering the bill to the clerk of the peace, declared that they returned a true bill, but their indorsement on the bill was in the following words:

We find a true bill against Florence Rugg, for not providing food for her child.

John Plimsaul, Foreman.

Inadvertently the special indorsement had not been called to the attention of the court till after the grand jury had been discharged and had dispersed and left the court.

The defendant was arraigned on the whole indictment and pleaded not guilty, and was tried and found guilty on the first two counts, but the jury added in giving their verdict,

We do so on the ground that if she had applied (to the guardians) for relief she would have had it.

There was no evidence of an assault.

Clarke prosecuted for the guardians of the poor.

The prisoner was undefended.

Judgment was postponed, and the following questions reserved for the consideration and decision of this court, viz.:—First, whether the presentment of the grand jury was sufficient? (*R.* v. *Cooke*, 8 C. & P. 582.) Secondly, if it were, whether upon the verdict given on the ground alleged by the jury the Recorder ought not to have directed an acquittal? (*R.* v. *Chandler*, 1 Dears. C. C. R. 453.)

No counsel appeared on either side.

Bovill, C. J.—In this case the prisoner was indicted for not providing food for her infant child. In the first count it is alleged that the prisoner unlawfully and wilfully neglected and refused to find the infant with sufficient food, &c., she, the prisoner, being able, and having the means to perform and fulfil her said duty, to protect, shelter, and nourish the infant. The second count states that the prisoner unlawfully and wilfully neglected and refused to provide for her infant sufficient meat, &c., but did not contain any allegation of ability on the part of the prisoner to provide sufficient meat, &c. The grand jury returned a true bill against the prisoner "for not providing food for her child." Assuming that they intended to negative the charge of assault in the third count, the grand jury may be taken to have found a true bill on the first two counts. We have to consider the effect of the verdict of the petit jury on the first two counts. They found a verdict of guilty, but added, "we do so on the ground that if she had applied" (to the guardians) "for relief, she would have had it." The case of *Reg.* v. *Chandler* shows that that finding was not sufficient to maintain the first count of the indictment, which contains the allegation of ability and means on the part of the prisoner. On the second count of the indictment, assuming that count to be good, which we doubt, the allegation is, that the prisoner unlawfully and wilfully did neglect and refuse to find and provide her child with necessary food, &c., but there is no allegation that the prisoner had the means of procuring, or could have procured it, and wilfully abstained from doing so. That allegation in that count is not found by the jury. On these grounds we are of opinion that the conviction should be quashed.

The rest of the Court concurring,

Conviction quashed.

Tuesday, Jan. 31, 1871.

(Before Bovill, C. J., Channell, B., Willes, J., Byles, J., and Pigott, B.)

Reg. *v.* Ardley.

False pretences—What amount to—False statement of fact.

The prisoner induced the prosecutor to buy a chain by knowingly and falsely asserting (inter alia) "*it is* 15 *carat fine gold, and you will see it stamped on every link.*" *In point of fact, it was little more than* 6 *carat.*

Held, that the above assertion was sufficient evidence of the false representation of a definite matter of fact to support a conviction for false pretences.

Case reserved for the opinion of this court by the chairman of the court of quarter sessions for the county palatine of Durham.

John Ardley was tried before me at the winter sessions held for the county of Durham on the 2nd Jan. 1871, for obtaining 5*l.* and an Albert chain of the value of 7*s.* 6*d.* by false pretences. The first count of the indictment was in these words:

The jurors for our Lady the Queen upon their oath present that John Ardley on the 31st day of October, A.D. 1870, unlawfully, knowingly, and designedly did falsely pretend to one Thomas Wakefield that a certain Albert chain which he the said John Ardley then asked the said Thomas Wakefield to buy from him the said John Ardley, was of 15-carat gold, and that he the said John Ardley was then a draper and that the said chain had been made expressly for him the said John Ardley, by means of which said false pretences the said John Ardley did then unlawfully obtain from the said Thomas Wakefield a certain sum of money, to wit, 5*l.*, and a certain other Albert chain of the value of 7*s.* 6*d.*, with intent to defraud, whereas in truth and in fact the said Albert chain which he the said John Ardley then asked the said Thomas Wakefield to buy from him the said John Ardley as aforesaid was not of 15-carat gold. And whereas in truth and in fact he the said John Ardley was not then a draper; and whereas in truth and in fact the said chain had not been made expressly for him the said John Ardley as he the said John Ardley well knew at the time when he did so falsely pretend as aforesaid, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The material facts were as follows.

The prisoner went into the shop of the prosecutor, who was a watchmaker and jeweller, and stated that he was a draper, and was 5*l.* short of the money required to make up a bill, and asked the prosecutor to buy an Albert chain, which he (the prisoner) was then wearing. The prisoner said, "It is 15-carat fine gold, and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth 5*l.* to sell as old gold."

The prosecutor bought the chain, relying, as he said, on prisoner's statement, but also examining the chain, and paid 5*l.* for it, and gave also to the prisoner, in part payment, a gold Albert chain, valued at 7*s.* 6*d.*

The prisoner's chain was marked "15-carat" on every link. And in a very short time afterwards he (the prisoner) was apprehended, and then wore another Albert chain, of a character similar to that sold to the prosecutor, this also being marked "15 carat" on every link.

It was proved that "15-carat" was a Hall mark used in certain towns of England, and placed on certain articles made of gold of that quality, and that chains, when assayed, are generally found to be 1 grain less than the mark, exceptionally 2 grains.

The chain bought by the prosecutor was assayed, and found to be of a quality a trifle better than 6 carat gold, and of the value in gold of 2*l.* 2*s.* 9*d.* It was proved that had it been 15 carat gold, it would have been worth 5*l.* 10*s.* Adding the charge for what is called "fashion" or "make," and the price of a locket attached, the chain bought by the prosecutor would be sold for 3*l.* 0*s.* 3*d.*, but had it been 15 carat, it would have been sold for 9*l.*

There were no drapery goods or anything connected with such trade found on the prisoner; but when arrested he had in his possession a licence to sell plate, two watches, two white metal watch guards, and the chain obtained from the prosecutor.

I was asked by counsel for the prisoner to stop the case on the authority of *Reg.* v. *Bryant*, (D. & B. 265). This I declined to do, and left the case to the jury, who found the prisoner guilty, and, in answer to me, said they found that the prisoner knew he was falsely representing the quality of the chain as 15 carat gold.

The question for the opinion of this honourable court is whether or not the prisoner was rightly convicted of obtaining money under false pretences.

JOHN R. DAVISON.

Jan. 21, 1871.

No counsel was instructed for the prisoner.

Edge for the prosecution.—The conviction was right. The case is within the principle of *Reg.* v. *Dundas*, 6 Cox C. C. 380, where the prisoner was convicted of falsely pretending that blacking labelled "Everett's Premier" sold by him to the prosecutor was "Everett's Premier" blacking. Erle, J. there told the jury, "That it was of little consequence whether the prisoner's name was Everitt, as he had stated, or not, for even if it were, and he went about the country and offered blacking for sale as Everett's Premier, representing it to be the well-known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent." So here 15-carat gold was marked on each link, and the prisoner pretended not merely to sell a gold chain, but one of 15-carat gold. In *Reg.* v. *Goss* and *Reg.* v. *Ragg* (29 L. J. 86, M.C.), it was held that a false representation of an alleged matter of definite fact, knowingly made, whether in the course of a bargain or not, is a false pretence within the statute. In *Reg* v. *Ragg* the prisoner obtained money by falsely representing that he had delivered 15cwt. of coal when he knew that he had only delivered 8cwt. That is very like this case, for the representation was that the chain was 15-carat gold when it was only a little more than 6-carat gold. *Reg.* v. *Bryant* was decided on the ground that the false statement was not of a definite triable fact but matter of opinion, and the judges said that if the prisoner in that case had represented the spoons as Elkington's A, it would have been a different thing, but his statement was only that they were equal to Elkington's A. In *Reg.* v. *Jessup* (D. & B. 443; 7 Cox C. C. 399), a person who fraudulently offered a one pound note as a note for 5*l.*, and got it changed upon that representation, was convicted for obtaining money by false pretences, although the person to whom it was passed could read, and the note upon the face of it afforded the means of detecting the fraud. The following authorities were also cited:

Reg. v. *Roebuck*, D. & B. 24; 7 Cox C. C. 126;
Reg. v. *Stevens*, 1 Cox. C. C. 83;
Reg. v. *Woolley*, 1 Den. C. C. 563; 4 Cox C. C. 191.

Greenhow (*amicus curiæ*), having been counsel for the prisoner at the trial, referred to
Reg. v. *Ridgway*, 3 F. & F.

BOVILL, C.J.—At the conclusion of the case the learned chairman was asked to stop the case, on the authority of *Reg.* v. *Bryant*. The question for the court at that stage was, whether there was any evidence in support of the charge to go to the jury? The court declined to stop the case, on the ground that there was. The evidence was left to the jury, and the prisoner was found guilty. It seems to me that it was quite impossible to stop the case on the evidence as it stood, because there was a distinct statement of a fact, and evidence that it was false. The prisoner not only made a representation with respect to the quality, but he made the statement in order to induce the prosecutor to purchase the chain. He went into the prosecutor's shop and stated that he was a draper, and was 5*l.* short of the money required to make up a bill, and asked the prosecutor to buy a chain. He said it was "15-carat fine gold, and you will see it stamped on every link;" that it was made for him, and that he paid nine guineas for it, and that the maker had told him it was worth five guineas to sell as old gold. All these are statements in addition to that with respect to the quality. And there was clear evidence to negative them, and they were made for the purpose of inducing the prosecutor to purchase the chain, and so of defrauding him. The case seems to come distinctly within the statute if the jury are satisfied that the statements are false and fraudulent. But the case does not depend on that alone, for there was evidence that the prisoner was not a draper; but there was found in his possession a licence to sell plate, certain articles of jewellery, and he was wearing another Albert chain similar to that sold to the prosecutor, and marked 15-ct. on every link. There was, therefore, evidence to negative the whole statement he made as to matters of fact, and the jury expressly found that the prisoner knew he was falsely representing the quality of the chain as 15-carat gold. The authorities draw nice distinctions between what is a statement of fact and what is matter of opinion or exaggerated praise. It is difficult in many cases for the court to come to the conclusion as to what is a matter of opinion and exaggerated praise, or what is a matter of fact; but the judge must consider those matters, and tell the jury not to convict for mere matter of opinion and exaggerated praise, and that the false statements of matters of fact must be made with the intention to defraud. In the case of *Reg.* v. *Bryant* the prisoner represented that certain spoons were equal to Elkington's A, not that they were Elkington's A, but equal to Elkington's A. *Primâ facie* that seems the expression of a matter of opinion and not one of fact, but at all events it was open to that construction. Though it was there decided that the conviction could not be supported, yet many of the judges expressed the opinion that it might be the subject of false pretences, although a false statement was made

with reference to the quality of the article, if the statement was false to the knowledge of the party and made with the intention to defraud. Cockburn, C.J. said in the course of his judgment: "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing; but the representation here made was only a vaunting and exaggerating of the value of the article in which he was dealing by representing it to be in quality equal to a particular manufacture." Pollock, C.B. said: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit and were to sell it as and for something very different, even in quality from what it was, the statute would apply." So that a statement as to the character of an article but which is in fact a misrepresentation of the quality, is not sufficient, but a misrepresentation as to the quality is sufficient if it is known that it is not the quality which it is pretended to be. Coleridge, J., said, "I agree with the Lord Chief Baron in the latter part of his observations, as it seems to me it would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute in the course of an ordinary transaction of buying and selling. . . . It seems to me to be a safe rule to say, where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other which too frequently takes place even in tolerably honest transactions between parties, this is not the subject of a criminal proceeding." Erle, J. treated the representation as a misrepresentation on a matter of opinion rather than of a definite matter of fact, and on that ground decided against the conviction. He said, "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction on the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A., but the affirmation is of what is mere matter of opinion and falls within the category of untrue praise in the course of a contract of sale, where the vendee has in substance the article contracted for, namely, plated spoons." His Lordship then referred to the judgment of Crompton, J. The opinion of my brother Willes, carefully and elaborately given in that case, goes to the effect that a misrepresentation of quality made with intent to defraud is within the statute. Bramwell, B., also was in favour of a conviction in that case. Applying those observations to the case before us, how does it stand? The statement made by the prisoner was not one of mere opinion or exaggerated praise, or an opinion as to its probable quality, but it was a distinct statement that the chain was 15-carat fine gold, untrue to the knowledge of the prisoner, and of which there was abundant evidence. How different it is to the case where a man manufactures a chain, knows it is of a different standard of gold, and yet goes and misrepresents the standard. This case is distinguishable from *Reg* v. *Bryant*, for here there was a distinct statement of a matter of fact false to the knowledge of the prisoner and made by him with intent to defraud. The conviction therefore was correct, and must be affirmed.

WILLES, J.—I am of the same opinion. The majority of the judges in *Reg.* v. *Bryant* held that if the statement of the prisoner had been that the electro-plate was Elkington's A. it would have been sufficient within the statute.

BYLES, J.—I am of the same opinion. We are not infringing on the authority of *Reg.* v. *Bryant*, which was decided on the principle that *simplex commendatio* is not criminal.

CHANNELL, B.—I am of the same opinion. I decide that the conviction is good on the ground that the learned chairman was not bound to stop the case, and that there was evidence for the jury in support of the prosecution.

PIGOTT, B.—I am of the same opinion. It was not intended to bring within the criminal law any mere statement of matter of opinion, however strongly expressed; but in this case I think there was a false statement of a fact knowingly made for the purpose of defrauding the prosecutor.

Conviction affirmed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 16, 18, *and* 25, 1870.

(Present: The Right Hon. the LORD CHANCELLOR, The Archbishop of YORK, and Lord CHELMSFORD.

MARTIN v. MACKONOCHIE.

Monition of the Privy Council—Motion to enforce obedience—Elevation of the cup and paten—Prostration—Literal compliance—Intention—Previous disobedience—Sentence.

By a monition of the Privy Council the respondent was commanded to abstain from the elevation of the cup and paten above his head during the administration of the Holy Communion, and from kneeling or prostrating himself before the consecrated elements during the Prayer of Consecration. On a motion to enforce obedience to the above monition, it appeared that the respondent, or his curates, had during the Prayer of Consecration elevated wafer bread, taken out of the paten, above the head, and had also elevated the cup so that its rim was some inches above the head. The respondent, however, while admitting that he had attempted only to obey the letter of the monition, stated that the elevation above the head was unintentional and unconscious. It further appeared that the respondent had, during the Prayer of Consecration, bowed down towards the table, remaining some seconds in that position, after replacing the wafer and the cup respectively on the table.

Held, that the respondent had been guilty of disobedience to the monition:—First, in respect to elevation, because, since he intended to render a mere literal obedience to the precise letter of the monition, he must be made accountable for an actual non-compliance with the terms of the monition, whatever his intention to obey it might have been; secondly, in respect to prostration, because, though a reverential bow would not be an act of prostration, yet the posture assumed and maintained for some seconds by the respondent was not a mere bow, but a humble prostration of the body in reverence and adoration.

The respondent, having been on a former occasion declared to have disobeyed this same monition, was now, on a repetition of the offence, sus-

pended for three months from all clerical duties, and condemned in costs.

THIS was a motion to enforce obedience to a monition of the Privy Council, dated Jan. 19, 1869, by which the respondent, the Rev. A. H. Mackonochie, incumbent of St. Alban's, Holborn, was commanded to abstain (among other things) from the elevation of the cup and paten above his head, and from kneeling or prostrating himself before the consecrated elements during the Prayer of Consecration. Long affidavits in support of and in answer to the charge of disobedience to the monition in the above particulars were filed. The purport of these and of the statements of the respondent in cross-examination, is sufficiently given in the judgment *post*.

The monition referred to, and proceedings against the respondent on a similar motion in Dec. 1869, will be found in 21 L. T. Rep. N. S. 512.

Dr. *Stephens*, Q.C., *Archibald*, *Currie*, and *Shaw*, were for the appellant in support of the motion.

Judgment was delivered by Lord CHELMSFORD.—This is an application against the Rev. Alexander Heriot Mackonochie, perpetual curate of the parish of St. Alban's, Holborn, for disobedience to a monition founded upon an Order in Council of the 19th Jan. 1869, by which he was commanded (amongst other things) to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the consecrated elements during the Prayer of Consecration. A previous application for disobedience to the monition in these particulars was made against Mr. Mackonochie, upon which their Lordships expressed an opinion that the monition had been disobeyed with reference to kneeling during the Prayer of Consecration, and condemned him in costs: (21 L, T. Rep. N. S. 512.) Upon that occasion their Lordships explained the way in which the article of charge with respect to the elevation of the cup and paten came to be worded as it was. The article, as it was originally framed, was objected to as vague and general, and was ordered to be reformed. The article, as reformed, charged Mr. Mackonochie with having elevated the paten and the cup above his head during the Prayer of Consecration. It was quite unnecessary to charge an elevation of the paten and the cup to the extent described in the reformed article, because the 28th of the Articles of Religion prohibits all elevation of the elements, declaring that "the sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." So the elevation of the paten and cup need not have been charged to have taken place during the Prayer of Consecration. It would have been sufficient to have stated it to have occurred during the administration of the Holy Communion. But the charge having been thus precisely framed (however unnecessarily), the specific offence to be proved against Mr. Mackonochie was not simply an elevation of the cup and paten, but an elevation of them above his head at the particular period of the administration when the Prayer of Consecration was being read. Upon the original hearing before the Dean of the Arches, he pronounced that Mr. Mackonochie had offended in the terms of this article, and monished him to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion as pleaded in the articles. There was no appeal from this part of the sentence. In the monition which followed the appeal to this committee from the rest of the sentence of the learned judge of the Arches Court, Mr. Macknochie is commanded to abstain from the elevation of the cup and paten during the administration of the Holy Communion; but upon the former application against Mr. Mackonochie for disobedience to this monition, their Lordships were of opinion that the words "as pleaded in the articles," must be understood as being in the monition, and, therefore, that the prohibited elevation was confined to the degree and the time charged in the article. The unnecessary particularity in the wording of this article of charge afforded Mr. Mackonochie the opportunity of which he availed himself, to obey the monition to the letter, and still to continue to elevate the cup and paten during the administration of the Holy Communion, but not above his head, nor during the Prayer of Consecration. Their Lordships were therefore compelled, upon the evidence produced upon the former application against Mr. Mackonochie, to come to the conclusion that he had not disobeyed the monition in this respect, but they took care "to have it distinctly understood that they gave no sanction whatever to a notion that any elevation of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister, was sanctioned by law." Upon another charge of disobedience to the monition, Mr. Mackonochie was not so successful upon the former occasion in protecting himself by a supposed literal compliance with its terms. He was commanded not to kneel or prostrate himself before the consecrated elements during the Prayer of Consecration. He admitted that it was his practice "during the Prayer of Consecration reverently to bend one knee at certain parts of the prayer, and that occasionally in so doing his knee momentarily touched the ground, but that such touching of the ground was no part of the act of reverence intended by him. And he contended that this genuflection, unless the knee reached the ground, was not kneeling. Their Lordships, however, expressed a clear opinion that bowing the knee in the manner described by Mr. Mackonochie was kneeling, and that it was not necessary a person should touch the ground in order to perform such an act of reverence as will constitute kneeling." Their Lordships thought it right, upon this occasion, to express a hope that Mr. Mackonochie would learn "that mere literal compliance with the monition in a merely evasive manner would not suffice." And they observed that "literal compliance with regard to the actual limits of the order was of course all that he was held to by law, and for obedience to the spirit of the order they could only trust to his own feelings and his own conscience." Mr. Mackonochie is now again before their Lordships upon complaint of acts of disobedience to the monition similar to those with which he was charged upon the former occasion. The appellant prays their Lordships to declare that Mr. Mackonochie has not complied with the monition, inasmuch as: First, he knowingly and habitually sanctions the elevation of the paten and cup above the head of the officiating clergyman in the Prayer of Consecration;—Secondly, that he knowingly and habitually sanctions kneeling or prostration before the consecrated elements during the Prayer of Consecration. The affidavits filed on behalf of the appellant describe the acts done

by the officiating clergyman during the administration of the Holy Communion upon seven different Sundays in the months of Dec. 1869, and Jan. and Feb. 1870. As the affidavits on the other side do not deny the general correctness of the account of what took place upon these occasions (nor did Mr. Mackonochie in his cross-examination), it may be assumed that they describe what is the ordinary course pursued in the administration of the Holy Communion in the Church of St. Alban's. It appears, then, that the practice is that, upon the officiating clergyman reaching the solemn words of institution in the Prayer of Consecration, he drops his voice so as to be nearly inaudible, and a bell begins to toll; that he then elevates (not the paten, but) a wafer, and replacing it upon the communion table bows his head down towards the table and remains for some seconds in this position; that he then elevates the cup and replacing it on the table bows down as before, after which the administration of the elements commences. The appellant alleges that on the days mentioned in the affidavits which he has filed, the paten and cup were elevated above the head of the officiating clergymen during the Prayer of Consecration; and that during the same prayer there was kneeling or prostration before the consecrated elements. To begin with his case as to the elevation of the cup and paten, the appellant has distinctly proved that, upon each of the seven Sundays mentioned in the affidavits, the officiating clergyman during the Prayer of Consecration elevated a large wafer bread above his head, and also during the same prayer elevated the cup, so that its rim was some inches above his head. These statements are opposed by the affidavits of the clergymen who officiated upon the several Sundays mentioned in the appellant's affidavits. Mr. Howes, who was the officiating clergyman on four of the Sundays, denies that, on either of those days, he raised or elevated the paten or chalice above his head during the Prayer of Consecration, and adds that he had not consciously nor to the best of his knowledge done so since the practice was discontinued by Mr. Mackonochie after the 30th Dec. 1866. Mr. Stanton, who officiated on Sunday, the 26th Dec. 1869, swears that he did not intentionally elevate the paten or cup above his head in the Prayer of Consecration; and Mr. Willington, who officiated on two of the Sundays, states, positively, that he did not elevate the paten or cup above his head in the Prayer of Consecration. It is to be observed that these affidavits might, according to a possible view entertained by the reverend gentleman, be regarded by them as literally true, because the paten was not elevated by them but a wafer bread, and the whole of the cup was not raised above the head, but only the upper part of it. It appears from the cross-examination of Mr. Mackonochie that, after the institution of proceedings against him, he introduced the practice of elevating the wafer and not the paten. As he has confessed that his object upon every occasion has been merely to comply literally with the law, it was not unfair to presume that the change from the paten to the wafer was made in order that he might not be accused of elevating the paten. But Mr. Mackonochie stated to their Lordships (and they accept his statement) that "he has in no way sheltered himself behind the difference between the wafer and the paten, but has treated the wafer as the paten, and considered the elevation of the wafer as equivalent to the elevation of the paten." It is sufficient, therefore, to say that, if any such distinction had been attempted, it could not have been successful, as the elevation which is unlawful is that of the consecrated bread itself, and not of the paten in which it is placed. Again, there can be no doubt that the elevation of any part of the cup above the head is an elevation to that extent of the cup itself. This Mr. Mackonochie very properly admitted in his cross-examination. He said, "The cup is the whole cup; to raise any part of the cup above the forehead is to raise the cup above the forehead." Now, the conclusion to be drawn from this state of facts is, that Mr. Mackonochie, having determined to yield the merest literal obedience to the precise letter of the monition, had resolved that neither he nor his curates should elevate the paten or the cup above their heads during the Prayer of Consecration; but, in consequence of the difficulty of keeping to the exact degree of elevation intended, the officiating clergyman unconsciously and unintentionally elevated the wafer and the cup to the extent mentioned in the affidavits. But if Mr. Mackonochie has been (as he admitted) "carefully scanning the monition and the Order in Council to see how he could keep exactly within them," and has been acting upon his understanding "that legal judgments should be interpreted according to their letter," he has no right to complain of the letter if the monition is applied against him, and he is made accountable for an actual non-compliance with its terms, whatever his intentions to obey it may have been. The act of elevation to the prohibited degree was witnessed; the secret intention could not be known. That the elevation charged took place during the Prayer of Consecration appears from the evidence of Mr. Mackonochie that the raising of the wafer and of the cup takes place after the words of institution in each kind; consequently, the wafer, at least, must be raised as the prayer is proceeding. The remaining charge to be considered against Mr. Mackonochie is, his sanctioning kneeling or prostration before the consecrated elements during the prayer of consecration. Their Lordships (as already mentioned) having upon the former occasion, when Mr. Mackonochie was charged with disobedience to the monition, decided that the genuflexion which he practised amounted to kneeling, Mr. Mackonochie, with the same object which he has always had in view, to pay only the closest literal obedience to the monition, gave notice to his curates that he intended thenceforth to bow without bending the knee at the part of the Prayer of Consecration where he had previously knelt. This intention he and his curates carried out, according to the description given in the affidavits, by bowing down towards the table after replacing the wafer upon it, and remaining some seconds in that position, and adopting the same course with respect to the cup. Mr. Mackonochie stated that upon some of these occasions his forehead may have touched the table, but that this was no part of the act of bowing, his object being merely a low bow. Their Lordships do not regard a reverential bow in the light of an act of prostration, as contended for by the learned counsel for the appellant; but the posture assumed and maintained for some seconds by Mr. Mackonochie is certainly not a mere bow, but a humble prostration of the body in reverence and adoration. Their Lordships con-

sider that the charge against Mr. Mackonochie, of sanctioning prostration before the consecrated elements, is therefore fully proved. Their Lordships cannot refrain from expressing their great regret at the course which Mr. Mackonochie has thought himself justified in adopting in his proposed submission to the authority of the monition. He has (as he admitted in his cross-examination) "carefully scanned the monition and the Order in Council, to see" how nearly he could preserve the prohibited ceremonies, or, as he expressed it, "how far he could obey the law of the church" (or what he chooses to consider the law of the church) "without disobeying the law of the state." Mr. Mackonochie must be reminded that the right of the Church of England to ordain ceremonies is asserted by the 34th of the Articles of Religion, to which he has given his assent, and that none of the ceremonies which he practises are prescribed by the Church. In the attempt to satisfy his conscience, and to shelter himself under the narrowest literal obedience to lawful authority, Mr. Mackonochie has been a second time foiled. Upon the former occasion their Lordships, after expressing their opinion judicially that the monition had been disobeyed, did not think it necessary to do more to mark their disapprobation of Mr. Mackonochie's course of proceedings than by directing that he should pay the costs of the application. Upon this repetition of his offence, their Lordships think that they ought to proceed further. They therefore declare that Mr. Mackonochie has not complied with the monition in respect of the elevation of the paten or wafer, nor as abstaining from prostration before the consecrated elements. And they order that he be suspended for the space of three calendar months from the time of notice of the suspension, from all discharge of his clerical duties and offices, and the execution thereof: that is to say, from preaching the Word of God, and administering the Sacraments, and celebrating all other clerical duties and offices; and further, that he pay the costs of this application.

Proctors for the appellant, *Moore* and *Currey*.

COURT OF COMMON PLEAS.

Reported by M. W. MICKLEM, and H. H. HOCKLEY, Esqrs., Barristers-at-Law.

Jan. 23 and 24, 1871.

REG. v. CHAMPNEYS.

Rectory annexed to deanery—Severance—3 & 4 Vict. c. 113, s. 50—13 & 14 Vict. c. 94, s. 19.

By an Act of 4 & 5 Anne, intituled "An Act for augmenting the number of canons residentiary in the cathedral church of L., and for improving the deanery and prebends of the said cathedral," it was enacted that the rectory and church of T. should be united and annexed to the deanery of L. for ever, and that the Dean of L. then in being, upon application to the Bishop of L., should receive institution to the same without presentation, and continue possessed thereof in right of his deanery so long as he should remain dean, it being the object of the Act that the Dean of L. and his successors for ever should always be rectors of the church of T., on making allowances for a curate, &c.

By sect. 50 of 3 & 4 Vict. c. 113, it is provided that, "subject to the provisions herein contained all the estate and interest which the holder of any deanery or canonry . . . . and his successors have or would have in any lands, tithes, or other hereditaments or endowments whatsoever annexed or belonging to or usually held with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry as such holder separately, and in addition to his share of the corporate revenues of such chapter shall without any conveyance," &c., pass to the Ecclesiastical Commissioners for the purposes of this Act:

Held, that this section did not disannex the rectory of T. from the deanery of L., and vest it in the Ecclesiastical Commissioners, but that the Dean of L. was still entitled, under the above-mentioned statute of Anne, to receive institution to the rectory of T., without presentation:

Held also, that the Dean of L., on receiving such institution to the rectory of T., did not accept a benefice to take and hold with his deanery, within the meaning of 13 & 14 Vict. c. 94, s. 19.

THIS was an action commenced by a writ of summons issued in accordance with sect. 26 of the Common Law Procedure Act 1860, and indorsed with a notice as follows:—"The Attorney-General, on behalf of Her Majesty, intends to declare in *quare impedit*." Afterwards, by the consent of the parties and the order of a judge, the following case was stated, without pleadings, for the opinion of the court:

1. By a private Act, made and passed in the sessions of Parliament holden in the fourth and fifth years of the reign of her late Majesty Queen Anne, chapter 32, intituled "An Act for augmenting the number of Canons residentiary in the Cathedral Church of Lichfield, and for improving the Deanery and Prebends of the said Cathedral," reciting (*inter alia*) that Her Majesty, in consideration of the small income that arose to the dean out of the revenue of the said church, and the great charge he must necessarily undergo in the decent attendance upon his place and office, had been graciously pleased to permit that the rectory of Tatenhill, the perpetual advowson whereof Her Majesty was seised of in right of the Duchy of Lancaster, should be annexed to the said deanery, it is, by sect. 2, enacted as follows, that is to say:

Be it enacted by the authority aforesaid, that the said rectory and church of Tatenhill, whenever it shall by any lawful means first become void, shall be united and annexed to the said deanery of the church of Lichfield for ever, and the Dean of Lichfield then in being, upon application made to the bishop of the diocese of Lichfield and Coventry, shall receive institution to the same without presentation and continue possessed thereof in right of his deanery, so long as he shall remain Dean of Lichfield, and no longer, it being the intent of this Act that the Dean of Lichfield, and his successors for ever, should always be rectors and incumbents of that church on making such allowance to a curate or curates as the bishop for the time being shall appoint, the said dean for the time being, nevertheless, paying the first fruits at his instalment into the said deanery, and tenths yearly and all other dues after the same manner as all former incumbents or persons instituted into the said rectory have hitherto done.

2. By the statute 3 & 4 Vict. c. 113, intituled, "An Act to carry into effect with certain Modifications the fourth Report of the Commissioners of Ecclesiastical Duties and Revenues," it is (by sect. 50) enacted as follows, that is to say:

Subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors have and would have in any lands,

tithes, and other hereditaments or endowments whatsoever annexed or belonging to, or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry as such holder separately, and in addition to his share of the corporate revenues of such chapter shall, without any conveyance or assurance in the law other than the provisions of this Act accrue to, and be vested absolutely in the ecclesiastical commissioners for England and their successors for the purposes of this Act.

3. By the statute 13 & 14 Vict. c. 94, intituled "An Act to amend the Acts relating to the Ecclesiastical Commissioners." It is (by the 19th section) enacted as follows, that is to say:

That no spiritual person appointed to the deanery of any cathedral or collegiate church after the 10th April 1850 shall accept to take and hold therewith any benefice not situate within the city or town of the cathedral or collegiate church in which he shall hold such deanery, and where any spiritual person so appointed after the said 10th day of April, holds at the time of his admission to such deanery any benefice not situate within such city or town, such benefice, unless sooner avoided, shall become void on the expiration of six calendar months from the time of his admission to such deanery. Provided always that the income of any benefice which may be holden with any such deanery shall in no case exceed the amount or sum of 500*l.* per annum.

4. On the 20th Nov. 1868 the defendant was by letters patent of that date, under the great seal, duly appointed by her Majesty dean of the said cathedral church of Lichfield.

5. The defendant accepted the said appointment and was afterwards, on the 15th Dec. 1868, duly installed and inducted into the said deanery with all its rights, members, and appurtenances.

6. The defendant upon his said installation, entered into the real, actual, and corporeal possession of the said rectory of Tatenhill, and claims to hold and retain the same in right of his said deanery, under the provisions of the said statute of Anne, and has, since his appointment to the said deanery, always been and is willing to make such allowance to a curate or curates of the said rectory as the bishop for the time being shall appoint, and to make all other payments and perform all such acts as are directed in and by the said statute.

7. The said rectory of Tatenhill is not situate within the city of the said cathedral church of Lichfield, in which the defendant holds the said deanery.

8. Since the Act of Queen Anne, referred to in the first paragraph of this case, the Dean of Lichfield for the time being has always held the rectory of Tatenhill, and received the tithes and emoluments of that benefice, but no institution of any dean to the rectory has ever in fact been made, and his title has been solely that derived from his appointment as dean, and his induction and installation as such.

The questions for the opinion of the court are—first, whether the said rectory of Tatenhill is united or annexed to the Deanery of Lichfield, so that the defendant, as Dean of Lichfield, can lawfully hold and retain the same. If the rectory cannot be so held, then, secondly, whether Her Majesty is entitled, in right of the Duchy of Lancaster, to present a new incumbent to the said rectory? or, thirdly, whether Her Majesty is entitled, in right of the Crown, to present a new incumbent to the said rectory?

Judgment is to be entered for the Crown or for the defendant in accordance with the answers to these questions, but without costs.

The *Solicitor-General* (Sir J. D. Coleridge) (*Archibald* with him), for the Crown.—The great object of 3 & 4 Vict. c. 113, was to make the emoluments attached to deaneries and canonries more uniform; and this object it was proposed to attain by depriving deans and canons of any separate estate which they held in addition to their shares of the corporate revenues of the dean and chapter, and by providing that, in certain cases where the income of the deans and canons amounted to more than a certain sum, such deans and canons should pay annually to the ecclesiastical commisioners as much as would leave to them the annual stipends fixed by the Act; and that, in other cases where the incomes of the deans and canons did not amount to a sum named, the commissioners should annually pay to them as much as would raise their stipends to that sum. The fund from which these payments were to come was to be made up of the proceeds of suppressed prebends, canonries and deaneries, and of the separate estates and emoluments attached to deaneries and canonries. The latter provision is found in the 50th section of the Act (*supra*). It is submitted that the words of that section include the present case of the rectory of Tatenhill. A rectory is an "hereditament" *Savile* v. *Savile* (Fortescue, 351), it is certainly an "endowment." It has been "usually held or enjoyed" with the deanery of Lichfield, and the "rents and profits have been taken and enjoyed" by the dean "separately and in addition to his share of the corporate revenues." Unless this construction of the Act be adopted, the general object of the Act which is to provide more uniform stipends for deans and canons, will not be attained in Lichfield. The word "rectory" includes the endowments belonging to it, the freehold of the chancel of the church and everything belonging to the rectory. [WILLES, J.—What becomes of the right of presentation?] It must revert to the Crown. [WILLES, J.—In that case would the presentee of the Crown take the bare rectory, or would he take the rectory with its emolument?] That would be a matter for future consideration. By the statute of Anne, not the advowson but the rectory was annexed to the deanery of Lichfield; the advowson has always remained with the Crown, but the right to use it has been suspended. The Act 3 & 4 Vict. c. 113, was passed (as appears from the title and preamble) to carry into effect, with some alterations and modifications, the fourth report of the ecclesiastical commissioners; it is therefore useful to look at that report. (He here referred to some passages in the second and fourth reports of the commissioners, to show that they proposed to disannex the rectory of Tatenhill from the deanery of Lichfield). Moreover, the 19th sect. of 13 & 14 Vict. c. 94 disables the dean of Lichfield from holding this rectory, as it is not within the town of Lichfield and is worth more than 500*l.* a year.

Sir *J. Karslake*, Q. C. (*Philbrick* with him) for the defendant.—The stat. 4 & 5 Anne, c. 32, is not repealed by 3 & 4 Vict. c. 113, and the latter Act has no relation to the Dean of Lichfield in his capacity of rector of Tatenhill. The statute of Anne was passed for the purpose of augmenting the revenue of the Dean of Lichfield, and it did so by providing that the then dean and every succeeding dean should, without presentation, be rectors of Tatenhill. The question now is, whether the defendant, being Dean of Lichfield, is entitled under that statute to become, without

presentation, rector of Tatenhill. The 50th section of 3 & 4 Vict. c. 113, does not deprive him of the right, for it speaks only of the "rents, tithes, hereditaments, or endowments . . . . whereof the rents and profits have been usually taken or enjoyed by the holder of such deanery or canonry, *as such holder*, separately," &c. In the present case, the defendant claims to take the profits annexed to the rectory, not as the holder of the deanery, but because he, being dean, becomes rector. He receives the emoluments of the rectory as appurtenant, not to the deanery, but to the rectory. With some exceptions, the Act 3 & 4 Vict. c. 113, does not deal at all with rectories; the exception is the case of sinecure rectories, but there the Act is express as to what is to be done with any right of patronage concerning such rectories, and also as to the cure of souls, if any. In this case, nothing is said as to the patronage or as to the cure of souls, and the commissioners have no power to take the former or to make any provision for the latter. Again, the 50th section was to take effect at once, so that, if the contention of the Crown be correct, the Dean of Lichfield, at the time of the passing of the Act, ought to have been deprived of the rectory. Again, the sort of property that was to vest in the commissioners was property that could have been dealt with by them under the Act; but they could not have dealt with this rectory in that way. The case, then, according to the contention of the Crown, stands thus: the profits of the rectory are to go to the commissioners, the advowson is to go to the Crown, and if the Crown then present, the presentee is not to get any emolument except what the commissioners may choose to give him, they having no power to give him anything. What really was intended by the Act, especially by the 50th section, was this: there were many cases in which a dean or a canon held a particular part of the corporate estates of the dean and chapter, separately and in addition to his ordinary share of the corporate property, and it was the object of the 50th section to provide that where this was the case, such part so held should go to the commissioners. The language of the 67th section, where it speaks of the commissioners making "additional provision" for certain parishes, shows that it never was the intention of the Legislature to hand over a rich rectory to the commissioners, giving them power to take all the tithes, &c., of a particular place, and then re-grant a part. Moreover, not only do we find no express dealing with this case, but we do find that the Act makes express provision as to what is to be done in the two very similar cases of the rectory of Haseley, attached to the deanery of St. George, Windsor, and the prebend of Sawley, in the cathedral church of Lichfield, annexed to the rectory of St. Philip's, Birmingham. The case of Haseley is dealt with in the 43rd section, which makes express provision as to what is to be done with the rectory on its disannexation. The case of St. Philip's is dealt with in the 13th and 63rd sections. This circumstance goes far to show that the Legislature did not mean to include this case in the general language of the statute. As to the effect of 13 & 14 Vict. c. 94, s. 19, that has no application to the present case. It provides that "no spiritual person appointed to any deanery, &c., shall accept to take and hold therewith any benefice," &c. That applies *to a case* where a man, being dean, has the option of accepting or not any benefice that may be offered to him; it does not apply to this case, where the dean cannot be said to accept the rectory, but to become rector by virtue of an Act of Parliament. The statute 3 & 4 Anne, c. 32, is not repealed by either of the Acts of Victoria, and that being so, the defendant is entitled to this rectory.

The *Solicitor-General* in reply.

BOVILL, C.J.—By the statute 4 & 5 Anne, c. 32, which united several of the prebends of Lichfield and annexed one of the prebends to the bishopric, the rectory and parish church of Tatenhill, were united to the deanery of Lichfield for ever, and the then dean and every succeeding dean of Lichfield became, without presentation, rectors of Tatenhill and entitled, as such rectors and in right, as it seems to me, of the rectory, to the parish church with all rights, glebes, and other profits appurtenant to the rectory. If that Act is still in force and has not been affected by subsequent legislation, the present dean of Lichfield, having been duly appointed to the deanery, is now legally rector of Tatenhill, and as such rector entitled to the emoluments belonging to the rectory. But it is contended on behalf of the Crown, that the statute 3 & 4 Vict. c. 113, and especially the 50th section of that Act, did in point of law repeal the statute of Anne, or at any rate interfered with its operation so far as the rectory of Tatenhill was concerned, and that the effect of this subsequent Act has been to vest something or another belonging to the rectory of Tatenhill (what, I will consider hereafter) in the Ecclesiastical Commissioners, and to revest the patronage of the rectory in the Crown. The Act of 3 & 4 Vict. c. 113, was no doubt passed to give effect, with certain modifications and exceptions, to the fourth report of the ecclesiastical commissioners, which is mentioned in the title and recited in the preamble of the Act, and has, therefore, been very properly brought to our attention. The report related principally to cathedral and collegiate churches and the officers connected therewith, and the cathedral church and the dean and chapter, and various officers of Lichfield are particularly referred to, both in the report and in the Act. The Act does not profess to carry out the whole of the scheme of the commissioners. Both the title and the preamble refer to certain modifications, so that it is impossible to say how far the Legislature intended to carry out the report. We must, therefore, be guided by the language of the Act, though some light is no doubt thrown upon the Act by the report which it recites. By the 13th section of the Act, two canonries of Lichfield were suspended, and in the same section it appears that one of these canonries was annexed to the rectory of the church of St. Philip in Birmingham. It has also been brought to our attention that the statute under which this rectory and the prebend of Lichfield were united was 7 Anne, c. 34, from which it appears that the prebend in question was the prebend of Sawley. By the 13th section of 3 & 4 Vict. c. 113, this prebend and the rectory of St. Philip's are detached from one another by express words. If the rectory had been detached simply, I should have expected to find some provision made for the cure of souls, not only as to the person to be appointed for that purpose, but also as to the fund destined for his remuneration. But in the present case, the emolument of the prebend ceases,

because the prebend itself is suspended; so that the prebend being detatched and suspended, the rectory remained with all its incidents. Further provision for this case is made by the 63rd section, which has been referred to in the argument, which makes provision for the endowment of the rector of St. Philip's, Birmingham, out of the endowment of the suspended prebend. By the latter part of sect. 49, "the profits and emoluments arising from corporate revenues belonging to the canonries suspended in the cathedrals of Chester, Lichfield, and Ripon respectively, shall become, as the vacancies occur, part of the divisible corporate revenues of the said chapters respectively;" and by sect. 63 provision is made for the rector of St. Philip's, as before stated. By sect. 29, two rectories in Westminster are permanently annexed and united to two canonries there, and provision is made by which the holders of these canonries and their successors were to become *ipso facto* rectors of the respective parishes in question, to all intents and purposes. There is also an important provision in the Act, to which Sir John Karslake has called our attention, relating to the rectory of Haseley. That was annexed to the deanery of St. George's, Windsor, also by a statute of Anne. That part of this statute that relates to the rectory of Haseley is by the 43rd section expressly repealed, and it is there expressly declared, that the rectory of Haseley shall be absolutely detached and severed from the deanery of Windsor, and the patronage of the living is given to the dean and chapter of Windsor. We have, therefore, thus far two express enactments as to rectories to be severed from the cathedral dignities to which they were attached; and in each case we find a special provision for the purpose. Whilst I am upon the subject, I may refer to that part of the statute 13 & 14 Vict. c. 94, which relates to rectories attached to cathedral dignities, to show that where it is the intention of the Legislature to sever the one from the other, it is done by an express enactment. What was done in 1850 is not a certain guide as to the meaning of what was said in 1840; but the latter Act shows what the Legislature thought ought to be done when a rectory was severed from a dignity. Sect. 22 of 13 & 14 Vict. c. 94, applies to the case of certain benefits annexed to bishoprics. There, as in the case of Haseley and St. Philip's, Birmingham, there is an express enactment to effect the severance, and to provide what is to be done on the severance. There is also in 3 & 4 Vict. c. 113 a provision with respect to sinecure rectories. The 48th section provides that such rectories shall be suppressed, with a proviso to meet the cases of private patronage. These rectories being suppressed, there is a distinct enactment (sect. 54) as to what is to become of the "lands, tithes, or other hereditaments or endowments whatsoever" belonging to them, the same words being used as in sect. 50, in the interpretation of which some assistance may be derived from a consideration of this 54th section. The 50th section vests certain matters, which belonged to the deans and chapters, in the commissioners, but for the purposes of the Act, and subject to certain provisions. The general purposes of the Act appear from sects. 66 and 67 to be the provision of adequate stipends for deans and canons, and the making of additional provision for the cure of souls where such provision is most required. Then sect. 83 provides that the commissioners are to lay schemes before the Queen in council for carrying their recommendations into effect. By a subsequent Act (4 & 5 Vict. c. 39), a larger scope is given to the commissioners for carrying out the purposes of the Act. Now what is the true meaning of the 50th section? for it is on the interpretation to be put on the language of that section that our decision in the present case must depend. It must be remarked that one of the main purposes of the Act is to enable the commissioners to bring various descriptions of property into a common fund, and then form schemes for the application of it. The whole of this 50th section refers to property which may be convertible for the purposes of the Act. The words used, as I have before pointed out, are the same as those employed in connection with the suppressed rectories, and only refer to things in the nature of property, and, further, property held by persons in the character of deans or canons. The effect sought to be given to the section by the advisers of the Crown is, that it repeals the statute 4 & 5 Ann, c. 32, which annexed the rectory of Tatenhill to the deanery of Lichfield; that it transfers the emoluments of the rectory to the Ecclesiastical Commissioners, and entitles the Crown to resume the patronage of the living thus shorn of its emoluments. I am unable to concur in this view. First of all it appears to me that, if the Legislature had intended to repeal the statute of Anne, there would have been an express enactment for that purpose. I should have expected, moreover, that it would have made special provision as to the patronage of the rectory, especially as, wherever the Act does interfere with rights of patronage, it does make some express provision for the case. Again, some provision would have been made as to the cure of souls in the place, the person to be appointed to the rectory, and the curate. There is an utter absence of any such provision; while, on the other hand, we find that, where the Legislature has intended to deal with the parallel case of Haseley and the analagous case of St. Philip's, Birmingham, it has done so by special enactment, and has made express provision for all these matters. It is said that we do not know all the facts connected with the prebend of Sawley and St. Philip's, Birmingham, and that this is shown by comparing sect. 13, where the term canonry is used, with sect. 63, which speaks of a prebend. I cannot, however, concur in that. The prebend was united to the living by a statute of Anne, and the two have remained united ever since, and I think that the words canonry and prebend are used indifferently in the two sections, and that substantially the same thing is meant in each case. We find, then, that in these two cases the Legislature makes an express enactment, whereas none is made with reference to the present case. Again, when the Legislature has intended to vest the emoluments of rectories in the commissioners, as in the case of the sinecure rectories that are suppressed by the Act, there is an express enactment for the purpose (sect. 54). It is contended that the words used in sect. 50 are large enough to include "a rectory" in the widest signification of the word, not only the emoluments, but the whole thing—the church, church-yard, glebe, tithes, and all matters appurtenant. That is certainly a large construction to put upon the words. I do not know that the commissioners have vested in them any "rectory" in so wide a sense of the word. No

similar instance is known. To have such property vested in them would be foreign to the office and position of the commissioners. Again, if "the rectory," in the widest sense of the word, passes under these words, then, as the whole thing passed by the statute of Anne to the deanery, one would expect the patronage to pass too. It is difficult to say if the rectory passes to the commissioners, that the Crown would be entitled to the patronage. It seems to me, moreover, that these words in the 50th section have a very different meaning. They refer to "lands, tithes, and other hereditaments or endowments" which belong to a deanery or canonry, and are held by the holder of a deanery or canonry as such holder, and the emoluments, which it is now contended pass to the commissioners, are emoluments which belong to the rectory of Tatenhill, and which are enjoyed by the dean of Lichfield, not as dean but as rector of Tatenhill. Again, if it had been intended to repeal the statute of Anne, by which this rectory is for ever annexed to the deanery, one would have expected to find some provision in the Act for the cure of souls in the parish; but not only is there no such provision, but the commissioners have no power to make any such provision. If it be said that, in the event of our deciding against the Crown, the case of the deanery of Lichfield will be unique, the answer is that in the event of our deciding in favour of the Crown, the case of the rectory of Tatenhill would be unique. For these reasons, I cannot think that the Legislature ever intended to repeal the statute of 4 & 5 Anne, c. 32, but am of opinion that the latter Act is still in force. The rule as to the construction of statutes couched in general terms is, that they do not repeal previous particular statutes, unless they use express words for the purpose, or show a clear intention to repeal them, or defeat them by necessary implication. We had occasion to consider this doctrine the other day in the case of *Thorpe* v. *Adams* (23 L. T. Rep. N. S. 810), which is an authority to show that general words of doubtful import cannot have the effect of repealing the express provisions of a prior Act. I think, therefore, that this 50th section does not transfer the rectory of Tatenhill to the Ecclesiastical Commissioners in the sense contended for by the Solicitor-General, nor does it transfer to them the emoluments of the rectory which are enjoyed by the dean of Lichfield as rector. The next point is that by 13 & 14 Vict. c. 94, s. 19, the Dean of Lichfield is disabled from holding the rectory. The words of the section are, that "no spiritual person, appointed to the deanery of any cathedral or collegiate church after," &c., "shall accept to take, and hold therewith any benefice not within" the cathedral town, and that the income of any benefice that may be holden with a deanery shall in no case exceed the amount or sum of 500*l.* per annum. It is contended that, in the present case, the defendant did "accept to take and hold" this rectory with his deanery. I think, however, that the enactment properly relates only to cases where a person, being dean, has the option of accepting or not. In the present case, the statute of 4 & 5 Anne, c. 32, not being repealed, the dean of Lichfield, on being appointed, unavoidably becomes rector—not because he accepts the rectory, but because by Act of Parliament the rectory is annexed to the deanery. Sect. 19 of 13 & 14 Vict. c. 94 applies only to a case where a dean voluntarily accepts a living. It was impossible, the statute of Anne not having been repealed, for the defendant to accept the deanery of Lichfield without thereby becoming rector of Tatenhill, the rectory being annexed to the deanery by Act of Parliament. On these grounds, I think that the case for the Crown fails on both points, and that our judgment must be for the defendant.

WILLES, J.—I am of the same opinion. It seems to me that the question in the present case turns altogether on the construction to be put upon sect. 50 of 3 & 4 Vict. c. 113, and that we must construe this section by the light afforded by the other provisions of the Act. Although the language of the section is no doubt wide enough to include such property as is claimed by the Crown in the present case, and in respect of which the present proceedings are founded, yet the language, though general, when construed according to the rule by which the general words in a conveyance are to be restricted to things of the character which the nature of the transaction or the rest of the instrument shows that it is the intention of the grantor should pass, must be restricted to such matters as the Legislature, throughout the rest of the Act, manifests an intention of vesting in the Ecclesiastical Commissioners, and being so restricted, will be found not to include the sort of property now in question. I am further of opinion that, assuming these words to be read in a sense so general as to include the rectory of Tatenhill, the effect of the section would be to vest that rectory with the right of presentation in the commissioners, and not to re-vest the patronage in the Crown. I might be content to let the matter rest there, and give judgment for the defendant accordingly; but that course would not be satisfactory to the parties, because, if it were shown that the rectory does not re-vest in the Crown, the question would then arise whether it does not vest in the commissioners. I therefore address myself to my first proposition, viz., that the general words of the 50th section, construed according to the true meaning of the Legislature as gathered from the rest of the Act, do not touch the right of the dean of Lichfield to this rectory. No rule is clearer, than that general words in any instrument cannot be made to include everything that they might embrace, simply because in some possible context they might bear so wide an interpretation. It is necessary to look at all parts of the instrument to see whether or not such general words are to have not only a general but a universal effect. Generality and universality are two very different things. I will give an illustration of my meaning in this respect, and then proceed to test the propriety of giving a universal effect to the words in sect. 50. Suppose a man makes a will, devising all his estates of a particular kind, say his estates in fee simple, to trustees, with the ordinary direction to pay debts and legacies. No words more general could be employed, for the words are general enough to include all the estates in fee simple which the testator had. Yet nothing is more obvious than this, that if the testator died possessed of estates in fee simple, some of which were his beneficially while others were held by him in trust, such a devise would include the former, but not the latter estates. If this proposition needed proof, I should cite the case of *Reade* v. *Reade* (8 T. R. 118). For the same reason, if the testator held a fee simple estate by way of mortgage, the words in the devise would be large

enough to include it. Yet, for the reason that such an estate could not properly be applied by the trustees for the purposes of the trust, such an estate would not pass to them under the general words of the devise: (*Roylance* v. *Lightfoot*, 8 M. & W. 553). If that is so in the case of temporal property, by reason of the rule that a special application in the same instrument restricts the general words, *à fortiori*, the rule applies to church property, which is stamped not only with a trust of a temporal character, but has been consecrated to pious uses by a trust more sacred than the other, and which we are not at liberty to presume or fancy, or guess the Legislature to have intended to divest of that trust, although the Legislature has no doubt at various times passed special enactments altering the destination of property stamped with a trust of this sacred character. Moreover, in cases where the Legislature has dealt with property generally, and has not made special provision for the case of property held for religious uses, it has been held that the general words do not include such property, even though it be in part applicable for the purposes of the Act, lest the whole should be diverted from the objects of the trust, and turned to secular purposes: (*Parry* v. *Jones*, 1 C. B., N. S., 345.) Everybody knows that creditors may get at the property of a parson, being the proceeds of his benefice, under a judgment. But no writ can be issued to a sheriff to lay hands on church property; but it is necessary to address a writ of sequestration to the bishop, who then appoints an officer to collect the emoluments of the benefice, and devote them to the creditors, after deducting sufficient to make due provision for the support of the parson, and to defray certain necessary expenses, *e.g.*, doing repairs, &c. Accordingly, when the statutes of bankruptcy or insolvency were first passed, it was found necessary to introduce a special provision to give the assignees power to apply to the bishop and obtain a sequestration. Therefore, I think it is only necessary to look at the Act, and see whether its special provisions, in respect of what it certainly intended should pass to the commissioners, or in respect of its subsequent directions to the commissioners as to the application of what is vested in them by the Act, are or are not consistent with the proposition that this rectory passes to them by sect. 50. I think that it will appear from a consideration of the Act (which seems to me to be arranged with the greatest possible care and learning, and to be most explicit in its provisions) that three things are clear: First, that it was not the intention of the Legislature to give the commissioners any ecclesiastical patronage; secondly, that it was not the intention of the Legislature to confer any benefit on the Crown at the expense of the Church, either in respect of patronage or otherwise; and, thirdly, that it was not the intention of the Legislature to interfere with any existing or active cure of souls. I think these propositions are established by a consideration of a great many sections of the Act; but it will be sufficient to refer to some which put them, to my mind, in a very clear light, and establish them very conclusively. I take it to be quite clear that the handing over of church property to other than spiritual persons is repugnant to the general principles of our law. No doubt, impropriations were made in very early times, but they were made by spiritual persons, and that being their origin, very many were converted into lay freeholds on the dissolution of the monasteries in the reign of Henry VIII. It is certain that before that time the Crown had the impropriation of such property as might be impropriated in favour of religious houses. The Crown was *persona mixta*, both lay and spiritual, and no one disputed its prerogative in this respect. It may be that by impropriations of that description the Crown, being in possession, might transfer its impropriations, just as it subsequently transferred the possessions of the dissolved monasteries. But it must be repugnant to anyone administering the law of the Church to suppose that where there is an existing cure of souls the property annexed to such cure should be transferred, as it is contended the property annexed to the rectory of Tatenhill is transferred by the 50th section, and that the patronage of such living should be vested in the hands of laymen, without any provision that they should use it for the benefit of the Church. With reference to the three propositions I have laid down, the first section of the Act to which I might refer is the 22nd, which deals with the case of certain non-residentiary officers, but does not affect the case of a dean. The next is the 28th, which deals in express terms with the case of any statute or custom for assigning to the dean or any canon any lands, &c., in addition to his share of the corporate revenues and proceeds to repeal and annul any such statute or custom. Thus, in this 28th section there is a special provision to abolish that which it was the intention of the Legislature to deal with, and what it abolishes is, not every statute by which property is appropriated to a dean or canon, but only the statutes made by the dean and chapter under customs, and the section exhausts itself with statutes relating to the corporate property. The 41st section is important. It takes away from deans and other individual members of chapters the separate patronage of all benefices with cure of souls, and vests it in the respective bishops of the dioceses in which the benefices respectively are situate. This, therefore, is a clear provision dealing with benefices with an active cure of souls; and it provides, not that the patronage of such benefices shall go back to whence it came, but that it shall vest in the bishop of the diocese. That is followed by a proviso that, where any benefice is possessed by a dean in right of any separate estate held by him as dean, every future dean of the same deanery, may, upon any vacancy of such benefice, present himself thereto. What is the meaning of this proviso? I will not stop curiously to investigate it; but it shows clearly that in the case of a dean who held a manor with an advowson belonging to it, in addition to his share of the corporate revenues, the manor would vest in the commissioners, but the advowson would not go either to the bishop or to the heirs of the original founder, but would remain with the dean with power for him to present himself to the benefice. I now come to the 43rd section, which deals with the rectory of Haseley, on which I will content myself with saying that I agree with the Lord Chief Justice. I now pass on to the 48th section, which appears to me taken together with the 54th section, conclusive as to my first proposition. It provides that sinecure rectories, to which no cure of souls belongs, shall be suppressed, and that the advowson of any such rectory shall be bought (if it belongs to a layman) by the com-

missioners, "and that upon the suppression of any such rectory as aforesaid, all ecclesiastical patronage belonging to the rector thereof, as such rector, shall be absolutely transferred to and vested in the original patron or patrons of such rectory." If ever there was an express provision in any Act, it is the 48th section of this Act read in connection with the 54th, because you have the section almost immediately preceding the 50th section dealing with rectories and advowsons, for the purpose of providing what shall be done with the latter on the former being suppressed. What is to happen on the suppression of a rectory without cure of souls? That is provided for by the 54th section, which provides that the endowments of suppressed rectories shall vest in the commissioners; the 48th section provides a special machinery for getting rid of the patrons and a special provision that, in certain cases, the patronage shall revert to the original patron. The 49th section deals with the profits of suspended canonries, vesting them in the commissioners. With this concentration of lights as to the intentions of the Legislature, I now come to the 50th section, which vests in the commissioners all the estate or interest which the holder of a deanery or canonry has in "any lands, tithes, or other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage) or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry as such holder separately, and in addition to his share of the corporate revenues." The words of the section are conclusive as to my first proposition. Could the Legislature, when it thus excepted any right of patronage, intend to pass anything under this section of which patronage forms an essential part?—a part of anything, which in point of law is an entirety? There must be somebody to present to the living, unless it is still inseparably annexed to the deanery by the statute of Anne. But the right of presentation is inseparably annexed to the rectory, and some benefits are also inseparably annexed. They may be severed by violence or by Act of Parliament, but one would not expect the Legislature to effect the severance, unless some provision were made for the cure of souls, and some emoluments, probably also some land, provided for the rector. A rectory must be made up of two things—the *beneficium* and the *officium*. Can it be intended here to pluck the rectory, give the feathers to the Crown, and leave the substantial body to the Ecclesiastical Commissioners? Can any instance be given of such an effect being produced, except by the express provisions of sects. 48 and 54? I would not only rest my judgment on the absence of any special provision where one would most certainly expect to find it, but on the language of the section itself. I cannot throughout the Act see any trace of an intention to do that which would give patronage to the Crown, or confiscate property which was applicable and in use at the time for the cure of souls. No instance can be found of such a course being adopted in the whole series of Acts for the impropriation of church property. I do not purpose to go through the whole Act; but I will deal with the remaining sections with this general remark. If the emoluments of the rectory pass to the commissioners, I see no mode in which they are to deal with them, except that it is provided by the subsequent sections that they are to apply them as a sustentation fund for the cathedral clergy, which, having regard to the intention of the Legislature, as expressed in the other sections, would be a misappropriation of them. There is no instance, except in the case of a rectory without cure of souls, of property devoted to the cure of souls being taken away to augment the revenues of the cathedral clergy. I think I have said enough to illustrate the three propositions I laid down, from the first of which it clearly appears that the advowson of this rectory did not revert to the Crown. It would be a waste of words to show that it never was intended to give it to the Ecclesiastical Commissioners. As to my second proposition, I have gone through the statute and heard the argument, and can find no evidence of an intention to confer any benefit on the Crown, though, in the 48th section, where it is intended to revest certain patronage in the original patrons, express words are used for the purpose; nor (and this relates to my third proposition) can I find any intention to take away the emoluments from an active cure of souls. All these propositions would be contradicted, unless we say that the general words of sect. 50 are so restricted as not to include the rectory in the present case. I am clearly of opinion that sect. 50 has not the effect of taking away the provision for the cure of souls, and that, in the case of a benefice like this of Tatenhill, we ought not to give such effect to sect. 50 as to deprive the rector of the emoluments that belong to the rectory. On the other point, as to the effect of 13 & 14 Vict. c. 94, sect. 19, I will say nothing, except that I entirely agree with what has fallen from the Lord Chief Justice.

M. SMITH, J.—I also think that our judgment should be for the defendant. The principal foundation for the argument of the Solicitor-General rests on the interpretation which he seeks to put upon the 50th section of the Act. The general words of that clause may no doubt be sufficiently large to include a rectory, but the general words must be restricted in signification, if the rest of the Act makes it necessary that they should be. The 50th section operates as a conveyance to the commissioners of certain property, and it is obvious that nothing is severed from the deanery which is not vested in the commissioners. It is also plain that the rectory of Tatenhill, which was annexed to the deanery of Lichfield by the statute of Anne, is the entire rectory, including the parish church, and cure of souls and all tithes and other emoluments belonging to the rectory. I do not find in 3 & 4 Vict. c. 113, any intention to vest in the commissioners any property that is clothed with the duty of performing spiritual duties. If we were to hold that the whole rectory passed to the commissioners, we should be bound at the same time to determine that the freehold of the chancel of the church, and the churchyard was in them, and that the whole rectory had passed to them, whereas the Act makes no provision for the performance of the spiritual duties in such a case. Such a construction would be repugnant to the spirit of the whole of the rest of the Act. I will only mention the 54th section, which relates to the endowments of sinecure rectories, and the 55th section which enables the commissioners to vest certain lands, &c., the endowment of a suppressed rectory, in the vicar or perpetual curate of the place, if it shall appear expedient. It is obvious, therefore, that, in the case of sinecure rectories the

Legislature, by the 55th section, made provision for the performance of spiritual duties by devoting an adequate endowment. If the Legislature is thus careful in the case of a sinecure rectory, can it be supposed to vest in the commissioners this rectory without making any provision at all for the cure of souls? I can only add that I fully concur with my Lord and my brother Willes, whose judgments have been so full, that I have nothing further to add. As for the 13 & 14 Vict. c. 94, it is hardly seriously contended by the Solicitor-General that the present defendant is within the direct operation of that Act. I do not think that the Act applies at all to this case, but only to a case where a dean voluntarily accepts a benefice, and has the option of accepting it or not. In the present case the dean, on accepting the deanery, *ipso facto* and without the exercise of his own will, becomes, if the statute of Anne is not repealed, rector of Tatenhill. Then it is said that it is inconsistent with the legislation referred to, that the rectory should remain annexed to the deanery; but the argument is not sufficiently strong to counteract the construction of 3 & 4 Vict. c. 113, as collected from its various provisions.

BRETT, J.—Unless the statute 4 & 5 Anne, c. 32, is repealed, the Dean of Lichfield is entitled to and possessed of the rectory of Tatenhill. The question is whether it is repealed by 3 & 4 Vict. c. 113, or 13 & 14 Vict. c. 94. The statute of Anne is a particular Act; those of the present reign are general. It is not expressly repealed by either, therefore it is still in force unless repealed by necessary implication. It is not repealed by implication, unless, upon a fair construction, the later enactments are inconsistent with it. To show that a particular Act is repealed by subsequent general Acts, it is not enough to show that the terms of the general Act are different in spirit to those of the particular Act; they must be shown to be directly inconsistent with it. That has not been shown here, so that I come to the conclusion that the statute of Anne has not been repealed. But I think that the terms of 3 & 4 Vict. c. 113, are not only not inconsistent with the statute of Anne, but that the case of the rectory of Tatenhill is not within it. Looking at the history of these Acts, following, as they did, the Acts relating to the bishops, I accept the view that the only property included in the terms of sect. 50 of 3 & 4 Vict. c. 113, is that which can be brought into a common fund under sect. 67, to be dealt with by the commissioners by a scheme to be laid by them before the Queen in council. If that be so, sects. 50 and 51 apply only to such property. The question, then, is whether a rectory is such property as could be thrown into the common fund. If so, the Crown might nominate a rector for the performance of the spiritual duties, but the commissioners would take the emoluments for the purposes of the Act. That view is, in my judgment, wholly inconsistent with the rest of the Act. I think that the cases cited by my brother Willes as to the application of the Bankruptcy Acts to church property, are very much in point to show that the Legislature must use express words, if it desires to reach property devoted to these religious purposes. Such express language is used in the Act now under consideration, in order to deal with the two analogous cases of Haseley and St. Philip's, Birmingham. I think, too, that the 28th section, dealing with the case of a dean or canon holding a separate estate in addition to his share of the corporate revenues, and the 48th and 54th sections, dealing with the case of the sinecure rectories suppressed by the Act, afford strong arguments to show that sect. 50 does not apply to the present case. As for the statute 13 & 14 Vict. c. 94, s. 19, I think, with my learned brothers, that that only applies to a case where a dean, being dean, might either accept or not, and that it does not apply to this case, where the dean becomes rector by force of an Act of Parliament.

Judgment for the defendant.

Solicitors: *Raven* and *Bradley*, for the *Solicitor to the Treasury*, for the prosecution; *Burder* and *Dunning* for the defendant.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 28, 1871.

(Before BOVILL, C. J., CHANNELL, B., WILLES, J., BYLES, J., and PIGOTT, B.)

REG. v. LONDON.

Perjury—Indictment—Evidence.

An indictment for perjury charged that prisoner swore on a plaint in the County Court for the price of coals obtained on credit at different times, in which it was a material question whether or not the prisoner had received any coals on credit from P., either on account of himself or A., "that he had never received any coals on credit from P., either on account of himself or A.:"

Held, that the allegation in the indictment was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P.

At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A., have any coals on credit from P., to which the prisoner always answered, "I did not."

Held, that the prisoner's attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transactions on credit were suggested to him during his examination.

CASE reserved for the opinion of this Court by the Common Serjeant of the City of London.

At a session of the Central Criminal Court held on Monday the 9th Jan. 1871, William London was tried before me on an indictment for perjury, which alleged that an action against Hannah London, at the suit of Michael Pass, was tried in the Lambeth County Court on the 6th Dec. 1870, and that upon the trial of that action the said William London appeared as a witness and was duly sworn, &c., and that upon the said trial of the action it became and was a material question whether or not he the said William London had received any coals on credit from the said Michael Pass on account of the said H. London, and whether he the said William London had received any coals on credit from the said Michael Pass, either on account of himself or the said H. London, and that while it was so material he the said William London wilfully, falsely, and corruptly swore upon the trial of the said action, "that he had never received any coals on credit from the said Michael Pass, either on account of himself or his mother, the said H. London."

Collins, on behalf of the defendant, objected

upon the authority of the case of *Reg.* v. *Stolady* (1 F. & F. 518), that a general allegation such as that made by the defendant, and averred in the indictment, was not sufficiently precise to found or support an indictment for perjury, and that the whole of the defendant's evidence should have been set out and proved.

I overruled the objections, and the defendant was found guilty. I deferred sentence and discharged the defendant on recognizance with sureties for his appearance to receive judgment, and in deference to the decision of the learned judge in *Stolady's* case, reserved for the consideration of the Court for Crown Cases Reserved the questions raised as above by the defendant's counsel.

The following is a copy of the evidence given before me on the trial for perjury.

THOMAS CHAMBERS.
Common Serjeant of London.

Henry Devereaux Pritchard, high bailiff, Lambeth County Court saith,

I produce certified copies of the proceedings in *Pass* v. *London* (put in). I have also the original summons and papers annexed. Judgment for defendant. No person would be examained without being sworn.

Cross-examined:

I don't remember anything about the case. Elworthy (attorney) appeared for plaintiff. Defendant's daughter appeared for her.

John Mason, usher, Lambeth County Court said,—

I know defendant by sight; I remember the adjourned hearing of *Pass* v. *London*. I saw defendant in the witness box, I believe he was sworn, but don't remember it. I heard him asked, "Did you ever have any coals either on your own account or your mother's on credit?" He answered in the negative. The question was repeated, and he denied it again.

Cross-examined:

The attorney said, "Will you swear you never had any coals," &c. The questions I have mentioned were not the only questions put. The question may have been, "Will you swear that neither you nor your mother had these coals on credit?"

Joseph Wilson, coal merchant, 13½, High-street, Vauxhall, foreman to Pass and Co., or manager:

Had the sole control of everything. I frequently saw the defendant on the premises ordering coals. He generally bought coals for cash, but he has ordered them on credit. Coals ordered are entered on a ticket, of which there is a duplicate, and upon which it appears whether or not the coals are paid for. I saw this ticket of 21st March handed to defendant. It was made out by the ticket boy. I see by it that the coals were not paid for. I was present at the transaction. I said to defendant, "How is it, as you generally pay cash, there are notwitstanding several instances of your not paying?" He said, "My mother is not always in the way; but I will call and settle them altogether." He had no credit after 21st March. The tickets were entered in the day-book in the usual course of business, and the entries therein tally with the tickets. The coals supplied on 21st March have never been paid for. I frequently spoke to defendant on the subject of the claim made against his mother. I said, "Your mother repudiates the debt, and says it is owing by you." He said "My mother gave me the money to pay, but I have spent it; and he has repeatedly promised to pay it or a portion of it, but has not kept his word. I was present at the court on 6th Dec., and heard defendant examined. I saw him sworn. I heard him asked, "Did you at any time, either on your own account or that of your mother, have any coals on credit." He said, "I did not;" a direct negative. The question was repeated, same words, and he denied again. The judge put the question first, and he denied it. When the answers were repeated the attorney said, "I can't carry the case any further."

Cross-examined:

"Will you swear that neither you nor your mother had these coals on credit" was not the question. There is a cash-book. Davis keeps the day-book. The judge did not say the books were badly kept. The books were not produced. He said our system of doing business was irregular. I don't think I mentioned about prisoner's saying he had had the money and spent it before to-day. I never told my attorney.

Re-examined by me:

The prisoner promised to pay fifty times over.

George Davis saith:

I was in the employ of Pass and Co. I often saw defendant on the premises ordering coals. I wrote out tickets, all these, and I handed them to defendant. If the coals are paid for, "paid" is put on the ticket; some of these (three) are marked "paid," the rest not, and they all tally with the counterfoils. Defendant had goods on credit and for cash on the same day sometimes. He generally paid cash, but on several occasions he had credit. I often heard Wilson ask defendant, and I have asked defendant himself for payment, and he made an excuse he would pay next week; once he said he was going to see an aunt and he would get some money, and he would pay when he came back. We gave credit to the mother. I delivered an account to her.

Cross-examined:

I took all the money. We had accounts with defendant and his mother. Wilson started in business on his own account in September. Pass took money for coals and handed it to me.

James Strickland saith:

I was foreman and weigher to Pass and Co. I have seen defendant purchasing coals many times; a ticket was brought to me for delivery of coals, and I entered the barge or wharf upon it. If "paid" was not on the ticket I used to say, "Well, Bill, credit again?" and he used to say, "Yes, you b——y fool," that happened several times. Defendant never paid me for any coals on the days named. If he paid me I always put "paid" on the ticket. At the County Court defendant was asked if he had ever had any credit for himself or his mother. He said "No," and was asked several times and made the same answer.

Cross-examined:

He may have had credit from fifty to one hundred times for himself or his mother during three years. The question was "any coals," not "these coals."

Thomas for the prisoner.—The objection taken at the trial was well founded. In *Reg.* v. *Stolady* it was held that it is not a sufficiently precise allegation upon which to found an indictment for perjury that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. [BOVILL, C.J.—The word "allegation" in the marginal note in that case does not mean the allegation in the indictment, but what took place at the former trial.] So here the prisoner's attention should have been called to the occasion on which he was alleged to have bought coals on credit, and the mere general question and denial was not sufficient. So in *Rex* v. *Hepper* (1 Car. & P. 608), where an insolvent debtor had sworn that his schedule contained a full, true, and perfect account of all debts owing to him at the time of his petitioning for his discharge, it was held that an assignment of perjury on that oath stating that whereas in fact the said schedule did not contain a full, true, and perfect account, &c., is too general, and that it ought to have stated what debts he was charged with omitting; so in an indictment for false pretences a similar general form of allegation has been held bad: (*Rex* v. *Perrott*, 2 M. & S. 379.)

Thorne Cole, for the prosecution, was not called upon.

BOVILL, C.J.—We are all of opinion that this conviction was good. The first question is upon the form of the indictment, which is sufficient. *Reg* v. *Stolady* does not interfere with our decision. The second point is whether the attention of the prisoner was sufficiently called to the transactions he was being questioned about, and we are all of opinion that it was amply called to it, even if the second point has been reserved for us.

WILLES, J.—We do not intend to overrule what Pollock, C.B. said, that the attention of a witness ought to be called to the point upon which his answer is supposed to be erroneous before a charge for perjury can be founded upon it. Mr. Graves, in his last edition of Russell on Crimes, makes some observations on *Reg.* v. *Stolady*, which are in accordance with the judgment of the Lord Chief Justice.

The rest of the Court concurring,

Conviction affirmed.

Attorney for the prosecution, *Elworthy*.

Attorney for the prisoner, *S. N. Cooper*.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Nov. 23, *Dec.* 15 *and* 19, 1870, *and Jan.* 16, 1871.

WATTS *v.* KELSON.

Easement *— Necessary or continuous — Stream of water—Easement used only from time to time— Right of way—Conveyance—Implication of law— General words in conveyance.*

There is a well recognised distinction between easements used from time to time, such as a right of way, and easements which are used as of necessity or are in their nature continuous. And upon a severance of tenements the latter will pass by implication of law without any words of grant; whereas the former pass only when the owner by appropriate language shows an intention that they should pass

But semble, that if there was a formed road over the servient tenement to and for the apparent use of the dominant tenement, a right of way over it would pass by a conveyance of the latter with ordinary general words.

In 1863 *F., the owner of two adjoining properties, conveyed to the plaintiff one of them which consisted of a house, stalls for feeding cattle, and a yard and outbuildings, and he so conveyed it with "all waters, watercourses, rights, &c., to the same hereditaments, belonging, or with the same held, used, enjoyed, or reputed as appurtenant thereto." The defendant afterwards became the owner of the other property, from which there was a small natural watercourse flowing to the plaintiff's premises, and in this stream there was, at the time of the conveyance to the plaintiff, a tank, which was on the other property, which stopped the natural flow of the water, and an artificial culvert which conducted the water to another tank, also in the latter property, whence two pipes conducted it to the plaintiff's yard and cattle sheds, for the purpose of suppl., ng which the culvert had been expressly made. This was the state of things at all events from the year* 1860. *On bill filed by the plaintiff for an injunction to restrain the defendant from obstructing and diverting the watercourse, it was Held (reversing the decision of the Master of the Rolls), that, apart from the general words of the conveyance to the plaintiff, the right to the supply of the water, inasmuch as it was an easement of necessity and continuous, passed to him by implication of law by virtue of the conveyance of the property; that what passed to him was a right to have the water flow as theretofore through the defendant's premises to his own, to be applied to any purpose he liked, and that no change of the purpose to which it had been originally applied would deprive him of that right.*

Held, also, that if there had been no such implication of law, the general words above quoted were amply sufficient to pass the easement.

THIS was an appeal by the plaintiff against 'a decision of the Master of the Rolls dismissing the bill so far as it sought for an injunction to restrain the defendant from obstructing and diverting the flow of water from his premises to those of the plaintiff under circumstances which are fully stated by Mellish, L.J., in delivering their Lordships' judgment.

There was also a question as to a right of way, which the Master of the Rolls decided in the plaintiff's favour; but from this part of the decree there was no appeal.

Amphlett, Q. C. and *Roberts* supported the appeal, and contended that the easement claimed was of necessity and continuous, and not discon-,tinuous merely, and that upon this distinction which was clearly established, the decision rested:

Nicholas v. *Chamberlain*, 1 Cro. Jac. 121;
Polden v. *Bastard*, L. Rep. 1 Q. B. 156; 13 L. T. Rep. N. S. 441;
Suffield v. *Brown*, 9 L. T. Rep. N. S. 627;
Wardle v. *Brocklehurst*, 1 Ell. & Ell. 1058; 1 L. T. Rep. N. S. 519.

The Master of the Rolls had not been sufficiently impressed with the distinction, and chiefly relied on—

Thomson v. *Waterlow*, L. Rep. 6 Eq. 36; 18 L. T. Rep. N. S. 545;
Langley v. *Hammond*, L. Rep. 3 Ex. 161; 18 L. T. Rep. N. S. 858;

in both of which cases the easement in dispute was a right of way. Upon the general rights to easements, they referred to—

Ewart v. *Cochrane*, 4 Macq. 117; 5 L. T. Rep. N. S. 1;
Gale on Easements, 3rd edit., 20, 81, chap. 4, 262;

They contended also that it was of no importance, even if the original purpose of the culvert was to supply the plaintiff's cattle sheds, that those sheds had now been removed; the plaintiff was entitled to the water for any purpose for which he required it. But if the easement did not pass by implication of law, the general words of the conveyance were large enough to pass it:

Pyer v. *Carter*, 1 H. & N. 922;
Hinchcliff v. *The Earl of Kinnoul*, 5 Bing. N. C. 22.

Southgate, Q. C., and *William Barber* supported the decree.—This culvert was made for no other purpose than to supply the cattle sheds, and was not of necessity to the plaintiff for any other purpose; he himself had pulled those sheds down. Nor was it a continuous easement, for it had existed but a short time in its present shape, the previous supply having come from another part of the stream. The facts being so, no easement can pass except by express grant, and these general words did not amount to such a grant. They relied on

Thomson v. *Waterlow* (*ubi sup.*);
Langley v. *Hammond* (*ubi sup.*);
and referred to
Russell v. *Harford*, L. Rep. 5 Eq. 507; 15 L. T. Rep. N. S. 171;
Plant v. *James*, 5 B. & Ad. 791;
Crossley v. *Lightowler*, L. Rep. 2 Ch. App. 478; 16 L. T. Rep. N. S. 438;
Pearson v. *Spencer*, 1 B. & Sm. 571; 4 L. T. Rep. N. S. 769;
Worthington v. *Gimson*, 29 L. J., 116 Q. B.; 2 L. T. Rep. N. S. 320.

Amphlett, Q. C., having replied, judgment was reserved until the 16th Jan. 1871, when

Lord Justice MELLISH delivered the judgment of their Lordships, and said: — The plaintiff and the defendant are the owners and occupiers of two adjoining properties, which, up to Jan. 1863 belonged to a single owner; but on the 10th Jan. 1863 John Graham Foley, the then owner of the two properties, conveyed to the plaintiff the premises now belonging to him, which then consisted of a cottage residence and a large number of stalls for feeding cattle, with a yard and outbuildings belonging thereto, and a few acres of land. The premises were conveyed, together with (amongst other general words) all waters, watercourses, rights, privileges, advantages and appurtenances whatsoever to the same hereditaments and premises belonging or appertaining, or with the same, or any part thereof, held, used, enjoyed, or reputed as part thereof, or as appurtenant thereto. There is a small natural watercourse flowing from the defendant's premises to the plaintiff's, and in this stream at the time of the conveyance to the plaintiff there was, near to the house now belonging to the defendant and on his ground, a tank which stopped the natural flow of the water, and an artificial drain or culvert into which the water flowed from the tank through a considerable distance to another tank, also in what is now the defendant's property, and from that tank there were two pipes which conducted the water to the yard of the plaintiff's cattle sheds, where it could be used by the occupier of the plaintiff's premises for any purpose that he required. This artificial watercourse was originally made for the express purpose of supplying the cattle sheds with water. According to several of the witnesses it was not originally supplied with water from the upper tank, but from a lower part of the stream. It was admitted, however, that, as early as the year 1860, the connection was formed between the upper tank and the drain which conducts the water to the lower tank, and that from that time the lower tank was exclusively supplied with water from the upper tank.

It was also alleged by the defendant that the plaintiff having, after he purchased his own property, become in the year 1864 tenant of the property now belonging to the defendant, had altered the upper tank by making a hole in its lower side, and placing an iron hatch over the hole, and that the effect of this was to raise the water in the tank, and to increase the flow of the water through the artificial watercourse. After, however, considering the evidence on both sides on this part of the case, we are of opinion that, before the iron hatch was placed on the tank, there had been a wooden hatch, or some wooden contrivance, which practically served the purpose of raising the water in the tank so as to cause it to flow freely down the artificial watercourse to the lower tank, and we are of opinion that the plaintiff is not proved to have made any such alteration in the watercourse as can affect any right to the water he might otherwise have. The real question to be determined is, did the indenture of the 10th Jan. 1863, convey to the plaintiff any right to the benefit of the artificial watercourse above described.

The Master of the Rolls has held on the authority of *Thomson* v. *Waterlow* and *Langley* v. *Hammond* that, because the artificial watercourse was first made and begun by a person who was owner of both properties, and had no prior existence at a time when the properties were separately owned, the general words in the conveyance were not sufficient to pass the right. *Thomson* v. *Waterlow* and *Langley* v. *Hammond* were both cases of rights of way, and we cannot but think that in the decision of the Master of the Rolls the well-established distinction between easements like rights of way, which are only used from time to time, and what are called continuous easements, has been overlooked. In *Polden* v. *Bastard* (L. Rep. 1 Q. B. 161), Erle, C. J., delivering the unanimous judgment of the Exchequer Chamber, says: "There is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear that upon a severance of tenements, easements which are used as of necessity, or are in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shows an intention that they should pass.

We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement, by which water was continuously brought through the servient tenement to the dominant tenement, for the use of the occupier of the dominant tenement. According to the rule as laid down by Erle, C.J., the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule; but if words of grant are necessary, we also think that the general words in this case are amply sufficient to pass the easement. It was a watercourse with the premises at the time of the conveyance used and enjoyed. We may also observe, that in *Langley* v. *Hammond*, Bramwell, B. expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words. We do not think it necessary to go through the large number of cases cited in the argument, for it will be sufficient to refer to two or three of them. In the old case of *Nicholas* v. *Chamberlain* (Cro. Jac. 121), it was held by all the courts upon demurrer that, if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenants, excepting the land, or sells the land to another, reserving to himself the house, the con-

duit and pipes pass with the house because it is necessary and *quasi* appurtenant thereto. This case has always been cited with approval, and is identical, not only in principle but in its actual facts, with the case now before us. It was expressly approved of by Lord Westbury in *Suffield* v. *Brown*, where, though he objected to the decision in *Pryer* v. *Carter*, in which it it was held that a right to an existent continuous apparent easement was impliedly reserved in a conveyance by the owner of two houses of the alleged servient house, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first. *Wardle* v. *Brocklehurst* (1 E. & E. 1058) is also a direct authority that, by a grant of a farm with the usual general words, the benefit of a culvert, and a stream of water running through the lands of the vendor to the farm granted passed; and Lord Campbell says: "The land must be taken to be conveyed in the state in which it then was; that is, we must take it that the culvert so bringing down the water and all the watercourses, are granted, not only those which belong and appertain to the premises, but also those which were used and enjoyed therewith." This judgment was confirmed in the Exchequer Chamber, and it was held that the defendant was entitled to use the water not only for the farm which was sold to him, but for a manufactory which he possessed beyond.

It was objected before us on the part of the defendant, that on the severance of the two tenements, no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the watercourse was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water, and we think it is no answer to say that if this supply was cut off possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained. We are also of opinion, having regard to the general words in the conveyance, that the language of the conveyance was sufficient to pass the right to the watercourse, even if it was not necessary but only convenient for the use of the premises. It was further objected that the fact of the plaintiff having pulled down the cattle sheds and erected cottages in their place deprived him of the right to the use of the water. We are of opinion, however, that what passed to the plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises to his premises, and that when it arrived at his premises he could do what he liked with it, and that he would not lose his right to the water by any alteration he might make in his premises. On the whole we are of opinion that the judgment of the Master of the Rolls on the part of the case relating to the watercourse ought to be reversed, and that the defendant must be restrained by a perpetual injunction from obstructing and diverting the said stream and watercourse so as to prevent the same from flowing through the defendant's premises to the plaintiff's, in the course and manner in which it used to flow at the time of the execution of the conveyance to the plaintiff of the 10th Jan. 1863, or in any way preventing or hindering the plaintiff, and the tenants and occupiers of his said hereditaments and premises, from having the full use and enjoyment of the said stream, and the water thereof, in the manner in which the same was used and enjoyed before and at the time of the said conveyance. We are also of opinion that the plaintiff should have the general costs of suit in the court below, but that there should be no costs of this appeal.

Solicitors for the plaintiff appealing, *R. W. Roberts*, for *Clark* and *Collins*, of Trowbridge, Wilts;

Solicitors for the defendant, *Thomas Horwood*, for *Wilton*, of Bath.

Monday, Jan. 23, 1871.

(Before the LORDS JUSTICES.)

Re THE CHURCH ESTATE CHARITY.

Charity for repairs of church—Sub-division of parish—Right of new church to an apportionment—8 & 9 Vict. c. 70, *s.* 22.

The object of the 22nd section of the 8 *& 9 Vict. c.* 70, *is to enable this court, in cases where a whole parish is entitled to participate in a charity, to apportion that charity between the several portions of the parish upon its being divided and separated into distinct parishes; but the Act does not confer any power to divert a charity from the purpose to which it was by its foundation devoted, to any other purpose.*

The churchwardens and overseers of W. had from time immemorial been seised of certain lands for the use and repairs of the parish church. In 1820 *a new church was built in the parish, and the two churches were maintained out of one church-rate, levied on the whole parish from that time until* 1846, *when the parish was divided and the new church was constituted the parish church of one of the divisions. From that time separate rates were levied, and the income of the charity was devoted to the original church. In the absence of all evidence as to the origin of the charity,*

Held (*affirming the decision of the Master of the Rolls*), *that the gift must be presumed to have been made specifically for the benefit of the original church, and, therefore, that the new parish had no right to an apportionment under the Church Building Acts Amendment Act.*

THIS was an appeal by two parishioners of St. Anne's, Wandsworth, named Denny and Coventry, against an order of the Master of the Rolls dismissing a petition presented by them for an inquiry whether it was fit and proper that an apportionment of a certain charity called "The Church Estate Charity" should be made between the parishes of All Saints and St. Anne's, Wandsworth, and their several districts, or any of them; and if such an apportionment should be found fit and proper, then for the settlement of a scheme for the future administration of the charity.

The report of the original hearing is in 23 L. T. Rep. N. S. 293, where the circumstances are fully stated. It is necessary only to add that there was no evidence how the estate from which the funds were derived originally came into the possession of the parish, which appeared to have been seised thereof from time immemorial.

The petition was presented, with the authorisation of the Charity Commissioners, under the 8 & 9 Vict. c. 70, the 22nd section of which Act is

to the following effect: that, when the commissioners shall have formed, or shall thereafter form, any distinct and separate parish, &c., out of any parish, the court may, on a petition presented by any two residents, apportion between the remaining part of such parish, and the distinct and separate parish, any charitable devises, bequests, or gifts which shall have been made or given to or for the use of any such parish, or the produce thereof, and in any such case may direct that the proportions of such devises, bequests, or gifts, or the produce thereof as shall be so apportioned, shall be made and distributed by the incumbent or churchwardens of any such distinct and separate parish, either jointly or severally as the said court shall think expedient.

Upton (with whom was *Joshua Williams*, Q. C.), supported the appeal, and contended that this land, if not originally a gift for the benefit of the whole parish, had virtually operated as such by diminishing the amount of church-rate required for repair of the churches. He referred to

Re The West Ham Charities, 2 De G. & Sm. 213;
Ex parte The Incumbent of Brompton, 5 De G. & Sm. 626.

Lindley (with whom was *Jessel*, Q. C.) supported the order on behalf of the churchwardens of All Saints, contending that the manner in which the charity funds had been applied ever since the sub-division of the parish, showed to what purpose they were applicable, and this was confirmed by the fact that from that time each parish had made its own rate. The abolition of church-rates could not alter the right to the funds. The case was concluded by the authority of *The Attorney-General* v. *Love* (23 Beav. 499), decided by the Master of the Rolls, and never appealed.

Upton having replied,

Lord Justice JAMES said.—I am of opinion that the decision of the Master of the Rolls gives the correct interpretation of this statute. The question was very properly put in the argument of the appellant in this way: Was the charity a charity substantially for the benefit of the parishioners, *qua* parishioners, or not? It may have been a charity which enured incidentally for the benefit of the ratepayers, but that was only an incidental benefit which might result in various ways from various charities within the parish. The charity was a charity for the repair of this particular church, for the use and repair of the church, and it appears to me that it must be considered in exactly the same way as if that church had not been a parochial church, as if it had been a church situate in some extra-parochial district, as if it had been a church *in partibus infidelium*, established as a missionary church for the purpose of converting heathens or infidels to the Christian religion; that is to say, as if the charity had been a charity for the advancement of religion through the repairs, and other use of that particular church. That being so, it appears to me that it would have been a breach of trust to have applied its funds in any other manner whatever in case of the parishioners, because if those funds could have been applied in case of the parishioners, *qua* parishioners, then they might have been applied in relief of the poor rates or anything else to which the parishioners were liable.

The question is, is this a thing confined to that particular church? It appears to me that it is confined to that particular church, for I do not know what other limit you are to put upon it. If a dozen chapels of ease were built, each of them might have had as much right to a share of this as St. Anne's had at the time when St. Anne's was built; and if St. Anne's had not that right at the time it was built, I see nothing which gave it that right, because of the subsequent division of districts, or because of the alteration in the law of church rates afterwards. At the time when St. Anne's was built it was not repaired out of the church rates at all, and at that time it was no more entitled to this fund than any other ecclesiastical building in the parish. I am of opinion this is not a gift for the use of the parish within the meaning of the Act of Parliament. The Master of the Rolls decided in this case as he had decided in a former suit (*The Attorney-General* v. *Love*, *ubi sup.*), upon an information filed which raised the very question which seems to be involved in this case, and as fully as it is raised here, because if the contention on the part of the parishioners is right, then that contention involves this consequence, that there was a common right independently of the provisions of the particular statute which gives us a power to distribute, and it must have been because that church was entitled. In the case I have mentioned the title came into question before the Master of the Rolls upon an information, and his decision seems to have been acquiesced in by the Attorney-General, and in the present case the Master of the Rolls followed that decision. It appears to me he was right both in that decision and the present case. That decision is of great weight and importance, having regard to the fact that the Attorney-General, who is the guardian, so to speak, of these charities, has acquiesced in it, and, therefore, it may be said to have passed into law. But independently of that, upon the construction alone of the Act, I am of opinion that this court has no jurisdiction to make any apportionment of this fund.

Lord Justice MELLISH said:—I am of the same opinion. The simple question is whether, according to the true construction of the 22nd sect. of 8 & 9 Vict. c. 70, this particular charity is a charitable devise, bequest, or gift which shall have been made or given to or for the use of any such parish. Now I am clearly of opinion that this section does not enable the court to divert any charity from the purpose to which, by the foundation of the charity, it was to be devoted to some other purpose. The object of the section is simply this, that if the whole parish were entitled to the charity, if the part divided was as much entitled to it as the whole original part, then for convenience the court should be entitled under this section to apportion it. Therefore, the real question is whether, wholly independently of this section, this was a charity for the repair of this particular church, or was a charity for the repair of all churches that might happen to be built in the parish of Wandsworth, or, at any rate, all churches that might happen to be built and be repaired out of the church rates of the parish of Wandsworth. I am very clearly of opinion that this was a charity for the repair of the particular church and nothing else, and that we should be diverting the charitable funds from their proper object to another and improper object, if we were to make an order such as is prayed by this petition. I think a charity of this kind may, as Mr. Lindley has shown, be applied to objects which a church-rate could not be applied to at all, and I think it is only incidentally that it happens, from the incident that the repair of churches was

provided for out of the church rates, that the parishioners got some benefit from this charity. It appears to me that the real object of the charity is to promote religious purposes by having this particular church kept in good repair. The appeal must be refused, but the churchwardens must have their costs out of the estate.

Solicitors for the appellants, *Vallance* and *Vallance*, agents for *Corsellis*, of Wandsworth.

Solicitors for the churchwardens, *Michael*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barristers-at-Law.

Jan. 17, 18, *and* 20, 1871.

HARRISON *v.* GOOD.

Restrictive covenant—Nuisance—School.

Where land is sold in lots, and each purchaser enters into a restrictive covenant with the vendor which is required by the conditions of sale, a person claiming under one purchaser can enforce the covenant against a person who claims under another purchaser with notice of the covenant.

A national parochial school is not a nuisance in the legal sense of the word.

In 1824 *land was sold in lots, and (as required by the conditions of sale) each purchaser covenanted for himself and his assigns with the vendor not to do or suffer to be done on the premises anything which might be or be deemed to be a nuisance to the vendor or any of his tenants, or the occupiers or proprietors for the time being of the adjoining property. G. having become possessed of two lots, with notice of the covenant which had been entered into by T., the original purchaser of those lots, offered them to a school committee as a site for a national parochial school. A bill having been filed by the owners of the adjoining lots to enforce the covenant:*

Held, that the plaintiffs were entitled to the benefit of the covenant; but that the establishment of a national parochial school would not be an infringement of it.

THIS was a suit instituted to prevent the erection of national parochial schools on a plot of ground in Abbey-place, St. John's-wood, in the county of Middlesex, under the following circumstances:

In 1824 a part of an estate, known as the Eyre estate, which included the plot in question, was contracted to be sold to one Chandless. The conveyance to him, which was not executed until June 1824, contained a covenant on the part of Chandless, his heirs, executors, administrators, and assigns, with Walpole Eyre, his heirs and assigns, that Chandless, his heirs or assigns, would not do, or suffer to be done, on any of the hereditaments thereby granted, anything which should be a nuisance to Henry Samuel Eyre, or any of his tenants, or the occupiers or owners of the adjoining property, or of the houses to be built thereon, and should not erect, or suffer to be erected, on any part of the said ground, within twenty-five feet of an intended road therein mentioned, any buildings except garden walls. And further, that no drainage should be made from the said ground in a south-eastern direction, but that all drainage should be carried in a north-western direction.

In May 1824, Chandless put up the land which he had contracted to purchase for sale by auction, in thirty-four lots. The fifth condition of sale was as follows:

The purchaser of each lot shall, so as to bind the owners for the time being, enter into a covenant with the vendor to make and form, previous to Lady Day next, in a good and proper manner, and afterwards keep in good repair, the road opposite such lot to the centre of such road, and in default thereof the vendor shall be at liberty to do so, and be paid the expense thereof immediately afterwards; and also a covenant not to erect any building, except garden walls, within 25ft. of the road, and not to do or suffer to be done on the ground anything which will be a nuisance to Henry Samuel Eyre, Esq., or any of his tenants, or the occupiers of the adjoining property, and that all drainage shall be in a north-western direction.

All the thirty-four lots were sold at the auction.

Of these lots, Nos. 5 and 6 and 7 lay on one side of part of the intended new road, and Nos. 26, 27, and 28 lay immediately opposite them on the other.

Lots 26, 27, 28 were purchased by one John Barry, and became ultimately vested in the plaintiffs, Charles Harrison and Abraham Dangerfield, as trustees for the plaintiff, John Dangerfield.

Lot 5 was purchased by one George Vipond, and became ultimately vested in the plaintiff Frederick Grey.

Lots 6 and 7 were purchased by one John Thurlow, and became ultimately vested in the defendant, Joseph Henry Good.

In pursuance of the 5th condition of sale, the conveyance to John Thurlow, which was dated the 24th July 1824, contained the following covenant:

The said John Thurlow doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said Henry Gore Chandless, his heirs and assigns, that he, the said John Thurlow, his heirs or assigns, will form one moiety of the road opposite the said piece of land before Lady-day next at his own expense, in a workmanlike manner, and that in case he shall refuse or neglect so to do, it shall be lawful for the said Henry Gore Chandless to make and form the same at the expense of the said John Thurlow, to be paid on demand. And also that he, the said John Thurlow, his heirs or assigns, shall not do, or suffer to be done on any of the premises hereby granted, appointed, &c., or any part thereof, anything which shall, will, or may be deemed a nuisance to Henry Samuel Eyre, or any of his tenants or the occupiers or proprietors for the time being of the adjoining property or the houses to be built thereon, and shall not erect, or cause or suffer to be erected, on any part of the hereditaments any buildings, except garden walls, within 25ft. from the said intended road, and that all drainage from the said ground shall be carried in a north-westerly direction.

The conveyances to the predecessors in title of the plaintiffs Dangerfield and Grey contained covenants substantially the same as that contained in the conveyance to John Thurlow. It was admitted that Good purchased lots 6 and 7, with notice of the covenant entered into by John Thurlow.

After the purchase of lots 26, 27, and 28 by the plaintiff John Dangerfield, he erected a valuable house thereon, and a house was also erected by the plaintiff Grey upon lot 5.

In 1869 lots 6 and 7 (which were then a vacant space) were offered by the defendant Good to the school committee of St. Mark's parish as a site for national parochial schools. The parish of St. Mark was a district which in 1847 had been separated from the parish of Marylebone, and from 1847 to 1869 the schools of the district were situate in Marlborough-place. In 1867 the erection of new schools was contemplated. The site at first proposed was a piece of ground immediately adjoining

St. Mark's Church, and plans for the erection of the new schools on that site were prepared by the defendant Good, who was an architect. This proposal was, however, abandoned after the offer of the site in Abbey-place had been made by Good. When the plaintiff John Dangerfield became acquainted with this offer, he addressed a written statement to the school committee, protesting against the scheme for erecting the schools upon the site in Abbey-place. He took the opinion of counsel as to the site adjoining the church, and was advised there was no legal difficulty to prevent the erection of the schools there. He further obtained the consent of the church trustees to that site being used for the purpose.

However, on the 28th Jan. 1870 a meeting of the school committee was held, at which Good's offer was accepted; and preparations were accordingly made for laying the foundations of the schools on the site in Abbey-place.

This bill was then filed by John Dangerfield and his trustees, and by Grey, against Good and the members of the school committee of the parish of St. Mark. It prayed that the defendants might be restrained from establishing any national or parochial schools on the piece of land belonging to the defendant Good in Abbey-place, and from doing or suffering to be done upon the said premises anything which should be or should be deemed to be a nuisance to the plaintiffs or any of the tenants or occupiers of the adjoining property.

Evidence was produced on the part of the plaintiffs to prove the annoyance which these schools had caused to the inhabitants of Marlborough-place, and the consequent depreciation in value which property had suffered in that locality. The defendants' evidence tended to show that in certain other localities schools of this nature had neither caused annoyance nor depreciated property.

The plaintiff, John Dangerfield, had offered to purchase the piece of ground in question from the defendant Good at the price which he had given for it; but this offer was refused by Good.

Eddis, Q.C. and *Lindley* for the plaintiffs.—Good is bound by Thurlow's covenant with Chandless, and the plaintiffs are entitled to the benefit of that covenant. Where property is sold in lots, and the several purchasers enter into restrictive covenants with the vendor, an injunction will be granted to one purchaser to restrain a breach of the covenants by another.

Western v. *MacDermott*, L. Rep. 1 Eq. 499; Ibid. 2 Ch. 72; 15 L. T. Rep. N. S. 641;
Mann v. *Stephens*, 15 Sim. 377.

This covenant must give the plaintiffs larger rights than they would possess without it; and the word "nuisance" in the covenant should not be interpreted strictly. But even if it be interpreted strictly, a parochial school is a nuisance in the legal sense, as something which will render the plaintiffs' lives and property substantially uncomfortable.

Cavey v. *Ledbitter*, 13 C. B., N. S., 477;
Bamford v. *Turnley*, 3 B. & S. 66; 6 L. T. Rep. N. S. 721;
Walter v. *Selfe*, 4 De G. & Sm. 315.

Our evidence is sufficient to bring the school within the definitions of nuisance given in Gale on Easements (p. 448, 4th edit.); 3 Blackstone 225. Schools have been considered a nuisance:

Doe v. *Keeling*, 1 M. & S. 95;
Kemp v. *Sober*, 1 Sim. N. S. 517.

Depreciation of property, which is proved to have taken place in Marlborough-place, is important, "as an indicium of the extent of the nuisance:"

Soltau v. *De Held*, 2 Sim. N. S. 133;
Gauntlett v. *Whitworth*, 2 Car. & Kir. 720.

Kay, Q.C., and *Marten*, for the defendants.—The plaintiffs are not entitled to the benefit of Thurlow's covenant. In *Child* v. *Douglas* (2 Jur. N. S. 950), Wood, V.C. expressed a doubt as to the rights of purchasers *inter se*, each of whom has covenanted with the vendor, but who have neither covenanted with each other, nor taken any reciprocal covenant from the vendor themselves. He said that matters would stand very curiously if one purchaser was to have a right to restrain another purchaser from a breach of the covenant, while the vendor was to have the power of releasing him from it. Again, in *Keates* v. *Lyon* (L. Rep. 4 Ch. 218; 20 L. T. Rep. N. S. 255), the vendor did not enter into any reciprocal covenants, and it was held that the purchaser of one part was not entitled to the benefit of covenants entered into by the purchaser of another part. But even if the plaintiffs are entitled to the benefit of the covenant, it does not give them a larger right, but a more formidable remedy. To sustain this bill the plaintiffs must show that a school is necessarily and inevitably a nuisance in the legal sense of the word. But a school is not such a nuisance as the court will restrain by injunction:

1 Com. Dig. 420. 5th edit.;
5 Bac. Abr. 787, 7th edit.;
Rex v. *Moore*, 3 B. & Ad. 184;
Inchbald v. *Robinson*, L. Rep. 4 Ch. 388; 20 L. T. Rep. N. S. 259;
Biddulph v. *The Vestry of St. George, Hanover-square*, 33 L. J. 411, Ch.; 8 L. T. Rep. N. S. 44, 558.

Eddis, Q.C. in reply.—According to *Child* v. *Douglas* and *Keates* v. *Lyon* it is sufficient to prove notice of the covenant. Now here Good had express notice of Thurlow's covenant.

The VICE-CHANCELLOR.—I have no doubt whatever that the plaintiff is entitled to the full benefit of the covenant, and entitled to it against the defendant the owner of the land, and the other defendants associated with him. It appears that Mr. Eyre sold his land to Mr. Chandless, and took a restrictive covenant from him. At a subsequent period Chandless sold the land which he had bought, and sold it under certain conditions of sale. The fifth of these conditions is in substance, and nearly in words the same as the covenant which was afterwards introduced into the conveyance to Thurlow. That covenant was as follows. [His Honour read the covenant.] The deed containing that covenant forms part of the title of the defendant Good, and in my opinion no question can be raised as to the title of the plaintiffs to sue upon it. It only remains to be considered whether that which the plaintiffs complain of is an infraction of the covenant. The covenant is in very limited terms. Probably the conveyancer thought that he had sufficiently guarded against the possibility of anything which could be even distasteful to the owners of the adjoining property. If that was his meaning, he has not expressed it; and it is not competent to me to enlarge the meaning of the words which he has employed, and which form the contract between the parties. The word "nuisance" is a word perfectly well known to the law, and in the law it only means one thing. In common parlance no doubt nuisance is applied to a great many things wholly different from, and to others not at all like the definition which the law

gives; but if it does not bear that signification, and that signification only which the law has put upon it, I am at a loss to know what it does mean. I do not know how I could stop if I were to substitute the popular word "annoyance" for the legal word "nuisance." I do not know how I could stop if a person entitled to the benefit of this covenant alleged to me that something which was being done was disagreeable to him. It might, I think, be carried so far as to include mere matters of personal antipathy, which might be odious and almost intolerable to one man, but which another would not care the least about. I say therefore that I am confined entirely to the meaning of the word "nuisance" as I find it used in, and applied by the law. The cases which have been referred to still limit the word to that meaning. The cases about brickburning amount to this—a man who burns bricks to the nuisance of his neighbour is liable to be restrained by this court, and to an action on the case in a court of common law; but the present case does not approach that at all. It is said that this will be disagreeable to the plaintiff; no doubt it will. It is said also that it will depreciate his property. I think there is abundant evidence in support of that fact. But that is not enough. The common law case of *Doe* v. *Keeling* establishes nothing to show that the thing itself is a nuisance. That was a case of a covenant not to carry on a trade; and it was there pointed out to the jury who were to assess the damages that they were not to consider a trifling matter—not a mere infraction of the covenant—which might bring with it no substantial injury, but they were to consider that the carrying on the trade of a school in a place where a man had contracted to carry on no trade at all might be a great inconvenience to the persons interested, and might be doing the very thing which the covenant was intended to prevent. The case of *Kemp* v. *Sober* is open, in my opinion, to the same observation. We all know that although the Court of Chancery interferes where it thinks right by way of injunction to prevent the violation of a covenant; yet, if the violation is so slight, so formal, so unsubstantial, that the plaintiff could have no proper reason in conscience to complain of it, the court will grant no injunction. How can I say that this is a nuisance? The building of a house is no nuisance. The establishment of a school is no nuisance in itself. No doubt a number of boys may be collected coming out of school at the end of school hours, but they would be the Queen's subjects walking along the Queen's highway; and I do not see by what kind of reasoning this can be turned into a nuisance. I do not forget that there was a school in Marlborough-place, which the evidence, it is said, proves to have been what is called a nuisance; but the inconvenience complained of there was, that the boys, on coming out of school, misbehaved themselves. But that is not a necessary consequence of their being in school, or of their coming out of school. The common police regulations of the metropolis, if the inhabitants think fit to put the law in force, prevent the possibility of any such nuisance. Throughout the whole of this case I have been trying, and trying in vain, to discover where the legal nuisance is. Unless the nuisance complained of is one for which an indictment would lie or an action could be maintained, in my opinion it is no nuisance within the terms of this covenant. I would not have it supposed that I am not perfectly sensible of the great disadvantage it will be to Mr. Dangerfield, if the school is established in the place where it is proposed. I have no doubt that the value of his property will be depreciated. But the case of *Soltau* v. *De Held* does not prove that because a depreciation in value would take place, the owners of adjoining property suffering depreciation have therefore a right to call that a nuisance, which they fail to prove otherwise to be a nuisance. I am obliged, therefore, to come to the conclusion that there will be no nuisance committed. I will go further and say (though it is somewhat extra-judicial) that I do not believe that by any possibility anything can happen which can be called a nuisance in the legal definition or in fair ordinary speech. An inconvenience, a loss to Mr. Dangerfield, unquestionably it is. All the hopes that he formed when he spent 6000*l.* in building his house will be disappointed. His residence will be made much less agreeable than it was; but I cannot enlarge the terms of the covenant to give him a right which has not been stipulated for. I am obliged, therefore, to dismiss the bill, but I cannot order the plaintiff to pay costs, and for this reason. There is near the church a suitable site which might be had gratis for the establishment of these schools, and I am satisfied that the defendants knew this. If they had been actuated by the ordinary motives which may be imputed to neighbours, they might have accomplished that most useful object which they have in view, without committing any wrong to Mr. Dangerfield. I say nothing as to Mr. Dangerfield's offer to purchase the site in Abbey-place from Mr. Good, because it is an offer which I have no power to enforce. But Mr. Dangerfield did his best to facilitate the acquisition of the church-site for the purpose of the schools. And if Mr. Dangerfield's endeavours had been more readily accepted, if his remonstrances had been more fairly and patiently attended to, there would have been no litigation. Although, therefore, I dismiss this bill, I dismiss it without costs.

Solicitors: *Dangerfield* and *Fraser*; *Dod* and *Longstaffe*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 30, *Dec.* 1 *and* 10, 1870.

(Present: the Right Hon. Sir JAMES W. COLVILE, Lord Justice JAMES, and Lord Justice MELLISH).

SMALLBONES (app.) *v.* EDNEY AND LUNN (resps.).

Rates under 5 *Geo.* 4, *c.* 36—*Liability of owner of tithe rentcharge to assessment—Distinction between rates under the Act and church rates.*

A sum of money was borrowed under the provisions of the stat. 5 *Geo.* 4, *c.* 36, *s.* 1, *from the commissioners authorised to make advances for public works, for the purpose of repairing and enlarging a parish church. The churchwardens and overseers of the parish made a rate upon the inhabitants and parishioners in order to pay an annual instalment and interest on the sum so borrowed.*

The appellant occupied a house in the parish, and was rated. To a suit to recover this rate, the defence was that M. P., the owner of a tithe rentcharge, arising out of lands in the parish, was not

assessed to the rate in respect of such rentcharge, and therefore that the rate was bad:

Held (reversing the judgment of the Court of Arches), that M. P., as the owner of a tithe rentcharge in the parish was liable to be assessed to the rates made for the repayment of the money, borrowed under the provisions of the above statute; such owner being the occupier of property in the parish, in respect of which he was entitled to vote upon the question whether money should be borrowed under the Act, and receiving as much benefit from the money being borrowed as the owners of other property in the parish. There is a distinction between rates under the above Act and church rates, and though there are strong reasons for holding that every person liable to be assessed to a church rate is also liable to be assessed to a rate under the Act, yet it does not follow that every person, who is exempted from liability to a church rate, is also to be exempted from liability to pay a rate under the Act, unless the reason for his exemption is equally applicable.

THIS was an appeal from a judgment of Sir Robert Phillimore, pronounced in the Court of Arches on 31st July 1869, in a suit for subtraction of church rates, promoted by the respondents, the churchwardens of the parish church of Whitchurch, near Southampton, against the appellant. The facts are stated in the judgment, *post*, and in the report of the case in the court below (21 L. T. Rep. N. S. 506.)

By the judgment appealed from the respondent was ordered to pay his assessment to the church rate, and was condemned in the costs of the suit.

Sir *Travers Twiss*, Q. C. (for the appellant.)—The important question in the case is on what principle the rate ought to be levied. The money borrowed from the commissioners might be expended in repairs of the chancel, for "church" includes "chancel:" (*Rippin* v. *Bastin*, 20 L. T. Rep N. S. 622; L. Rep. 2 A. & E. 386.) This rate is nowhere in the Act called a "church rate." It is the consent of the major part of the inhabitants and occupiers assessed to the poor rate that is required before application for the loan can be made to the commissioners. Assessment to the relief of the poor has no legal connection with church rates. [JAMES, L. J.—The church rate making body and the poor rate making body are quite distinct; the former existed centuries before the latter. MELLISH, L. J.—At the date of 5 Geo. 4, I think the liabilities of stock-in-trade to church rate and poor rate were on the same footing.] *Miller* v. *Bloomfield* (1 Adams 499) decided that stock-in-trade was liable to church rate. [MELLISH, L.J.—Are there any cases to show that tithes were exempted entirely from church rates, and not merely from church rates for the purposes of the body of the church?] Tithes were exempted entirely. *Re Batkin* (25 L. J., N. S., 126, M. C.), it was held that the jurisdiction of justices to enforce payment of a rate made for the repayment of money borrowed under 5 Geo. 4 c. 36, was the same as with respect to a church rate, was a decision in the express words words of sect. 2, prescribing the mode in which these rates are to be recovered, and throws no light on their nature or quality. Compare the wording of this Act with that of the 59 Geo. 3 c, 134, for building additional churches in populous parishes. There (sect. 14) the churchwardens, with the consent of the vestry and of the bishop and incumbent are empowered to borrow "upon the credit of the church rates," &c. Here the overseers of the poor are joined with the churchwardens, and there is no mention of church rates. [MELLISH, L. J.—We must either say that those liable to church rates are liable to this rate, or that those liable to poor rate are liable to this rate, or we must invent some new rate to satisfy the statute.] In the Act for the Abolition of Compulsory Church Rates (31 & 32 Vict. c. 109). sect. 3, which relates to money due in any parish on church rates, or rates in the nature of church rates, and to money "in the name of church rates," ordered to be raised by any Act of Parliament, contains the proviso "that the accounts of the churchwardens of such parish in reference to the receipt and expenditure of the moneys levied under such Acts shall be audited annually," &c. The case of overseers of the poor being joined with the churchwardens is not contemplated. [MELLISH, L. J.—The boundaries of poor law parishes and ecclesiastical parishes are often independent, but the statute cannot have intended to rate persons not within the church parish, and who would not have the benefit of the expenditure.]

Dr. *Swabey* followed, and cited:

Prideaux's Churchwarden's Guide, p. 157;

Reg v. *Basker*, 6 Ad. & El. p. 388.

A tithe-owner is by the words of the statute entitled to be present and vote in the vestry on the question whether the money should borrowed.

Dr. *Tristam* for the respondents.—A vicar and the occupier of church lands are entitled to vote for a church rate, although not liable to pay it.

Ransom v. *Campkie*, 2 Robertson, 370.

Sir *Travers Twiss*, Q. C., replied.

Cur. adv. vult.

Judgment was delivered by Sir JAMES W. COLVILE.—This is an appeal from the judgment of the Court of Arches in a suit brought by the churchwardens of the parish church of Whitchurch, for subtraction of an alleged rate made under the 5 Geo. 4, c. 36, s. 1, against James Smallbones, the appellant, by which the appellant was ordered to pay his assessment to the rate and the costs of suit. It appeared that, in 1867, the sum of 2000*l.* was borrowed from the commissioners authorised to make advances for public works, under the provisions of the Act for the purpose of repairing and enlarging the parish church of Whitchurch, and that on the 7th Feb. 1868 the churchwardens and overseers of the parish of Whitchurch made a rate of 6d. in the pound upon the inhabitants and parishioners of the parish of Whitchurch for the purpose of paying the annual instalment, and the interest of the said sum of 2000*l.*, which became due to the commissioners on the 18th March. The appellant occupied a house in the parish, and was rated at the sum of 5*s.* 6*d.* The defence to the suit was, that Melville Portal Esq., the owner of a tithe rentcharge of the rateable value of 1189*l.* arising out of lands in the parish, was not assessed to the rate in respect of such tithe rentcharge, and it was admitted that if he ought to have been so assessed the rate was bad, and that the appellant would be entitled to succeed. The question therefore is, whether according to the true construction of the 5 Geo. 4, c. 36, the owner of a tithe rentcharge in a parish is liable to be assessed to the rates made for the repayment of money borrowed under

the provisions of the Act? The first and second sections of the Act are as follows: By the 5 Geo. 4, c. 36, s. 1, it is enacted that—

From and after the passing of this Act, it shall and may be lawful for the churchwardens or chapelwardens and overseers of the poor of any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, and with the consent of the bishop of the diocese, and the incumbent of such parish, to make application to the commissioners authorised and empowered to make advances for public works under the provisions of the said recited Acts, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts, and this Act, for such sum or sums in Exchequer bills or money, as shall be necessary for defraying the expense, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish. And if such commissioners shall think fit to entertain such application, and shall be satisfied that such consent as required by this Act has been given and obtained, it shall and may be lawful for such commissioners, and they are hereby authorised and empowered to make and grant any such loan or advance for the purposes aforesaid, in such manner as such commissioners are empowered to make any loan or advance under the authority of the said recited Acts or any of them; and it shall be lawful for such churchwardens or chapelwardens, together with the overseers of the poor, of or for any such parish with respect to which such application shall be made and granted, to receive the sum or sums so advanced, and to apply the same for the purposes mentioned in such application; and from and after the grant of any such loan or advance, it shall be lawful for the churchwardens or chapelwardens, and overseers of the poor of the parish in respect of which such loan or loans shall be advanced as aforesaid, and their successors fro. time to time for the time being, and they are hereby authorised and required to make such annual or half-yearly rates for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said commissioners on that behalf, and to assign the rates so to be made as aforesaid as a security for repayment of the sums so advanced, in such manner and form as the said commissioners shall direct and appoint, and so as to secure the repayment of all sums so advanced, with interest thereon, at and after the rate of 4*l.* per cent. per annum, by annual or half-yearly instalments, on the amount of the principal money advanced, within the period of twenty years at the farthest from the advancing of any such sums respectively.

And by sect. 2 of the said Act it is enacted:

That it shall be lawful for any churchwarden or chapelwarden, or overseer in any parish in which any rates shall be made under the provisions of this Act, to collect, demand, and receive, sue for, levy, and recover all such rates, by all such ways and means as any church rates may by law be collected, demanded, received, sued for, levied, and recovered, as fully and effectually as if all power, authorities, provisions, penalties, and forfeitures relating to the collecting, demanding, suing for, levying, receiving, and recovering of any church rates, or relating to any refusal to pay any like rates were specially repeated and enacted in this Act, any law, statute, usage, or custom to the contrary notwithstanding.

The learned judge in the court below has held that though the Act does not specify the property on which the rate is to be levied, yet it is to be implied, that it is only to be levied on those on whom a church rate is to be levied, and that as the owner of a tithe rentcharge was not liable to be rated to an ordinary church rate, he was not liable to be rated to a rate made under the Act. The Act, however, nowhere describes the rates as church rates. On the contrary, it expressly distinguishes between the rates made under the provisions of the Act and church rates, and, although their Lordships agree, there are strong reasons for holding that every person liable to be assessed to a church rate is also liable to be assessed to a rate under the Act, because every such person is benefited by money being borrowed for the repair or building of the church, yet it does not follow that every person who is exempted from liability to a church rate is also to be exempted from a liability to pay a rate under the Act, unless the reason for his exemption is equally applicable. Now a tithe owner is exempted from an ordinary church rate for the repair of the body of a church, because he is under a particular liability to repair the chancel. He is not less liable, but more liable than the owners of other property in the parish to repair the church, being under a personal liability to repair a particular part of it. He is therefore not less benefited, but more benefited than the owners of other property in the parish by money being borrowed under the Act for the repairing, rebuilding, or enlarging the whole church including the chancel, and in this very case it is admitted that the money borrowed was expended in rebuilding the chancel as well as the rest of the church. Moreover, the owner of a tithe rentcharge, being an occupier of property assessed to the relief of the poor, is by the express words of the statute entitled to be present and to vote in the vestry on the question whether the money should be borrowed; and it would be strange if a person who, in respect of particular property, is entitled to vote on the question whether the money should be borrowed, and being in fact one of the borrowers, should not also be liable to be rated in respect of the same property to the rates made for the repayment of the money. It is indeed true that, in the case of an ordinary church rate also, a tithe owner is entitled to be present and vote in the vestry which imposes the rate, and, nevertheless, is not assessed to it; but, then, the money raised by an ordinary church rate cannot be expended in the repair of the chancel, and the tithe owner by the ancient custom of the realm is to be considered as having compounded for his liability to contribute to the church rate by having taken upon himself the exclusive liability to repair the chancel. On the whole their Lordships are of opinion that the owner of a tithe rentcharge being the occupier of property in the parish in respect of which he is entitled to vote upon the question whether money should be borrowed under the Act, and receiving as much or more benefit from the money being borrowed as the owners of other property in the parish, ought to be held liable to be rated to the rates made under the Act; and they will accordingly advise Her Majesty that the judgment of the Court of Arches ought to be reversed, and that judgment should be entered for the present appellant with costs in the court below, and the costs of this appeal.

Judgment reversed.

Proctors for the appellant, *Fielder* and *Sumner*.
Proctor for the respondent, *G. C. Ring*.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS, and J. SHORTT, Esqrs., Barristers-at-law.

Tuesday, Jan. 31, 1871.

REG. *v.* STANGER.

Criminal information—Evidence of publication of libel—Affidavits.

Where a libel appeared in a newspaper, and a rule nisi calling for a criminal information against J. S., for printing and publishing the libel, was obtained upon affidavits in which one deponent said only that copies of the newspaper had been purchased by him at the publishing office of the paper; and another, that by a foot note at the end of the said newspapers, J. S. was stated to be the printer and publisher of them; and that the deponent believed that the said J. S. was the printer and publisher of the papers:

Held, that there was not sufficient legal evidence to show that the defendant was the person who published the libel, and that therefore the rule must be discharged.

Quære, whether the prosecutor might supplement his defective affidavits by having recourse to those used on the part of the defendant.

RULE calling upon the defendant to show cause why an information should not be exhibited against him for a misdemeanor in printing and publishing a false and scandalous libel.

In the *Newcastle Daily Chronicle* of the 23rd May 1870 was an article censuring the conduct of the prosecutor as a justice of the peace, and a similar article also appeared in the same newspaper of the 30th May 1870. These articles contained the libel complained of.

The following were the affidavits used to connect the defendant with the libellous articles:

First. Affidavit of W. H. D. Longstaffe, saying,

1. That on the 30th May last past I attended at the publishing office of the newspaper called the *Newcastle Daily Chronicle*, situated in Westgate-street, in the borough and county of Newcastle-upon-Tyne, and purchased and paid for a copy of Number 3839 of the said *Newcastle Daily Chronicle*, dated the 30th May 1870, which then and there I received from William Gray, a clerk or salesman in the said office, and which said newspaper is now produced and shown to me, and marked with the letter A.

2. That on the 31st May last past I attended at the publishing office of the said *Newcastle Daily Chronicle*, situate as aforesaid, and purchased and paid for a copy of number 3839 of the said newspaper, dated the 23rd May 1870, which I then and there received from the said William Gray, and which said last-mentioned newspaper is now produced and shown to me, and marked with the letter B.

Secondly, affidavit of W. Crossman, saying:

1. That I have referred to the newspapers mentioned in the affidavit of W. D. Longstaffe, and verified by him, and which said newspapers are respectively marked A. and B., and I say that by a foot-note printed at the end of the said respective newspapers, John Stanger is stated to be the printer and publisher of the said newspaper respectively, and I say that the said John Stanger is, as I believe, the printer and publisher of the said papers.

Digby Seymour, Q. C. and *Udall* showed cause, arguing that the affidavits were insufficient; that they should afford such legal evidence as would justify a grand jury in finding a true bill of indictment; that the affidavits must be complete in the first instance; that there should be proof of publication by the defendant distinctly given, which was wanting here; and that recourse could not be had to the defendant's affidavits in answer, to supply the defect. They cited

Cole on Criminal Informations, 52, 55, 62;
Rex v. *Willett*, 6 T. R. 294;
Corner's Crown Pract. 172;
Reg. v. *Baldwin*, 8 Ad. & E. 168;
Ex parte Williams, 5 Jur. 1133;
Rex v. *Mein*, 3 T. R. 596;
Reg. v. *Woolmer*, 12 Ad. & E. 422.

Sir *J. Coleridge*, Q.C. (Solicitor-General), (with him *Beresford*), in support of the rule, contended that the two affidavits were sufficient; that the cases cited *contra* were decided when a statutory means of proof was available which was now taken away by 32 & 33 Vict. c. 24; that then absolute proof was required by the courts from a party who did not choose to adopt the statutory means, but that now common law *primâ facie* proof of publication was all that was necessary, or even in many cases possible; and that there was no denial in the defendant's affidavits that the newspaper was printed and published by him.

BLACKBURN, J.—We are agreed that the rule must be discharged, on the ground that there is not evidence to show that the person against whom the rule for a criminal information was moved, viz., John Stanger, is the publisher of the statement said to be libellous. There is no further evidence than that at the bottom of the newspaper John Stanger is described as the printer and publisher. And one of the persons who makes affidavits in support of the rule, says he believes Stanger is the publisher. That amounts to information and belief only, and anyone could depose to that. Then comes the question, is that sufficient legal evidence to show that Stanger was the person who published the libel? I think it is not. Facts might have been easily proved, which would have shown that Stanger was cognisant of or present at the printing or issuing of the paper, and then his own statement that it was printed and published by him would be sufficient. That information and belief only is not enough, was decided in *Rex* v. *Willett* (6 T. R. 294), where it was held that an affidavit by A., stating that B. had brought him a challenge from C., and that B. had refused to make an affidavit that C. sent him with it, is not evidence on which this court will grant a rule *nisi* for a criminal information against C. for sending the challenge. The court, after pointing out that the affidavit was but mere hearsay evidence, explained that "if they were to grant a rule calling on the defendant to show cause why an information should not be filed against him, it would be calling on him either to give evidence, on the showing cause, against himself, or leaving the rule to be made absolute on this affidavit alone, which was not legal evidence." So that the *ratio decidendi* in that case, determined eighty years ago, was that the "information and belief" of a person was not sufficient to call on the other party to make an answer thereto: (*Rex* v. *Willett*) was acted on subsequently in the case *Ex parte Williams* (*sup.*) Then comes the second question. Although the material fact did not appear in the affidavits upon which the rule was obtained, yet as other affidavits have now been used, it is said by the Solicitor-General that we should look at those. It is not necessary to decide whether we should do so or not. In *Rex* v. *Mein* (*sup.*) Lord Kenyon, C. J. states that if the matter had rested on the relator's affidavit alone he should have been clearly of opinion that the information

could not go; but that upon conference with the other judges, he found that it was not unusual to have recourse to the affidavits against the rule, in order to come, if possible, at the whole truth of the transaction. Mr. Cole, in his book upon Criminal Informations, remarks on that and says that the difference between *Reg.* v. *Baldwin* (*sup.*) and *Rex* v. *Mein* was that the former was a criminal matter and the latter a civil. I do not think that distinction is a sound one at all. Whether the application made to the court is for leave to file an information in the nature of a *quo warranto*, or for libel, seems to me the same. I think the rule in *Rex* v. *Mein* was sounder and more consistent with good sense. If it were necessary to consider which rule—that one, or the one in *Reg.* v. *Baldwin*—we should follow, I should require a good deal of consideration. But the affidavit of the defendant solely amounts to this—viz., that having made an affidavit, he does not therein answer so as to negative the belief that he was the publisher, and I think for the reasons in *Rex* v. *Willett* (*sup.*) he was not bound to answer, and on that ground the rule should be discharged.

MELLOR and HANNEN, JJ. concurred.

Attorneys for prosecutor, *Shum* and *Crossman*, for *Watson*, Durham.

Attorneys for defendant, *E. Flux* and *Leadbitter*, for *Laws* and *Glynn*, Newcastle-upon-Tyne.

Wednesday, Feb. 1, 1871.

(Before KEATING (*a*), LUSH, and HANNEN, JJ.)

RAWNSLEY *v.* HUTCHINSON AND OTHERS.

Quarter sessions—Adjournment of—Appeal dismissed with costs—Costs taxed and inserted in the order at the adjourned sessions.

An adjourned quarter sessions is a continuation of the original quarter sessions. Where, therefore, an appeal under the 9 *Geo.* 4, *c.* 61, *s.* 27, *which requires that "the court at such sessions shall hear and determine the matter of such appeal," was dismissed with costs, which costs were not taxed until the adjourned sessions, when they were ascertained and inserted in the order of sessions:*

Held, that such adjourned sessions were a continuation of the original quarter sessions, and that the taxation was warranted, and the order good.

THIS was a rule to quash an order of quarter sessions dismissing an appeal, and ordering the appellant to pay the sum of 27*l.* 11*s.* 8*d.* for costs. It appeared that at the general licensing meeting at Halifax in August last, the appellant applied for a wine and beer licence; but, being opposed, it was refused. The justices having adjourned over three weeks, he again applied at the adjournment day, when the justices refused to hear such second application. He then appealed to the Michaelmas Quarter Sessions, held at Leeds, when the court dismissed his appeal with costs, and the quarter sessions were then adjourned, and at such adjourned sessions at Sheffield they were taxed (under protest from the appellant) at the sum of 27*l.* 11*s.* 8*d.*, and the amount was inserted in the order. Not having been paid, the order of sessions was removed into this court and made a rule of court, under the provisions of the 12 & 13 Vict. c. 45, s. 18, for the purpose of being enforced, whereupon the present rule was obtained. The present rule was moved upon the ground that it was not competent to the adjourned sessions to make the order in question.

By sect. 8 of the 32 & 33 Vict. c. 27 (the Wine and Beerhouse Act 1869), all the provisions of the 9 Geo. 4, c. 61, as to appeals from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act; and by sect. 27 of the 9 Geo. 4, c. 61, a right of appeal is given to a party applying for a licence to the quarter sessions; "and in case of the dismissal of such appeal, or of the affirmance of the judgment on which such act was done, and which was appealed against, the said court shall adjudge and order the said judgment to be carried into execution and costs awarded to be paid, and shall, if necessary, issue process for enforcing such order."

Philbrick appeared in support of the order.—It is said on the other side that, although the quarter sessions could have taxed the costs, no taxation could take place at an adjourned sessions. But an adjournment of the sessions is only a continuation of the original sessions, and in principle it matters not whether the sessions are adjourned from day to day or over a week or a month, provided no subsequent quarter sessions should intervene. It is often impossible, from the pressure of business, that the clerk of the peace can tax at the original sessions. The other side will rely upon *Reg.* v. *Belton* (11 Q. B. 379), but that was not a question of the adjournment of the sessions, but of the adjournment of the appeal, which was held to be bad, inasmuch as the words of the 27th section of the 9 Geo. 4, c. 61, are that "the court at such sessions shall hear and determine the matter of such appeal." [LUSH, J.—That was not an adjournment of the sessions, but an adjournment of the case. It is really difficult to see what difference there is between an adjournment from one day to the next, and an adjournment for a week.]

Hannay, contra.—There is an important distinction between an original quarter sessions and an adjournment; the same justices may not be present at both and seldom are, and the granting of costs is a judicial act, which should be performed by the justices who decide the appeal; the order is incomplete until the amount of costs is filled in, and this should be the act of the sessions at which the costs are granted: (*Selwood* v. *Mount*, 1 Q. B. 726; *Reg.* v. *Clark*, 5 Q. B. 887.) [LUSH, J.—Suppose the court were to adjourn from the Thursday before Good Friday to the Saturday, will a taxation on the Saturday be good? and if so, why not equally so if the adjournment be for a week or a month?] Where the adjournment is merely temporary it may be otherwise, but here the regular business was at an end, and the sessions were only adjourned for certain specific business. The 9 Geo. 4, c. 61, s. 27, ties the justices down to decide the whole matter at the original sessions, and *Reg.* v. *Belton* (11 Q. B. 379) is an authority. The appeal was either adjourned or not; if not adjourned then there was no order for costs; if adjourned, then it is within *Reg.* v. *Belton*, and this order cannot be sustained.

KEATING, J.—This is the case of an appeal which was heard at the Michaelmas quarter sessions, and was then dismissed with costs, but the costs were not then ascertained; the sessions, however, were afterwards held by adjournment, and the costs which had been directed at the former sessions were at these adjourned sessions taxed and allowed; and the question now is this—being an appeal under

(*a*) Keating, J. sat under the provisions of the Judges Jurisdiction Act 1870, sect. 2.

the provisions of the 9 Geo. 4, c. 61, s. 27, can the costs be ascertained at an adjournment of the sessions? Now, although Mr. Hannay has endeavoured to throw much difficulty into the subject, it seems to me to be a very plain case, for it comes simply to this—whether an adjourned sessions is in law the same as an original sessions? If an adjourned sessions is another and a different sessions, then this order for costs is wrong. The 27th section of the 9 Geo. 4, c. 61, says that "the court at such sessions shall hear and determine the matter of such appeal," and therefore no other court can deal with the appeal, and in support of his argument Mr. Hannay relies upon *Reg.* v. *Belton*, which, however, seems to me not to further his argument, for in that case it was the *appeal* which was adjourned; whilst here it was not so. I am of opinion, therefore, that the proceeding was perfectly regular.

LUSH, J.—I am of the same opinion. An adjournment of the court is an adjournment of the same sessions. This was pending business, and at the adjournment day it came before the court again. I can see nothing in the 9 Geo. 4, c. 61, s. 27, which requires the court to determine an appeal upon one day. What the statute requires is that the appeal shall be heard and determined at the then next quarter sessions; there is nothing, however, which prevents the court from adjourning these sessions if convenience requires, and if adjourned it is merely a continuance of the original sessions.

HANNEN, J.—I am of the same opinion.

Rule discharged.

Attorneys for the appellant, *Bower* and *Cotton*.

Attorneys for the respondents, *Edwards*, *Layton*, and *Jaques*.

Saturday, Nov. 19, 1870.

THE GRAND JUNCTION CANAL COMPANY (apps.) *v.* THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF HEMEL HEMPSTEAD AND KING'S LANGLEY (resps.).

Poor-rate — Canal—Grand Junction Canal Company—Land and buildings of company adjoining the canal—Principle of rating.

By the 19th section of the 34 Geo. 3 c. xxiv., the Grand Junction Canal Company were to be rated to all parliamentary and parochial taxes and assessments, for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the company of proprietors in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated; and as the same lands, grounds, and buildings so purchased or taken, or to be purchased or taken, and erected, would be rateable, in case the same were the property of individuals, in their natural capacity. The company purchased land; and buildings thereon adjoining the canal, were erected by them, which became much enhanced in value, and, subsequently, they adopted the 8 & 9 Vict. c. 42, and became carriers upon the canal upon their own account.

Held, in assessing the canal to the poor-rate, that—first, the rateable value of the land occupied by the canal should not be estimated as being increased by the fact that the company had become carriers; secondly, that the buildings should be rated in the same proportion as other buildings near, and that the lands and other premises of the company should be rated in the same proportion as other lands and premises near.

THIS was a case stated by an arbitrator for the opinion of this court, pursuant to the 11 & 12 Vict. c. 45, upon an appeal by the appellants against two poor rates, as follows:

1. By a certain private Act of Parliament, passed in the 33 Geo. 3, c. lxxx., intituled "An Act for making and maintaining a navigable Canal from the Oxford Canal Navigation at Brainstone in the county of Northampton to join the River Thames at or near Brentford in the County of Middlesex, and also certain collateral Cuts from the said intended Canal," certain persons therein named were formed and incorporated into a joint-stock company for the purpose aforesaid by the name and style of "The Company of Proprietors of the Grand Junction Canal," and by that name to sue and be sued.

2. By a certain private Act of Parliament passed in the 34th year of King George 3, c. xxiv., entitled "An Act for making certain navigable Cuts from the Towns of Buckingham, Aylesbury, and Wendover, in the county of Buckingham, to communicate with the Grand Junction Navigation authorised to be made by an Act of the last Session of Parliament, and for amending the said Act," after reciting the said first hereinbefore-mentioned statute, the said company were empowered to make and maintain the said cuts in the title of the said amending statutes referred to.

3. By the 19th section of the said amending statute it was enacted as follows, that is to say: "That the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the said company of proprietors, in pursuance of the said recited Act and this Act, in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated, and as the same lands, grounds, and buildings so purchased or taken, or to be purchased or taken and erected, would be rateable, in case the same were the property of individuals in their natural capacity.

4. By the 7th section of a certain other private Act of Parliament, passed in the 36th year of King George 3, c. xxv., intituled, "An Act to enable the Company of Proprietors of the Grand Junction Canal to finish and complete the same, and the several cuts and other works authorised to be made and done by them by virtue of several Acts of Parliament," it was enacted by sect. 7: "All parochial rates and assessments which shall or may at any time be laid, assessed, or imposed upon the lands and personal estate of the said company of proprietors, shall be in each parish, township, hamlet, or place respectively, in proportion to the length of the said canal and cuts respectively, in such respective parish, township, hamlet, or place, and not otherwise."

5. By the aforesaid private Acts all necessary powers were given to the said company to take, hold and use lands, and erect buildings for the purposes of the said company, and to make and maintain the said canal and cuts, and which have been duly exercised by the said company.

6. The aforesaid canal has long since been made,

and a portion thereof, and the towing-path and lock-houses attached thereto, cover and occupy nineteen acres and one rood of land, and is of the length of two miles four furlongs, in the parish of Hemel Hempstead, in the county of Hertford, and no more, and which said lands were purchased by the said company, under and by virtue of the aforesaid private Acts, and for the purposes of the company.

7. Another portion of the said canal and the locks and buildings attached thereto cover and occupy eighteen acres and two roods, and is of the length of two miles and two furlongs, in the parish of King's Langley, in the county of Hertford, and no more, and which said last-mentioned lands were also purchased by the said company, under and by virtue of the aforesaid private statutes, and for the purposes of the said company.

8. In or about the year 1848 the said company adopted the provisions of the statute 8 & 9 Vict. c. 42, and commenced business as carriers on their own account on the said canal, and have from that time exercised all the powers given by the first section of that statute for the purpose of carrying on the trade or business of carriers, and for such trade or business the company have a tariff of freights and charges different from the tolls chargeable by their private Act.

9. Lock-houses and toll-houses have been erected on the lands of the said company, which are occupied by them for the purposes of their business.

10. In or about the year 1836 an Act was obtained for making a railway from London to Birmingham, which railway runs parallel with the said canal through the said parishes at various distances from the said canal, not exceeding 300 yards at the farthest point, at one place crossing the canal, which railway is assessed to the poor-rates at 2000*l.* per mile.

11. Buildings have been erected on much of the land lying near to the said canal, and other portions of such lands have been converted into gardens for watercresses, and otherwise greatly improved in value.

12. On the 8th Jan. 1867 an assessment for the relief of the poor of the said parish of Hemel Hempstead was made, allowed, and published according to law; and in and by the said assessment the said company were rated upon the annual sum of 200*l.* in respect of the said lands, tenements, and hereditaments in the said parish, as the net rateable value thereof.

13. On the 17th Feb. 1867 an assessment for the relief of the poor of the said parish of King's Langley was duly made, allowed, and published; and in and by the said assessment the said company were rated upon the annual sum of 196*l.* in respect of the said lands, tenements, and hereditaments in the said parish, as the net rateable value thereof.

14. The said company, on or about the 6th July 1867, duly objected before the assessment committee of the Hemel Hempstead Union, in which both of the said parishes are included, pursuant to previous written notices duly served upon them and upon the overseers of the poor of the said parishes respectively, to the said valuation lists respectively, upon the grounds of unfairness and incorrectness, and that in particular the said lands, tenements, and hereditaments of the said company, in the said respective parishes of Hemel Hempstead and King's Langley, were not valued and assessed in and by the said valuation lists respectively, according to the provisions of the said private statutes hereinbefore referred to in paragraphs 3 and 4, and that in respect of the said respective lands, tenements, and hereditaments of the said company in the said parishes respectively, the said company were over-assessed in the said valuation lists respectively, but the said company failed to obtain such relief in the matter as the said company deemed just.

The questions for the opinion of the court were, first, whether the company is liable to be assessed to the poor-rates at the value of the lands, buildings, and premises as improved by reason of the business of carriers carried on by the appellants? Secondly, what is the legal construction of "lying near" to the canal? Thirdly, whether, in estimating the value of the land over which the railway runs, the value of the site only is to be estimated, as being lands, grounds, and buildings, or is such site to be estimated at its improved value as a railway? Fourthly, are the lands lying near to the canal upon which buildings have been erected to be estimated at the value only of the sites of such buildings, or is the value of such buildings to be estimated? Fifthly, are the lands lying near to the canal, which have been improved by their conversion into gardens or otherwise, to be estimated at their improved value, or as agricultural land only? Sixthly, In estimating the value at which the premises of the appellants are to be assessed in proportion to the lands, grounds, and buildings lying near thereto, are all such lands, grounds, and buildings to be thrown into hotchpot, and the entire of the premises of the appellants to be assesed at the average rating value of the whole of such lands, grounds, and buildings, or is each portion of the appellants' premises to be assessed only in proportion to the rating value of so much of the lands, grounds, and buildings as is lying next to such portion of appellants' premises? Seventhly, whether, in estimating the value at which the premises of the appellants are to be assessed the proportion which by sect. 19 such assessment is to bear to the lands, grounds, and buildings lying near to the canal is to be distributive, that is, whether the land of the appellants is to be assessed in the same proportion as the land lying near, and the buildings of the appellants as the buildings lying near, or whether all the premises of the appellants are to be assessed as a whole in proportion to the aggregate rating value of all the lands, grounds, and buildings lying near?

Manisty, Q. C. (*Bush Cooper* with him) appeared for the appellants.—With reference to the first question, the rateable value ought not to be increased on account of the company becoming carriers; the only effect of the operation of the 8 & 9 Vict. c. 42 is that they carry for themselves as well as for the public generally. The other points are all determined by the cases of *R.* v. *The Grand Junction Canal* (1 B. & A. 289) and *R.* v. *Grand Junction Canal* (7 W. R. 597), *Reg.* v. *The Proprietors of the Glamorganshire Canal Company* (3 E. & E. 186; 29 L. J. 238, M. C.).

Sir *J. Karslake*, Q.C. (*Taylor* with him), appeared for the respondents.—The 8 & 9 Vict. c. 42, has placed canal companies upon the footing of common carriers, and they can make use of their canals in any manner most beneficial to themselves. The case of *Reg* v. *The Proprietors of the Glamor-*

ganshire Canal Company, 3 E. & E. 186, lays down the true principle of rating in this case.

The COURT intimated their opinion that by the adoption of the 8 & 9 Vict. c. 42, there was no repeal of the rating clauses in the 34 Geo. 3 c. xxiv; and that the land occupied by the canal lying near to the railway, ought not to be rated in proportion to the improved value of land with a railway upon it.

Manisty, Q.C. was heard in reply.

MELLOR, J.—We have disposed of several of the points raised by this case in the course of the argument, and there is now really but one upon which it is necessary we should deliver our judgment. If this case had been governed by *Reg.* v. *The Proprietors of the Glamorganshire Canal Company* (3 E. & E. 186), so that we could not dismiss that case from our view, I should have felt myself compelled to follow the rule which is there laid down; but it appears to me that there is an essential distinction between that case and the present. As I understand that decision, it was confined to the meaning to be put upon the words "lands or grounds," the word "buildings" not being mentioned. It appears also that a considerable portion of the lands had become covered with buildings, and it would have been impossible to have laid down any rule as to the rateable value of the canal without going through the process which the court felt itself at liberty to go through. I confess that I think that the Lord Chief Justice in disapproving of the judgment in *Reg.* v. *The Grand Junction Railway Company* (7 W. R. 597) scarcely sufficiently considered what really was intended to be expressed by Lord Campbell, C. J. and Erle, J., as reported in the *Weekly Reporter*. If they really intended that the land of the company was to be rated simply as agricultural land, I should agree with the present Lord Chief Justice; but I rather incline to think that that was not the meaning intended to be conveyed by what fell from Lord Campbell, C. J. or Erle, J. In the present case, as was suggested by my brother Hannen, I think that the respondents are not to look at the agricultural value of the land lying near at the time the Act passed, but they are to look at the reflected value of the land as determined by the change of circumstances. If from various circumstances the land becomes of more value, as if by a new mode of cultivation being adopted, a different use, such as that of a market garden had been made of it, then the rateable value of the canal would be determined by what would be the rateable value of the lands lying near with that additional value arising from the change of circumstances. Now, in this case we find it stated in parapraph 3 that, by the 19th section of the amending statute it was enacted as follows, that is to say, "that the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken; and all warehouses or other buildings to be erected by the said company of proprietors in pursuance of the said recited Act and this Act in the same proportion as other lands, grounds, and buildings so purchased or taken and erected would be rateable in case the same were the property of individuals in their natural capacity." We therefore find that the word "buildings" appears expressly to regulate the rating of buildings, and "lands" the rating of lands; and I think that we cannot interpret the word "lands" to mean land covered with buildings. It appears to me that in assessing the rateable value of the canal lying near to this particular land, the respondents must not take into consideration the land appropriated to buildings, or building land in the proper sense of that term, because no tenant from year to year would give anything for building land *qua* building land, but it may be that persons would give a higher value for land because it was near to buildings. In that sense alone, as I think, can we interpret the words of the 19th section. What I say is this, that the reflected value of the land, varying from time to time according to circumstances, is to be the measure of the rating of the land and buildings of the appellants. That being so, I think that our judgment does not in any degree affect the decision of this court in *Reg.* v. *The Proprietors of the Glamorganshire Navigation* (3 E. & E. 186), in which the Lord Chief Justice delivered the judgment of the court. This case is entirely distinguishable on the ground that the word "buildings" is used.

LUSH, J.—I am of the same opinion. The only question which remains for our opinion is whether the bed of the canal is to be rated as if it were land built over and covered with buildings, or whether it is to be rated as if it were open land? I think that it is only necessary to read the section to discover what it was that the Legislature meant. I think that the plain meaning of the language is, that, for the purpose of rating it is to be assumed always that the bed of the canal is open land, not land covered with buildings, but that whatever buildings are erected by the appellants on the land are to be rateable as buildings, and both are to be rated in proportion to the value of other lands and buildings in the neighbourhood or locality. The bed of the canal would no doubt be enhanced in value by reason of the growth of buildings in the neighbourhood, and the increased value is to be the value upon which the rate is to be made. It is not to be rated as land covered with buildings. I quite agree with my brother Mellor that the section which we have to interpret differs from the one upon which the court gave judgment in *Reg.* v. *The Proprietors of the Glamorganshire Navigation*. There the word "lands" was not used in conjunction with the word "buildings," but was evidently used to denote in its legal sense land of every description, whether covered with buildings or not. I also agree with what my brother Mellor has said as to the expression attributed to this court in *Reg.* v. *The Grand Junction Canal Company*, reported in the *Weekly Reporter*. If it was intended to lay down that the land which now comprises the bed of the canal was for all time to be treated as if it were purely agricultural land, I agree that that would not be the proper interpretation of the Act. But I do not think that the court intended to say so. I should dissent from the judgment of Lord Campbell and Erle, J., if they are to be read in the same way in which this court in *Reg.* v. *The Proprietors of the Glamorganshire Navigation* understood them. The land of the appellants is to be treated as land open and not covered with buildings, and which might be turned to uses more profitable than agricultural land.

HANNEN, J., concurred.

Judgment for the appellants.

Attorneys: for the appellants, *H. Day*; for the respondents, *Grover, Son, and Stocken*.

Thursday, Feb. 2, 1871.

(Before MELLOR, LUSH, and HANNEN, JJ.)

REG. *v.* HESLOP.

REG. *v.* LITTLECHILD.

Game—Killing on a Sunday—Joint information against two—Joint trial—Several convictions— 1 *&* 2 *Will.* 4, *c.* 32, *s.* 3.

Where two or more persons commit together an offence for which they are severally liable, they may, upon an information before justices, be tried together, and separately convicted; and in such a case it is a matter of discretion alone with the justices whether or not they will permit the defendants to be tried separately.

Whether an offence be single or several must depend upon the wording of the statute creating it, or its nature.

Where the offence is in its nature single, there the penalty can only be single; but where it is in its nature several, each offender is liable.

By the 1 *&* 2 *Will.* 4, *c.* 32 (*Game Act*), *s.* 3, *it is enacted "that if any person shall kill, &c., any game on a Sunday, such person shall on conviction forfeit for any such offence not exceeding* 5*l.*:

Held, that under this section two persons who were jointly concerned in killing game on a Sunday might be informed against and tried jointly, and severally convicted in the full penalty.

THESE were two cases stated by the quarter sessions for the county of Essex upon an appeal by each appellant against a separate conviction of each, for an offence under sect. 3 of the 1 & 2 Will. 4, c. 32 (Game Act), upon the hearing of which appeals the said convictions were affirmed, subject to a case reserved for the opinion of the Court of Queen's Bench, upon the second ground of appeal, namely, that if the said justices before whom the information was heard, did, in fact, convict the appellants of a joint offence, it was illegal to inflict such separate penalties upon each of them as they inflicted; and if the said justices did in fact convict each of them as of a separate offence, then it was illegal of them to do so upon a joint information, and a joint hearing after they had been requested and had refused to hear the charge against each separately.

On the hearing of the appeal it appeared that in respect to what was relied on by the appellants under the second ground of appeal the facts were as follows:—On the 13th Oct. 1869, one George Littlechild, and one William Heslop, were informed against by John Boram, by an information, of which the following is a copy:—

Essex to wit.—Be it remembered that within three calendar months after the commission of the offence hereinafter mentioned, to wit, on the 13th Oct. 1869, at High Ongar, in the county of Essex, John Boram, of Kelvedon Hatch, in the said county of Essex, gamekeeper, in his proper person, cometh before the undersigned, one of Her Majesty's justices of the peace, in and for the said county, and now here giveth me, the said justice, to understand and be informed that George Littlechild, of the parish of Kelvedon Hatch, in the county of Essex, farmer, and William Heslop, of Romford, in the said county, carpenter, did within three calendar months now last past, to wit, on Sunday, the 10th Oct. 1869, at the parish of Kelvedon Hatch, in the said county, unlawfully use a certain engine, to wit a gun, for the purpose of killing game, to wit two pheasants, contrary to the statute in such case made and provided, whereby and by force of the said statute they, the said George Littlechild and William Heslop, have severally forfeited a sum money not exceeding 5*l.*, to be applied as the statutes in that behalf made and provided direct. And thereupon the said John Boram prays that the said George Littlechild and William Heslop may be duly caused to appear before one or more of Her Majesty's justices of the peace in and for the said county, to answer to the said information, and to be further dealt with according to law.

In obedience to the summonses duly issued against them, the said George Littlechild and also the said William Heslop attended before the petty sessions for the division of Ongar, in the said county of Essex, holden at Chipping Ongar in the said county, on the 23rd Oct. 1869, and the said information then and there came on to be heard.

At the said petty sessions the said George Littlechild and the said William Heslop were defended by an attorney, who, on behalf of both, made application to the justices present that the cases might be heard separately, in order that on hearing the charge against the said George Littlechild, the said William Heslop might be called to give evidence, but the said justices refused to hear the said cases separately, and after hearing the evidence for the prosecution, convicted both the said defendants. 12. The two convictions returned to the quarter sessions were *verbatim* the same, except that the name of George Littlechild was used in the one, the name of William Heslop was used in the other.

On the hearing of the first-mentioned appeal it was contended for the said appellant that the said proceedings at the said petty sessions were irregular and invalid, and that by reason thereof the said conviction of the said appellant was invalid and ought to be quashed on appeal.

It was contended for the respondent that the said proceedings were not objectionable, and that the said conviction was valid.

The court of quarter sessions decided in favour of the respondent, and on their proceeding to hear the case of the appellant in the said first-mentioned appeal, the said William Heslop was called, and gave evidence for and on behalf of the appellant George Littlechild.

In the secondly above-mentioned appeal the appellant (William Heslop) was also convicted at the same time and place as the said George Littlechild, and all the facts above stated in reference to the appeal of the said George Littlechild as to the hearing before the petty sessions of the case against him apply equally and respectively to the said appeal by the said William Heslop or to the hearing before the petty sessions of the case against him, the said William Heslop.

The question for the opinion of the Court of Queen's Bench is—whether, by reason of the said proceedings at the petty sessions, the court of quarter sessions ought on the said appeals to have quashed the said convictions?

If the said question be answered in the affirmative, the said convictions are to be quashed. If it be answered in the negative, the said convictions are to stand confirmed.

By the 1 & 2 Will. 4, c. 32 (Game Act), s. 3, it is enacted "That if any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game on a Sunday or Christmas Day, such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence any sum of money not exceeding 5*l.* as to the said justices shall seem meet, together with the costs of the conviction," &c.

H. T. Atkinson appeared for the appellants.—

The conviction was bad, inasmuch as it was separate for what was a joint offence. The information was a joint one, and the hearing was joint; therefore the conviction should have been joint. There is only one penalty imposed by the 3rd section of the 1 & 2 Will. 4, c. 32, of not exceeding 5*l.*, and yet in consequence of there being separate convictions each appellant is ordered to pay the penalty of 3*l.* That it was a joint offence is clear from the fact that the two appellants, Littlechild and Heslop, used a gun, and killed two pheasants. The justices, therefore, could not have convicted each of using a gun and killing two pheasants. [MELLOR, J.—Each has committed an offence, although jointly. The question is, can the justices upon a joint offence convict separately?] The justices find that each has committed it. [MELLOR, J.—I find it stated in Paley on Convictions, p. 73: "Where the act is such that several may join in it, all the offenders may be included in the same information and conviction. But where separate convictions were drawn up upon a joint information the court refused to order the justices to alter the conviction by making it a joint one:" (*Re Clee and Asbourne*, 21 L. J. 112, M. C.) The section says, "If any person shall kill," &c., so that each will be liable to a penalty, though from their being together it may be a joint offence. LUSH, J.—Would it not be wrong under this section to impose a joint penalty? Each is liable to the entire penalty. The question asked is, whether by reason of the proceedings at the petty sessions the quarter sessions ought to have quashed the convictions?] It is clear that only one killed the two pheasants, and only one gun was used; the appellants, therefore, could not have been guilty: (*Ex parte Sylvester*, 9 B. & C. 61. per Bayley, J.) If it was a separate offence the justices at petty sessions ought to have allowed each defendant to have been tried separately.

Warton, for the respondents.—This was an offence committed by two, for which each is liable, and they were both properly tried together, just as two persons may be tried together upon an indictment for an offence committed together, for which each would be liable to the full penalty. It is merely a matter of discretion with the justices to allow a separate trial for each (*Re Biggins*, 5 L. T. Rep. 805). But, even supposing there was any error in this, the appeal was a fresh hearing, and then each case was tried separately, and each appellant was called for the other. The defendants had each committed an offence, though both joined in committing it, and therefore a separate penalty was properly imposed upon each. The distinction between what is a joint and what a separate offence, is well explained in *Re Bleasdall and another*, 4 T. R. 809, which was a conviction on the statute of 5 Anne c. 14, s. 4, for using a greyhound to destroy game without being qualified, for which the defendants were convicted in 5*l.* each, which conviction the court said could not be supported, for that it was only one offence, and that the magistrates should only have convicted them in one penalty; that this question depended on the 5 Anne c. 14, s. 4, which enacts, "that if any person or persons not qualified, &c., shall keep or use any greyhound, &c., to kill and destroy game, and shall be thereof convicted, &c., the person or persons so convicted shall forfeit the sum of 5*l.*" There, there was only one for the using of the dog, however many may have been the persons using it. The same doctrine is laid down in *Re Clack* (Cowp. 610; *Reg* v. *Hube*, 5 T. R. 542).

MELLOR, J.—I am of opinion that the judgment of the quarter sessions was right. We must look in such cases as these at the wording of the statutes to ascertain what is meant. The principle is very clearly stated by Lord Mansfield in *Rex* v. *Clarke* (Cowp. 612). He says, "Where the offence is, in its nature single, and cannot be severed, there the penalty shall be only single, because, though several persons may join in committing it, it still constitutes but one offence. But where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime." In the present case, when the information was laid it was treated as a joint offence, and at the hearing the defendants applied to be separately tried. That, however, was a matter entirely for the discretion of the justices, and neither could we nor the quarter sessions interfere. It is said this is a joint offence, and there should have been a joint penalty; but the words of the 3rd section of the 1 & 2 Will. 4, c. 32, point to each person as committing the offence. The offence is one certainly that may be committed by many, but each of them commits the offence, and if, therefore, a joint penalty had been imposed it would have been erroneous.

LUSH, J.—I am of the same opinion. It is obvious that two or more may assist in doing an act. That being so, the information was not objectionable for describing the act which many may commit as having been committed by the two defendants. Being jointly charged, each one claimed a right to be tried separately. But when several are jointly charged, can each one claim as a right to be separately tried? I think not, and there is no authority to the contrary. It is said, however, that a separate conviction of each is wrong. But if each has been guilty of an offence which each may commit, each may be convicted, and can it be said that a separate conviction is wrong? I can see no objection, no injustice or injury is done in each being separately convicted. I think, therefore, that the convictions were good, and the quarter sessions correct in their judgment.

HANNEN, J.—I am also of the same opinion. The first question which arises is, whether the defendants were entitled to be tried separately? Now that was an information for an offence of which two or more persons might be guilty. If so, they might be tried together, and it is only a matter of discretion with the justices to allow them to be separately tried. Then the second question is whether this was an offence for which the two defendants could be convicted separately? The rule upon the subject is clearly laid down in Paley on Convictions, p. 263. Now this is a case which falls within the first branch of this position. It was proper therefore to treat the offences as several. There is a case in 15 C. B., N. S., 550, of *Mayhew* (app.) v. *Wardley* (resp.), where two persons who were in a highway shot a partridge, and it was questioned whether the two offenders should have been convicted jointly; but it was held that they were rightly separately convicted, for it might well be inferred that the two were not

out for the common purpose of killing game, and that the unlawful act was the act of each.

Attorney for the appellants, *Rawlings*, Romford.

Attorney for the respondents, *Preston*, Brentwood.

Wednesday, Feb. 22, 1871.

THE HAMMERSMITH BRIDGE COMPANY (apps.) *v.* THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF HAMMERSMITH (resps.)

Sewers rate—Metropolitan district—Bridge and approaches—Rateability of bridge—General benefit from sewerage of district—The Metropolitan Sewers Act 1848 (11 *&* 12 *Vict. c.* 112, *s.* 76)—*The Metropolitan Local Management Act* 1855 (18 *&* 19 *Vict. c.* 126, *s.* 164).

The Overseers made a sewer rate for a metropolitan district, under 18 *&* 19 *Vict. c.* 120, *and assessed the company in respect of a "moiety of suspension bridge, appurtenances, and approaches," in one sum.*

The Company built this bridge over the Thames, with roads and approaches, and opened the same to the public, on payment of tolls, in 1827. *The bridge drains directly into the river. The approaches drain into a sewer made in* 1854; *but before that date the surface water was carried from them into the river by a barrel drain, which still exists, and could again be used as formerly.*

The Company appealed against the above-mentioned assessment on the ground that the bridge was not rateable, as it derived no benefit from the sewers, and that, being therefore originally exempt, its exemption was preserved by the Metropolitan Sewers Act 1848 (11 *&* 12 *Vict. c.* 112), *s.* 76, *and the Metropolitan Management Act* 1855 (18 *&* 19 *Vict. c.* 120), *s.* 164:

Held, per Blackburn and Hannen, JJ. (*Cockburn, C. J., dissentiente*), *on the authority of* Soady *v.* Wilson (3 *Ad. & E.* 248) *that a property such as the bridge and roads, although not deriving any immediate benefit from the sewers, does derive the general benefit and advantage of being accessible from the proper sewerage of the district; consequently that it would not have been exempt from sewers rates antecedent to* 1848, *and is therefore rateable.*

ON an appeal against a sewers rate made on the 16th March 1868, the following case was stated under 12 & 13 Vict. c. 45:

1. The appellants were rated in the sum of 39*l.* 11*s.* 8*d.* in respect of a "moiety of suspension bridge, appurtenances, and approaches," at a gross estimated rental of 1106*l.* and on a rateable value of 956*l.*

2. The appellants are the Hammersmith Bridge Company, constituted and incorporated by an Act of Parliament made in the 5 Geo. 4 (c. 112), for the purpose of building a bridge over the Thames from Hammersmith, in the county of Middlesex, to Barnes in the county of Surrey, and for making convenient roads and avenues to communicate with such bridge. The said Act was altered and amended by another Act passed in the 9 Geo. 4 (c. 52).

3. The above Acts hereinafter referred to as The Company's Acts may, if necessary be referred to as part of this case.

4. The respondents who are the Churchwardens and Overseers of the Parish of Hammersmith, made the rate under an order of the Board of Works for the Fulham district, constituted and incorporated by the Metropolitan Local Management Act 1855 (amended by the 19 & 20 Vict. c. 112, and 25 & 26 Vict. c. 102), for the local management of the metropolis in respect of the sewerage and drainage, and the paving, and the cleansing, and improvements thereof.

5. The appellants, under the powers conferred upon them by the said Company's Acts, made and completed a bridge over the Thames, and the said bridge with the approaches thereto, were thrown open to the public for use upon payment of the prescribed tolls in the year 1827. The said bridge and approaches have from thence hitherto been continually maintained by the appellants for, and have been used by, the public.

6. The parish of Hammersmith is one of the two parishes that comprise the Fulham district. It extends on the south to the middle line of the river Thames. The said bridge so made by the appellants as aforesaid, and hereinafter called "the bridge," crosses the river from Hammersmith on the north side to Barnes on the south side, one half being in Hammersmith parish and the other half being in Barnes parish.

7. The bridge drains directly into the river, and no part of it drains into the sewers of the district board of works or into any sewer whatever. The approaches, "the roads," and other neighbouring public ways are drained partly by the Metropolitan Board of Works and partly by the district board of works.

8. The appellants under the powers of the above Acts also purchased land and formed roads on each side of the bridge as approaches thereto. These roads they are bound to keep, and have kept, in repair. These roads did not drain into any common sewer until 1854 (none having existed there previously), up to which time the surface water was carried off by a barrel drain into the river. This barrel drain was made and maintained by the appellants, and is still in existence, and might be used as before. In that year 1854 the then Commissioners of Sewers constructed a sewer, hereinafter called the New Sewer, under the appellants' land. This sewer goes from the high road at Hammersmith into the Thames, near Hammersmith-bridge, and the commissioners made gullies to conduct the surface water from the road to the new sewer. The appellants did not require this to be done, nor was it necessary for them that it should be done, inasmuch as up to the time of construction of the said new sewer the beforementioned barrel drain was amply sufficient to carry off the surface water from and efficiently drain the said roads.

9. The new sewer became vested in the Metropolitan Board of Works, by virtue of the Metropolitan Local Management Act 1855, s. 135, and schedule D, and since it was constructed always has been and still is in operation as above described.

10. The houses adjacent to the roads drain into the new sewer. The surface water diverted from the appellants' drain into the new sewer assists to carry down the soil in that sewer.

11. The owners and occupiers of the said adjacent houses pay the sewers rate in respect of them. No sewers rate was ever made upon, or paid in the parish till the year 1854, but in that year and from thence to 1861, rates were made upon and paid by the appellants.

12. In 1862, after the opinion pronounced by the

Court of Queen's Bench on the *Vauxhall Bridge* case, the appellants objected to the charge of sewers rate, and the then overseers in conformity with that opinion, reduced the rate from 475*l.* to 40*l.* [Copy assessment set out, in which the description of property rated was "moiety of Suspension Bridge and appurtenances." Gross estimated rental "45*l.*," rateable value "40*l.*"] This rating was continued down to the making of the rate now appealed against.

13. The rate appealed against is made on the persons, including the appellants, and in respect of the property, including the bridge, by law rateable to the relief of the poor in the said parish, and is assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor.

14. The parties are to be at liberty to refer to the Act for the Local Management of the Metropolis.

15. The parties have agreed that no objection is to be taken to the form of the rate.

16. The appellants contend that they are not liable to be rated in respect of "the bridge," but only in respect of "the roads," in the rate called the "Approaches." The respondents contend that "the bridge" and the roads are one property, and, as such, both rateable according to the assessment for the relief of the poor.

17. The question for the opinion of the court was whether the bridge and the roads called in the rate "Approaches" are to be both rated to the sewers rate, or whether the bridge is exempt, and the roads only are rateable. If the former be decided, the rate is to stand, and judgment to be entered for the respondents with costs. If the latter judgment is to be entered for the appellants with costs, and the sewers rate is to be amended by confining the assessment to the approaches, and reducing the rate to 40*l.*

Jan. 18.—*J. Brown*, Q.C. (with him *Raymond*), for the appellants.—The bridge and the approaches are separate things. This bridge, apart from the approaches, is not rateable to the sewer rate, for it is drained directly into the river, and derives no benefit from the sewer. Although, by sect. 161 of 18 & 19 Vict. c. 120, the overseers are to levy the rate in the same manner as a poor-rate, yet by sect. 164 it is provided that where any property was, at the time of the issuing of the first commission under the 11 & 12 Vict. c. 112, entitled to exemption from, or to any reduction or allowance in respect of, the sewers rate, such exemption, reduction, or allowance shall be allowed. An opinion, which is almost equivalent to an express decision on the point, has been pronounced by the Court of Queen's Bench in *The Metropolitan Board of Works* v. *The Vauxhall Bridge Company* (29 L. T. Rep. 211; 7 E. & B. 983; 26 L. J., N. S., 256, Q. B.) There the effect of s. 76 of 11 & 15 c. 112 (which closely resembled s. 164 of 18 & 19 Vict. c. 120), was considered, and the court thought that clause carefully preserved the ancient principle of rating for sewers, and that the benefit derived from the sewers by the property rated should still be regarded. This bridge would not have been rateable under the old law, because it derives no benefit from the sewerage. In Callis on Sewers, pp. 222-3, the author says: "The words in our statute be in effect, 'and all such which reap profit or sustain damage, shall be assessed,' which words seem not to admit of discharges, yet, in my opinion, out of the strict words of these commissions, there be some exemptions, though not expressed in words, yet supplied in reason, and are to be added in construction. First, for the grounds lying between the sea-banks and the sea, are in reason exempted from the charge of the banks and walls, because they can take no safety thereby; secondly, those grounds which be upon an ascent and not on the level, are also by the rule of reason, exempted from assesses to be imposed only by the power of these laws." That benefit is the test of liability is also shown by—

Masters v. *Scroggs*, 3 M. & S. 447;
Stafford v. *Hamston*, 2 B. & B. 691.

In *Reg.* v. *Head and the Metropolitan Board of Works* (7 L. T. Rep. N. S. 708; 32 L. J., N. S., 115, M. C.) it was indeed held that the amount of benefit must not be considered in assessing the rateable property, but the bridge here without the approaches derived no benefit at all. Then, being exempt under the old law, its exemption is expressly continued by the sections of the statutes above referred to.(*a*)

Pollock, Q. C. (with him *Will*), for the respondents.—By 5 Geo. 4, c. cxii, s. 63, the company was authorised to build a bridge "with convenient roads and approaches to the said bridge at each end thereof," and to do all things necessary "for building, maintaining, and repairing the said bridge, and making proper roads and approaches thereto." The bridge and approaches are one joint construction. Without its approaches the bridge would be useless, for it could not be reached. Sect. 139 enacts that after the tolls shall cease the company shall continue and be trustees, and shall do everything necessary "for maintaining, repairing, and supporting the said bridge and the said roads." It would be highly inconvenient if they were to be rated for one part of the same property and not for another, as the question of quantum would at once arise. Then as to severance, *Soady* v. *Wilson* (3 Ad. & E. 248), is conclusive. It was therein held that the eastern wing of Somerset House was liable to a sewer's rate, although it was entirely drained by the Board of Works, and had no communication with the common sewer running along the body of the building, and Denman, C. J., delivering the judgment of the court said that the doctrine laid down in the numerous cases is uniform and undisputed. "It rests upon the principle that everyone whose property derives benefit from the works of the commissioners may be assessed to the rates they impose. The benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes, say anything of the nature or amount of the benefit. Possibly the benefit may be extremely small. . . . But, on the other

(*a*) 11 & 12 Vict. c. 112, s. 76, ". . . provided . . . that where in any separate sewerage district any property is by law, or by the practice of the existing commissions or commissioners of sewers, entitled to exemption, wholly or partially from or to any reduction or allowance in respect of the sewers' rate, the commissioners shall, in making the district sewers' rate, observe and allow such exemption, reduction, or allowance." 18 & 19 Vict. c. 120, s. 164, "Provided that where any property was at the time of the issuing of the first commission under the said Act, 11 & 12 Vict c. 112, entitled to exemption from, or to any reduction or allowance in respect of, the sewers' rate, such redemption, reduction, or allowance, shall be observed and allowed in levying any sewers' rate under this Act."

hand, the kind of benefit may be of high value, as if a house were inaccessible because surrounded by marshes, and the works of sewage had made them hard and passable." The present is a still stronger case, as but for the approaches the bridge would be perfectly inaccessible:

Dorling v. *Epsom Board of Health*, 5 E. & B. 471; *Rex* v. *The Inhabitants of Barnes*, 1 B. & Ad. 113.

[COCKBURN, C. J.—Those are both poor-rate cases, but the Act of Parliament does not put sewers rates on the same footing as poor rates.] In effect it does so. The poor rate cases depend on two questions, viz., the value of the premises and the quantum of benefit. Now, if property derives any benefit from the sewers, the court will not consider the quantum. In *Reg.* v. *The Hammersmith Bridge Company* (15 Q. B. 369; 18 L. J., N. S., 85, M. C.) this same bridge and its approaches were considered as one, and Lord Denman treats them as divisible only for the purpose of apportioning the rateable value of the whole between two parishes. Next, as to the general law of sewers. Callis on Sewers is cited *contra* to show that when lands were so high as to derive no benefit from the sewers, they were not liable to be rated. When Callis wrote, however, there were ancient districts of sewers, but no Act of Parliament creating a district and declaring that any person within it should be rated. In former times, if no part of the property was in a district then the person had not to pay a rate. The whole judgment reported in *Masters* v. *Scroggs* (*sup.*) is limited to three lines, which are these: "It ought to appear that the party receives or is likely to receive a benefit. That is negatived in one respect and is not shown in any other." [BLACKBURN, J.—And Scroggs' house being thus held exempt, the exemption was continued by 11 & 12 Vict. c. 112, s. 76; and 18 & 19 Vict. c. 120, s. 164?] That must be admitted. Reverting to the facts of the present case, here is a bridge receiving tolls, and having roads without which it could not be approached, surely the drainage of those roads is some benefit to the bridge. Then *Soady* v. *Wilson* shows that the benefit need not be immediate; and *Reg.* v. *Head and The Metropolitan Board of Works* (*sup.*) distinctly decides that quantum of benefit must not be taken into consideration. First, we say, that the bridge and approaches must be taken as a whole; secondly, if not so taken, then that the bridge derives a benefit.

Raymond in reply.—Taking the last point first, no doubt the old law of sewers was applied to a totally different state of things, and what appeared to be just in the time of Callis may not be so now; but the Legislature intended that the old common law exemption should continue nevertheless. *Reg.* v. *Head and the Metropolitan Board of Works* (*sup.*) does not apply. *Soady* v. *Wilson* (*sup.*) was decided before the two recent statutes, and is distinguishable from the nature of the property. Somerset House was within a district, and was benefited, but the persons liable to the sewers rate in respect of it had attempted to get rid of the liability by adopting a separate system of drainage. In *Dorling* v. *The Epsom Board* (*sup.*) there was no exemption, and so the question could not arise. As to the second branch of the respondent's argument, it is said that the bridge and approaches are indivisible. That is a matter of fact. Then what has been the conduct of the respondents in that respect? As soon as the *Vauxhall-bridge* case was decided the parish ceased to rate this bridge, and assessed only the approaches. That was done under a mistake as to the actual decision in *The Metropolitan Board of Works* v. *The Vauxhall-bridge Company* (*sup.*) Therefore the respondents show by their act that they did not deem the bridge and its approaches all one. There is no authority for making a bridge alone liable to sewers rate. Because the accessories, viz., the approaches, may be rateable, the principal, or the bridge, must not therefore be rated also.

Feb. 22.—The udgment of Blackburn and Hannen, JJ., was delivered by HANNEN, J.—In this case the appellants have been rated to a sewer rate in respect of so much of their property as is in the parish of Hammersmith. The parish of Hammersmith forms part of the Fulham district, and the rate is imposed under the Act for the Local Management of the Metropolis (18 & 19 Vict. c. 120). The property of the appellants consists of a suspension bridge thrown over the Thames from the north bank, which is in the parish of Hammersmith, to the south bank, which is in the parish of Barnes. The boundary between the two parishes is the *medium filum aquæ* of the River Thames, so that one moiety of the property of the appellants lies in the parish of Hammersmith. This moiety consists of one half of the structure which extends from bank to bank, and hangs over the River Thames, and which, in the case, is called the "bridge," and of the whole of the land on the northern side occupied by the appellants, so as to afford facilities for getting access to the bridge, and which, in the case, are called "roads." Neither phrase is, perhaps, precisely accurate, but they are sufficient to convey the meaning of the parties. The "bridge" (if the meaning of the word is thus restricted to the structure suspended in the air over the bed of the Thames) derives no immediate or direct benefit from the drains or sewers of the Fulham district; the roads and approaches are, it appears from the eighth paragraph of the case, now, in fact, drained by a new sewer, though this was not required by the appellants, their old drainage being sufficient for them. By agreement in the case no objection is to be made to the form of the rate, the question for the court being, whether the "bridge" and the "roads" are to be rated to the sewer rate, or whether the "bridge" is exempt, and the "roads" only are rateable. The statute 18 & 19 Vict. c. 120, s. 164, provides that where any property was at the time of the first commission under 11 & 12 Vict. c. 112, "entitled to exemption from or to any reduction or allowance in respect of the sewer rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewer rate under this Act." We are thus referred back to 11 & 12 Vict. c. 112, now expired. The 34th section required the commissioners from time to time to divide the metropolis into separate sewage districts, "having regard in such division or formation to the nature of the ground, to the main line of the sewers by which such separate districts are or shall be drained, or to the main line of sewers which it may appear to the commissioners expedient to form for the drainage of such sewerage district, and to the equal benefit, as far as may be, of all lands and buildings comprised in such districts." Sect. 76 enables the commissioners to levy a district sewer

rate in each sewerage district on the persons, and in respect of the property within each district by law rateable to the relief of the poor; and then comes this proviso, "that where in any separate sewerage district any property is by law, or by the practice of the existing commissions or commissioners of sewers, entitled to exemption, wholly or partially from or to any reduction or allowance in respect of the sewer rate, the commissioners shall, in making the district sewer rate, observe and allow such exemption, reduction, or allowance." It is on those clauses that the present question depends. It seems clear from the mode of legislation adopted, that the proviso in s. 76 of 11 & 12 Vict. c. 112, is brought down into the present Act; and the appellants' contention is, that the "bridge" is property which in 1848, when 11 & 12 Vict. c. 112, received the royal assent, was by law "entitled to exemption" from a sewer rate. No question arises as to the practice of former commissions, as no sewer rate was levied in this district before 1848. Under the old law of sewers, the commissioners had no jurisdiction to impose a rate on any property which did not derive benefit from the works for the maintenance of which the rate was levied, and so long as the only object for which such works were made was to protect from the inroads of the sea, or to relieve from land floods and stagnant waters, the district benefited was the level, that is, that district which, to adopt the language in *Rooke's Case* (5 Rep. 996), was "subject to drowning" if the work was not maintained. And in *Rex* v. *The Commissioners of the Tower Hamlets* (9 B. & C. 517, 523) this court determined that the commissioners were bound to divide the district over which they had jurisdiction into levels of this sort, and could not join Hackney, which drained into the river Lea, in the same district as the rest of the Tower Hamlets which drained into the river Thames, and consequently required different sewers. Lord Tenterden, in delivering the judgment, says:—"A great deal of reliance was placed in the argument on the word 'level,' which is found in the report of *Rooke's Case* (*sup.*), and in which it is said that all who be within the level are to contribute. That is very true; but the question is, what is the meaning of the word 'level?' Now, that word does not occur in the Act of Parliament, neither does it appear in the commission. If we are to attribute to the word 'level' the sense sought to be attributed to it in this argument, that will make it an artificial division of the land; whereas the natural import of the word denotes not an artificial division of the land, but the particular character and situation of it. So understood, all those cases and all those expressions which say that the rate is to be made equally upon all the inhabitants of the level, will stand untouched by our decision." This is quite consistent with good sense as long as the object of the sewers was only to save the land from being drowned; but as soon as the sanitary objects become of importance, the level of the ground, though an important element in determining what district was benefited by the sewers, ceased to be the sole, or even the chief one; and accordingly in *Dorling* v. *The Epsom Board* (5 E. & B. 471, 483; 24 L. J. 152, 156, M. C.), this court in construing the Public Health Act 1848 (11 & 12 Vict. c. 63), held, that "*the occupier of premises within* a district under *the management of a local* board of health may be assessed to a special district rate, where the premises, in respect of which he is so assessed, derive no direct and immediate benefit from the works to meet the expense of which the rate is imposed." The provisions of the Public Health Act 1848, though very analogous to those of 18 & 19 Vict. c. 120, are not precisely the same; and the Public Health Act 1848 contains nothing equivalent to the proviso in s. 76 of 11 & 12 Vict. c. 112, which is, by reference, brought down into 18 & 19 Vict. c. 120. It is not easy to assign any reason why the Legislature should have intended to apply a different rule as to sewerage districts within the metropolitan district from that which applies to those outside of that district; but there seems no doubt that by this proviso they have to some extent done so. In *The Metropolitan Board of Works* v. *The Vauxhall Bridge Company* (*sup.*), the Vauxhall Bridge Company were assessed to a sewer rate on their property under circumstances not at all differing from those under which the now appellants are assessed in respect of theirs. The action was brought with the intention of raising the very question now before us. The decision of the court was, that the question could not be raised by action, being only matter of appeal; but Lord Campbell intimated for the guidance of the parties an extra-judicial opinion of the court (though, as he says, aware that it was not binding) that the Commissioners, in making the rate, "ought not to have considered merely the value of the property of the company, as in making a poor rate, but should have been guided by the benefit which they considered that the property derived from the sewers." He adds, "Having said so much respecting the construction of the Act of Parliament, we must refrain from giving any opinion as to whether benefit was derived from the sewers to any or what part of the property, which the commissioners must be fully competent to determine." The commissioners, acting on the advice, have from that time imposed no sewer rate on the Vauxhall-bridge, though they have rated the approaches; and a similar practice has been followed in respect of the Hammersmith-bridge until the present rate, on which the appeal is brought, in order to have a judicial determination on the question. There are expressions in the opinion given by Lord Campbell that seem to favour an idea that the amount of the assessment was to be proportionate to the amount of benefit derived by the particular property; but in *Reg.* v. *Head* (*sup.*) Crompton, J., who was a party to the *Vauxhall-bridge* case (*sup.*), explains that it was intended merely to express that if there was no benefit (by which we understand to be meant no direct and immediate benefit) there was to be no rate, but if there was any benefit the amount of the rate was to depend upon the poor-law assessment. We are not to be understood as affirming the principle laid down in the *Vauxhall-bridge* case (*sup.*), even thus qualified, or as determining that the principle of *Dorling* v. *The Epsom Board* is not applicable to a district within the metropolis; but we do not think it necessary in this case to decide the general question, for in *Soady* v. *Wilson* (*sup.*), where it was found as a fact that Somerset House did not derive any immediate benefit from the sewers, "except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed," this court held the rate valid, the court saying in

their judgment that "the benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes, say anything of the nature or amount of the benefit. Possibly that benefit may be so extremely small that a jury would not have found the fact stated in the case. But, on the other hand, the kind of benefit may be of high value, as if a house were inaccessible because surrounded by marshes, and the works of sewage had made them hard and passable." It seems to us that a property such as the bridge and roads of the appellants does derive a benefit of this kind from the proper sewerage of this district, and consequently, on the authority of *Soady* v. *Wilson* (*sup.*), that it would not have been exempt from the jurisdiction of the Commissioners of Sewers antecedent to 1848. If this be so, the consequence follows that the judgment must be for the respondents.

The learned judge then read the judgment of COCKBURN, C. J.—I regret that I am unable to concur in the judgment of the majority of the court. I agree with the general reasoning of my learned brothers, and their exposition of the law; nor am I disposed to question the authority of the case of *Soady* v. *Wilson* (*sup.*); but that case appears to me to be inapplicable to the present, as I cannot see how the property of the appellants on Hammersmith-bridge can possibly derive benefit from the sewerage of the district, whether in a sanitary point of view or any other. The bridge is only of use to the public and of value to the appellants as a means of transit from one side of the River Thames to the other, and in this respect it differs from the ground occupied by the approaches, which are partly built upon, and which, serving for the purpose of habitation, derive benefit from the drainage of the neighbourhood. The bridge plainly derives no immediate benefit as regards sanitary purposes, neither does it as regards getting rid of its superfluous moisture, as the latter is carried immediately into the Thames by means wholly independent of the district drainage. It is, however, said, that the bridge, as well as the approaches to it, may derive a benefit from the proper sewerage of the district, and that the case comes, therefore, within the principle of the decision in *Soady* v. *Wilson* (*sup.*). It does not appear to me that this can be so in fact. The roads which lead to this bridge from the metropolis and elsewhere are public roads, and must be maintained in a proper state, independently of the district drainage. I cannot suppose that the general public desiring to cross the River Thames into Surrey will be materially influenced by the state of the sewerage or drainage of the Fulham district, and though it may be said that the traffic over the bridge may be increased by the neighbourhood on the northern side being populous and frequented, and that this state of things will be promoted by an efficient system of sewerage, the benefit to be derived to the bridge property from this source appears to me of too speculative, uncertain, and minute a character to justify the subjecting it to a rate for the sewerage of the district on the assumption of such a benefit. For these reasons, I think our judgment ought to be in favour of the appellants; but as my learned brothers hold otherwise, the judgment of the court must be for the respondents.

Judgment for the respondents.

Attorneys: *Miller* and *Son*; *Watson* and *Sons*.

Saturday, Jan. 21, 1871.

REG. *v.* DAVIDSON, NANSON AND MORLEY.

Order of quarter sessions—Appeal—Order for costs, upon whom to be made—Quashing order as to part only.

An information was laid by E. T. Morley, who was the surveyor of the local board of health of Carlisle, but without reference to his official position, against John Hargreaves, for the violation of a bye-law of such local board; and upon the hearing, the said John Hargreaves was convicted and ordered to pay 7l. 10s. to the said local board for their costs. Mr. Hargreaves, thereupon, gave notice of appeal to the convicting justices and to Mr. Morley. Both the justices and Mr. Morley handed their notices over to the attorney for the said local board, and he conducted the defence on the behalf of such local board. The quarter sessions quashed the conviction with costs; and the clerk of the peace directing the costs to be paid by the respondents, the costs were taxed, and being unpaid, application was made to justices for a warrant against the goods of Mr. Morley for the amount. Upon the order of the quarter sessions being removed into this court:

Held, first, that it was bad in ordering the costs to be paid by the respondents, who were the convicting justices, and Mr. Morley, for that it should have been made upon the local board, who were the parties appealed against;

Secondly, that as the order was valid, except as to that part which related to costs, it should be quashed as to that part only.

THIS was a rule calling upon the prosecutor to show cause why an order of sessions made on the appeal of John Hargreaves against a conviction under the hands and seals of Alexander Davidson and Thomas Nanson, Esqrs., two of Her Majesty's justices of the peace in and for the county of Cumberland, whereby the said conviction was quashed, and the defendants were ordered to pay certain costs in the said order mentioned, should not be quashed for the insufficiency thereof.

The conviction was as follows:

City of Carlisle to wit.—Be it remembered, that on the 9th Aug. 1869, John Hargreaves, of Brunswick-street, in the city of Carlisle aforesaid, manufacturer, is convicted before us, Alexander Davidson and Thomas Nanson, Esqrs., two of Her Majesty's justices of the peace in and for the said city of Carlisle, for that he, the said John Hargreaves, on the 12th July 1869, and on divers other days and times between the said 12th July and the 20th of the said month of July, at the parish of St. Mary Carlisle, in the city aforesaid, did, without the consent of the Carlisle Local Board of Health, build upon a certain open space belonging to a certain building used as a dwelling-house, situate in Brunswick-street, in the city aforesaid, contrary to the form of the statute in that case made and provided, and the bye-laws of the said local board of health, and we do adjudge that the said John Hargreaves hath forfeited for his said offence the sum of 40s., and that he do pay to the said Carlisle Local Board of Health the further sum of 7l. 10s., to and for their costs in his behalf. Given under our hands and seals the day and year first above written

ALEX. DAVIDSON, Mayor (L.S.)
THOMAS NANSON (L.S.)

The order of the quarter sessions upon the appeal was the following:

Cumberland to wit.—At the general quarter sessions of the peace of our sovereign Lady the Queen, holden at Carlisle in and for the county of Cumberland, on Tuesday, the 19th Oct., in the 31st year of the reign of our sovereign Lady the Queen Victoria, 1869, before certain justices of our said Lady the Queen, in the same county, and also to hear

and determine divers felonies, trespasses, and other misdemeanors in the same county committed. Whereas at the general quarter sessions of the place above mentioned an appeal by John Hargreaves against a conviction of Alexander Davidson and Thomas Nanson, Esqrs., two of Her Majesty's justices of the peace for the borough of Carlisle in the same county, bearing date the 9th Aug. 1869, came on to be tried, wherein the said John Hargreaves was appellant, and the said Alexander Davidson and Thomas Nanson, Esqrs., and Edward Taylor Morley, gentleman, were respondents. After hearing of Mr. Fawcett and Mr. Hills, of counsel for the said respondents, and Mr. Dawson and Mr. Thurlow, of counsel for the said appellant, the said appeal was then heard, determined, and decided in favour of the said appellant. Now therefore this court doth order that the said conviction shall be quashed, and that the said respondents shall pay to the said appellant the sum of 58*l.* 13*s.* 2*d.* for his costs incurred by him in the said appeal, and which sum is hereby ordered to be paid to the clerk of the peace for the said county at his office in Carlisle in the said county, on or before the 27th Nov. 1869, to be by him paid over to the said appellant.

By the court (Signed) HODGSON.

The clerk of the peace having taxed the appellant's costs, he gave the following certificate:

I hereby certify that at a court of general quarter sessions of the peace holden at Carlisle on the 19th Oct. last past, an appeal by John Hargreaves against a conviction of Alexander Davidson and Thomas Nanson, Esqrs., two of Her Majesty's justices of the peace for the borough of Carlisle, in the said county, came on to be tried, and was then heard and determined, and the said court of general quarter sessions thereupon ordered that the said conviction should be quashed, and that the said respondent should pay to the said appellant the sum of 58*l.* 13*s.* 2*d.* for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the clerk of the peace for the said county, on or before the 27th Nov. last past, to be by him handed over to the said appellant. And I further certify that the said sum for costs has not, nor has any part thereof been paid in obedience to the said order.

The information was laid by Edward Taylor Morley, in his own name, not stating that it was laid by him at the instance of the local board of health of Carlisle, or that he was an officer of such local board. The notice of appeal given by the appellant was directed

To Alexander Davidson and Thomas Nanson, both of the city of Carlisle, Esquires, two of Her Majesty's justices of the peace in and for the city of Carlisle, and to Edward Taylor Morley, of Wilfred-street, in the city aforesaid.

It appeared that there is a local board of health for the city of Carlisle, the town council being such board, and that Mr. Edward Taylor Morley is the surveyor of the board. A body of bye-laws having been framed, Mr. Hargreaves was supposed to have violated one of them, whereupon Mr. Morley laid the information in question against him at the instance and by the authority, as he alleged, of the local board. At the hearing, Mr. John Nanson, who was the town clerk and the clerk of the local board, attended and conducted, as he stated in his affidavit, on behalf of the said board. Upon notices of appeal being served upon the two justices and Mr. Morley, they respectively sent them to Mr. Nanson (such town clerk), who was instructed by the local board to defend the appeal and support the conviction, which he accordingly did, the said justices and Mr. Morley taking no part in it, except that the last-named gentleman was examined as a witness. That in the result the conviction was quashed, and upon the counsel for the appellant applying for costs, the chairman said the costs would follow the conviction. The sessions being then adjourned, the costs were afterwards taxed by the clerk of the peace, and a certificate given as before mentioned. These costs not being paid, the appellant applied to justices at petty sessions for a warrant of distress. This was resisted upon the ground that the order for costs was bad, inasmuch as it ought not to have been made either upon the convicting justices or Mr. Morley, but upon the local board of health, who were the real respondents. Upon this the appellant's attorney abandoned his application as against the justices, who he admitted were not liable, but pressed for a warrant against Mr. Morley; but upon its being urged that he also was not liable, and that an application to remove the order into the Court of Queen's Bench, in order to its being quashed, should at once be made, the justices adjourned the case, whereupon, the rule for the present *certiorari* was obtained, on the ground that the quarter sessions had no jurisdiction to make an order for costs upon either the convicting justices or Mr. Morley, who were neither of them the real parties to the appeal, although their names were inserted in it as respondents.

Quain, Q.C., showed cause.—It is not sought to make the convicting justices pay the costs, indeed the warrant was not applied for as against them; but Mr. Morley is clearly liable, for it was he who laid the information in his own name, and who was the respondent upon the appeal. The objection is a merely technical one—that the clerk of the peace, in drawing up the order, inserted Mr. Morley's name instead of the local board. The local board and Mr. Morley are, in effect, the same persons, and if Mr. Morley were to pay these costs, he would be repaid by the local board. It is not right that Mr. Hargreaves should lose his costs by the error of the clerk of the peace, if it be one. [COCKBURN, C.J.—Was it not your fault in making Mr. Morley the respondent in the appeal?] The information was by Mr. Morley in his own name, no mention being made that he was acting for the local board. [BLACKBURN, J.—But the conviction treats the local board as the real parties, for the costs are directed by it to be paid to them.] By the 135th section of the 11 & 12 Vict. c. 69 (Public Health Act 1848), the appellant may appeal to the sessions, and he is to give notice to the local board of health, or justice or justices, by whose act he may think himself aggrieved, and the court may award such costs to the party appealing or appealed against, as they shall think proper. Here the notice was given both to the justices and to the party who represented the local board. [COCKBURN, C.J.—The notice was given to Mr. Morley, but there is nothing in the Public Health Act which authorises the surveyor to act in his own behalf.] But if Mr. Morley had objected to being made a respondent, he should have done so upon the hearing of the appeal. [BLACKBURN, J.—The notice to Mr. Morley was a nullity, unless as representing the local board.] The attorney for the local board defended the appeal. [BLACKBURN, J.—Suppose notice of appeal had only been given the justices, and they should not appear themselves but give the notice to the local board, could not the local board appear? and must the conviction be quashed because the justices themselves did not choose to defend the appeal? Do you say that the local board of health had no right to appear?] Yes, they had no right to appear. Mr. Morley never objected to being treated as the respondent.

[COCKBURN, C. J.—He could not have supposed that he would have been rendered responsible for costs, especially after what took place in the court below. The local board no doubt ought to pay these costs.]

Manisty, Q. C., and *Gates*, appeared for the justices at sessions, and contended that the order of the court as pronounced being merely quashed with costs, the costs would properly fall on the real parties intended, namely, the local board, who were the parties intended, and that such costs migh be awarded against them, although their names were not inserted as respondents: (*R.* v. *Robinson*, 17 Q. B. 466; *Reg* v. *Justices of Hants*, 1 B. & Ad. 659.) Also that this court has power to quash part of an order which may be bad, if the remainder of the order can stand independently of such bad part, which would be the case here, if only that part of the order relating to costs were to be quashed.

R. v. *Sweet*, 9 East. 25;
R. v. *Maulden*, 8 B. & C. 78.

The COURT called upon *Pollock*, Q. C., and *T. P. E. Thompson*, to argue the last point, but they declined to do so.

COCKBURN, C. J.—What we must do in this case is to quash so much of the order of quarter sessions as applies to costs. It is clear that no costs could be given as against the convicting justices. In *Rex* v. *The Justices of Hants*, it was clearly laid down that, although the justices may be the nominal respondents, yet they cannot be made subject to costs, but that it should be the party who is really interested. That decision is in point in the present case. The order, therefore, so far as the justices are concerned, is clearly bad. Then, as regards the other respondent, Mr. Morley, it is true he laid the information, but it is equally clear that it was laid by him as an officer of the local board, and the justices below so treated it, for they gave the costs, not to Mr. Morley, but to the local board. Then when we come to the appeal, although the notice was given to Mr. Morley, the local board appear to have taken it up and therefore we must see who were really the parties answering to the characters of respondents. These were undoubtedly the local board. The quarter sessions therefore went beyond their powers in making the order for costs upon Mr. Morley individually. The only other question is—can we quash an order as to part? Upon the authorities it would seem that we can do so, and therefore I think that in this case we ought to quash it so far as concerns the direction as to costs, leaving the order to stand as regards the remainder.

BLACKBURN, J.—I am of the same opinion. If we look to the 133rd section of the Public Health Act 1848, we shall find that no proceedings can be taken to recover any penalty incurred under the Act except by the person aggrieved or the local board, or in certain cases by the parish officers, without the consent in writing of the Attorney-General, so that in the present case Mr. Morley could not have laid this information on his own account, but merely as an officer of the local board for, and at their instance; and that this was understood to have been so, is clear from the fact that the justices in convicting Mr. Hargreaves gave costs to the local board, the justices thinking that they were really the parties for whom the information was laid. Then we have the appeal clause, which is sect. 135, and which enacts that the party aggrieved may appeal to the court of general quarter sessions; "but the appellant shall not be heard in support of the appeal unless within fourteen days after the making and publication of the rate appealed against, or accrual of the cause of complaint, he give to the local board of health or justice or justices by whose act he may think himself aggrieved, notice in writing stating his intention to bring such appeal, together with a statement in writing of the grounds of appeal. And the said court upon hearing and finally determining the matter of the appeal shall and may according to its discretion award such costs to the party appealing or appealed against as they shall think proper." Now, then comes the question—when there is a provision that costs may be given *to the party appealing or appealed against*, who is the party appealed against in this case? Morley had no interest in the matter, he did not get the costs below. It is clear that the party really appealed against was the local board; and upon referring to *Rex* v. *The Justices of Hants*, we find it decided that the party appealed against is the party who is really interested. The justices at quarter sessions having therefore made an order in respect of part of which they had jurisdiction, and in another part not jurisdiction, we must quash that part of it over which they had not jurisdiction.

MELLOR, J.—I am also of the same opinion. The condition of the appeal is that notice shall be given to the local board of health or to the justices. Now here the notice was served upon the justices and Mr. Morley, who was the surveyor of the local board; but as the local board were undoubtedly the real parties in the litigation, if the sessions had made their order for costs upon them they would have been perfectly right. When the court made the order, everyone of course supposed that the local board would have paid the amount, and that they would not have taken this somewhat unworthy objection.

HANNEN, J., concurred.

Order quashed as to costs.

Attorneys for the applicant, *James, Curtis* and *James*.

Attorneys for the justices and the defendant, *Sharpe* and *Ullithorne*.

Saturday, April 22, 1871.

REG. *v.* LOVIBOND.

Indictment—When not the proper remedy—The Metropolis Management Amendment Act 1862—*Violation of the provisions of sect.* 75—*Summary proceedings before a justice.*

Where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued, and no other.

Where, therefore, the defendant had, as was alleged, violated the provisions of sect. 75 *of the* 25 *&* 26 *Vict. c.* 102 (*The Metropolis Management Amendment Act* 1862), *by erecting a building without the consent of the Metropolitan Board of Works and beyond the line of building as provided for by the said section, and which said section points out the*

remedy for such violation by summary proceedings before a justice:

Held, that the remedy for such offence was by summary proceeding only, and that an indictment would not lie.

THIS was a proceeding by an indictment preferred by the Metropolitan Board of Works against the defendant for an alleged breach of the provisions of the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), in erecting a building beyond the general line of buildings in a street within their jurisdiction. It is enacted by the said section "that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings, in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings of the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected or be begun to be erected or raised without such consent, or contrary to the terms or conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint, and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing; and in default of the building or erection complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates, and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same as they think fit; and all expenses incurred by the said vestry or board in carrying out the said order and in disposal of the said materials may be recovered by the said vestry or board from the owner or occupier of the said premises, or the builder or person engaged in the work, either by action at law or in a summary manner before a justice of the peace, at the option of the said vestry or board, in manner provided by the 227th section of the firstly-recited Act" (18 & 19 Vict. c. 120) "as to the recovery of penalties." The indictment having been removed by *certiorari*, was tried at the sittings after Trinity Term, in Middlesex, before Hannen, J., and a special jury, on the 14th June 1869, and it was agreed that a verdict should be entered for the Crown, with liberty to state the facts in the form of a special case, and that the court should direct on the facts so stated that the verdict so entered should stand, or that it should be set aside, and a verdict entered for the defendant.

The following are the facts of the case:

1. Lille-road (the alleged street in which the building complained of, was built by the defendant) is a road and public highway, leading from London to Fulham.

2. The defendant's premises, until the erection complained of, consisted of an old house (where the defendant resided) and premises standing at a considerable distance from the road, in grounds extending to the road in question, and bounded by a wall 9ft. in height and 400ft. in length. In the north-west corner, at about 10ft. from the road, stood within the grounds a lodge and stables, the grounds extended on the east to the line shown on the plan as dividing them from the ground on which Rosa-villa stands.

3. From time to time, within the last forty years, other houses and buildings have been built on each side of the road. The buildings shown on the plan and coloured black were in existence at the time of the proceedings of the Metropolitan Board of Works mentioned in this case, and when the erection of the building complained of was commenced, the buildings shown by a red colour, with the exception of the brewery, have been since built.

4. The houses called Rosa Villas and Hermitage Cottages are small semi-detached houses, having gardens in front, divided from the footway by a dwarf wall with iron railings on the top. The fronts of these houses vary in distance from the inner edge of the footpath from 33ft. to 33ft. 9in. The length of the frontage of Rosa Villas and Hermitage Cottages is 280ft. These are the oldest of the houses, except the defendant's residence, its lodge, and stabling.

5. Beyond Rosa Villas and Hermitage Cottages, on the east, at the time of the erection of the building complained of, and up to the trial of the indictment, there stood some other houses in carcase. They are called in the certificates of the said architects hereinafter mentioned, "houses still unfurnished." The fronts of the carcases coloured pink in the said plan B stood back from the said road in spaces intended for gardens, at varying distance, those in the middle being 30ft., the westernmost 21ft. 5in., and the easternmost 22ft. 2in. from the inner edge of the foothpath, the distances varying according to the curve of the road, the length of these frontages including the land in the aggregate is 330ft.

6. Lille-road, after passing Rosa-villas and the unfinished houses, runs to the east part, what was at the time of the certificate a piece of vacant ground, and beyond that is crossed by a street called Richmond-place, at a distance of 300 yards from the brewery. The end house of Richmond-place abutted on the footpath of Lille road, and windows of the houses look into Lille-road. Since then the shops along Lille-road coloured pink have been built. Lille-road then crosses the railway by a bridge, and continues on through Brompton towards London. The other houses and buildings were built, as appears by the plan A. These houses and buildings varied in their distances from the

inner edge of the footpath, and in their architectural character and size, and stood generally in gardens. The western end of Lille-road is separated from Crown-road by North-end-road.

7. In the autumn of 1867 the defendant, who is a brewer, proceeded, with the sanction of the local board, to erect the building on the plan A, called the Brewery. In the first place he proceeded to erect the back part of the buildings farthest from the road, which was required for the machinery used in the business. Part of the building scheme involved the erection of a chimney at the back of the building; and the plans of the part of the building, so far only as was necessary to show the position of the chimney, were shown to the prosecutors, whose consent was asked and obtained to its erection. On the 15th Feb. 1868 the defendant had completed the back part of the building, and the machinery was being erected therein, and in pursuance of the original plans (which he had not shown to the prosecutors) he had prepared the foundations, and was putting in the footings of the rest of the building, which was to be used as a tun room, when, in consequence of a suggestion made to him, the defendant called on Mr. Vulliamy, the superintending architect of the Metropolitan Board of Works, and produced to him the plan marked C, with the proposed buildings marked in red ink, and Mr. Vulliamy promised to lay the matter before the board for their consent, at the same time cautioning the defendant against building without their permission. The board refused their consent to the buildings, because they would extend beyond the houses in the road, and gave notice to the defendant of such refusal. He, however, continued to build according to his proposed plan, and at the time of the indictment had nearly completed the buildings. The board, upon the defendant continuing to build, directed Mr. Vulliamy to decide the general line of buildings under sect. 75 above mentioned.

8. The defendant and his architect attended before Mr. Vulliamy, who, on or about the 29th April 1868, proceeded to the spot, and afterwards, on the 30th April in the same year, gave his decision and drew up a certificate, a copy whereof, marked D, accompanies and is part of this case. The document was partly in writing and partly in print. The printed part is shown in red ink in the said copy, and was filled in and altered in writing, as shown in black ink. The said plan marked B, was annexed hereto. The orginals of the said certificates and plan may be referred to on the argument of this case.

9. In consequence of a letter received from the defendant's attorneys, dated the 1st May Mr. Vulliamy altered the form of certificate.

10. At the time these certificates were given, and when Mr. Vulliamy first visited the spot for the purpose of deciding the general line of buildings, the building objected to was in carcase, and the roof all but completed. The wall of the building nearest the road was built within the wall of the grounds of the defendant's residence, the Hermitage. The frontage of this building to the road was built 5in. farther from the centre of the road than the face of the old boundary wall, which was pulled down along this frontage, but the building extends close to the edge of this road, and stood at the time of the indictment 33ft. nearer the road than Rosa Villas, and 27ft. nearer than the said general line so decided by the said superintending architect.

11. Previous to the said certificates of Mr. Vulliamy, the houses along Lille-road stood, as above-stated in this case, at various distances from the road, and the jury on the trial found that at the time when the defendant erected his building, and at the time when Mr. Vulliamy gave his certificate, there was no general line of building in Lille-road. This was the only question left to the jury, and upon which their verdict was given, subject to this special case,

12. There was no building standing with its frontage line at such a distance from the footpath as decided by Mr. Vulliamy to be the general line, viz., 27ft. He stated on the trial that he decided the general line as being the mean distance between 33ft. (the distance from the footpath to some of the houses in Rosa-villas) and 22ft. (the distance of some of the houses in carcase). There is a space of 20ft. between Rosa-villas and the defendant's building called the Brewery.

13. The district board within whose limits the building stands having refused to make a complaint, or to take proceedings under the 75th section, the Metropolitan Board of Works preferred this indictment.

14. The court is to have power to draw inferences of fact, but it is to be taken as a fact that, except in so far as Mr. Vulliamy had power to decide, and has decided what the general line of building is, there is no general line of buildings.

The question for the opinion of the court is, whether upon the facts above stated the present indictment is sustainable? If the court should be of opinion in the affirmative, the verdict as entered is to stand; if in the negative, the verdict so entered is to be set aside and a verdict entered for the defendant.

Manisty, Q. C. (*Metcalfe* with him) appeared in support of the prosecution.—The building in this case was erected without the consent of the board, and not within the line laid down by the architect. [Mellor, J.—The question to be determined really is, can an indictment lie when there is another and an express remedy given?] This case comes within that class of cases in which, where there is a general prohibition, you may proceed by indictment for violating that prohibition. [Mellor, J.—But the 75th section directs the course of proceeding. The justices may make an order directing the demolition of the building, and may also direct the payment of costs.] The power to order the building to be taken down does not exclude the common law remedy by an indictment. [Mellor, J.—It would really seem that it was the intention of the Legislature that all such questions should be decided by the justices. An indictment gives but a very imperfect remedy.] The vestry or district board may not choose to take proceedings, and if so the only remedy is by indictment. There are, no doubt, cases which will be cited on the other side, of *Rex* v. *Wright* (1 Burr. 543) and *Rex* v. *Robinson* (2 Burr. 799). [Lush, J.—Those cases show that where a statute creates an offence and provides the remedy, that remedy only can be resorted to. What would be the punishment upon an indictment?] Fine and imprisonment. [Lush, J.—Notwithstanding that, the building might be pulled down.]

The *Solicitor-General* (*F. M. White* and *Poland* with him) were not called upon.

MELLOR, J. (*a*)—We are all agreed that it never was intended by the Act of Parliament to give power to initiate an indictment for disobeying an order of this description. If Mr. Manisty's argument is correct, it contains a very startling proposition, and we should certainly expect to find some very conclusive authority upon it. This case appears to come exactly within the rule laid down in *Rex* v. *Robinson* (2 Burr. 799), where Lord Mansfield, C. J. says, "The objection to this indictment is, that the offence is not indictable, because the Act of Parliament has pointed out a particular punishment and a specific method of recovering the penalty which it inflicts. The rule is certain—that where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued and no other. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, then either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute, because there the sanction is cumulative and does not exclude the common law punishment." Now I quite agree that there may be Acts of Parliament which contain an absolute prohibition, but which say that a party may have a particular remedy, and in which cases the right to indict may still exist. The distinction, as it seems to me, is this: Does the statute appoint *the* remedy or *a* remedy? If the statute appoints *the* remedy, *that* is the one which must be adopted. In the present case the public interest is confided to the care of the district board of works, and it is for them to take proceedings in the manner pointed out by the statute. I am of opinion therefore that this case falls within the rule stated in *Reg.* v. *Robinson*, and that no indictment will lie.

LUSH, J.—I am of the same opinion. The defendant has violated no common law right. The clause which creates the offence prescribes the remedy. That remedy only can be pursued.

HANNEN, J.—I am of the same opinion.

Verdict to be entered for the defendant.

Attorney for the prosecution, *W. W. Smith*, Metropolitan Board of Works.

Attorneys for the defendant, *Travers Smith* and *De Gex*.

(*a*) Cockburn, C. J., was absent at Nisi Prius.

COURT OF COMMON PLEAS.

Reported by M. W. MCNEILLAR, and H. H. HOCKINS, Esqrs., Barristers-at-Law.

Tuesday, April 18, 1871.

Re THE LIVERPOOL UNITED GAS COMPANY (appts.) *v.* THE OVERSEERS OF EVERTON (respts.); *Ex parte* THE OVERSEERS OF EVERTON.

Costs—Prohibition—Rule made absolute—Judgment —1 *Will.* 4, *c.* 21, *s.* 1.

When a rule is made absolute for a prohibition so that no proceedings in prohibition are taken, the party in whose favour the rule is made absolute has not a judgment in his favour so as to be entitled to the costs of the application under 1 *Will.* 4, *c.* 21, *s.* 1.

In this case the appellants had entered an appeal against a poor-rate at the Liverpool borough sessions, whereupon the respondents obtained a rule *nisi* for a prohibition to the sessions to entertain the appeal. This rule was subsequently made absolute, and no further proceedings in prohibition were taken. The respondents then made out a bill of costs in respect of costs attending the application, but the master, holding that the respondents were not entitled to costs, refused to tax it.

Douglas-Jones, Q. C. now moved, on behalf of the overseers, for a direction to the master to tax the respondents' bill of costs. Making the rule absolute was a judgment in favour of the overseers, so as to entitle them to the costs of their application under 1 Will. 4, c. 21, s. 1. In the case of applications for a prohibition, the court either discharges the rule, or else if it thinks the prohibition ought to issue, it either directs the parties to proceed in prohibition and enlarges the rule for that purpose, or else it makes the rule absolute. But the judgment is always on the rule. In this case the rule was made absolute, and that is a judgment in favour of the applicants. Before the statute 1 Will. 4, c. 21, s. 1, when the court made the rule absolute at once, no costs were allowed. That being the case, it was at one time contended that even when the rule was made absolute the applicant had a right to proceed and declare in prohibition in order to get costs, though the other party submitted. The courts, however, refused to allow this. That being the state of things, the Act of 1 Will. 4, c. 21, was passed, and under it the party in whose favour a rule is made absolute is entitled to his costs. [BOVILL, C. J.—The judgment spoken of in the statute is the judgment on the record when proceedings are taken.] It is submitted that that is too narrow an interpretation. In Gray on Costs, p. 446, it is said, "It may, it is true, be contended that the making the rule absolute is a judgment within the meaning of the Act; but if that had been in the contemplation of the Legislature at the time it was passed, it would probably have been provided for in less ambiguous terms." *Rex* v. *Kealing* (1 Dowl. 440) is no doubt directly against my contention; but that was only the decision of a single judge sitting in the Bail Court. No doubt, when the prohibition issues in consequence of a mistake on the part of the judge, it is not the practice to allow costs: (*Jones* v. *Jones*, 12 Jur. 399). But that is not the case here.

BOVILL, C. J.—I think that this application must be refused. Before 8 & 9 Will. 3 no costs were allowed in proceedings in prohibition, but by statute c. 11, s. 3 of that year, a plaintiff "obtaining judgment on any award of execution after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit." In *Pewtress* v. *Harvey* (1 B. & Ad. 154), after the plaintiff had declared, the defendant, instead of pleading, obtained a judge's order for staying proceedings upon payment of costs incurred since the rule to declare, and the court held that the plaintiff was not entitled to any further costs. Subsequently 1 Will. 4, c. 21 was passed, and the question now before us is, whether the making a rule absolute is giving judgment in favour of one party within the meaning of that Act, so as to entitle that party to his costs. I quite concur with the decision of Patteson, J. in *Rex* v. *Kealing* that this section

does not apply where there are no pleadings and no proceedings in prohibition. The Act leaves the court no discretion in the matter.

BYLES, M. SMITH, and BRETT, JJ. concurred.

Application refused.

Attorney for the overseers, *T. Goldring.*

Thursday, April 20, 1871.

JEFFERY v. NEALE.

Covenant to pay rent without any deduction except in respect of level tax, property-tax, and land-tax —To pay all taxes and assessments—Tithe rentcharge.

A lessee covenanted with his lessor, first, to pay rent without any deduction or abatement on any account whatsoever except in respect of level-tax, land-tax, and property-tax, which were to be borne by the lessor; secondly, to bear, pay, and discharge all taxes and assessments whatsoever for or in respect of the demised premises or any part thereof which shall be taxed, charged, or assessed on the same or on the landlord in respect of the same. The lessor was the owner of the tithe rentcharge upon the demised premises. The lessee had paid the rent, but not the tithe rentcharge.

Held, that he had satisfied the first covenant, and that the tithe rentcharge was not a tax or assessment within the meaning of the second.

ACTION by lessor in respect of alleged breach of covenants contained in a lease.

The first covenant was that the lessee should pay the rent "without any deduction or abatement on any account whatsoever, save and except in respect of level tax, property tax, and land tax," which were to be borne by the lessor. Secondly, "to bear, pay, and discharge all taxes and assessments whatsoever for or in respect of the said demised premises, or any part thereof, which shall be taxed, charged, or assessed on the same demised premises, or on the landlord in respect thereof, save and except the aforesaid exceptions." The breach alleged was the nonpayment of the tithe rentcharge due in respect of the demised premises.

At the trial before Hannen, J., at the Sussex Spring assizes, it appeared that the defendant had held the lands demised for the last ten years, during which time he had always paid the rent due. The plaintiff was owner of the tithe rentcharge upon the property. The defendant had never paid the tithe rentcharge, nor had it ever till recently been demanded. On this state of facts, the learned judge directed a verdict for the defendant, with leave for the plaintiff to move to enter the verdict for himself for the amount of arrears of tithe rentcharge due, if the court should be of opinion that the defendant was bound by the covenants in the lease to pay the same.

Sir *G. Honyman*, Q.C. (*Murphy* with him), moved accordingly.—By not paying the tithe rentcharge in addition to the rent, the defendant virtually makes a deduction from the rent. In *Parish* v. *Sleeman* (1 L. T. Rep. N. S. 506; 29 L. J. 96, Ch.), Lord Campbell held, reversing the decision of Stuart, V.C., that an agreement to pay the rent "free of all outgoings," involved the obligation to pay the tithe rentcharge. The fact that the plaintiff is also owner of the tithe rentcharge is of no importance. Again, the defendant is bound to pay this as an assessment charged upon the land derived.

BOVILL, C. J.—The question here really is whether the defendant is bound to pay this tithe rentcharge by his covenant to pay all taxes and assessments, &c. Sir George Honyman has endeavoured to rely also upon the other covenant to pay the rent without deduction; but I think that the defendant, having paid the full rent, has satisfied that covenant. From the nature of the action the plaintiff must rely on the covenant to pay all taxes and assessments, with certain exceptions, the exceptions being those taxes which fall on the landlord. There is no mention in the lease of the tithe rentcharge, and I think we should be doing violence to the language of the covenant if we held that it included the tithe rentcharge. The tithe rentcharge is not commonly spoken of as a tax, but is generally the subject of a special stipulation. The case of *Parish* v. *Sleeman* has been cited, but the language of the covenant was not the same as it is here.

BYLES, J.—I am of the same opinion. As for the first covenant, I think the defendant has satisfied it, and with regard to the second I do not think the tithe rentcharge is within it.

M. SMITH, J. -In this case the plaintiff, the lessor, was also owner of the tithe rentcharge, and it appears that for ten years after the commencement of the term, no demand was made by him on the defendant to pay the tithe rentcharge. These circumstances are strong to show that it was not the intention of the parties that the tithe rentcharge should be paid in addition to the rent. All that we have to do now is to look at the lease to see whether, by the covenants contained in it, the defendant is bound to pay the tithe rentcharge. Unless the tithe rentcharge is within the scope of one of the covenants, the plaintiff must fail. It seems to me that it is not within the scope of either of the covenants relied on. It may be called an "outgoing," but not a "tax or assessment." If the plaintiff has a remedy at all, it must be by distress under the 81th sect. of The Tithe Commutation Act (6 & 7 Will. 4, c. 71).

BRETT, J.—This is an action for breach of covenants, and the question for us to determine is what construction must be placed upon the covenants. Sir Geo. Honyman has made two points. First he says that the defendant is bound to pay the tithe rentcharge by the language of the reddendum; but on this point I think it is sufficient to say that I think the defendant has paid the rent without deduction, so as to satisfy the words of this covenant, and it is unnecessary to say whether or no the plaintiff, as owner of the tithe rentcharge, may distrain. But Sir George Honyman's principal reliance must be placed on the affirmative covenant to pay all taxes and assessments, and the question is thus raised, whether a tithe rentcharge is a tax or assessment within the meaning of this covenant. If it had been necessary to consider the effect of any cases decided on the point, I should have hesitated about refusing a rule; but no cases have been decided on the construction of these words, and as I cannot think that a tithe rentcharge is included in the words, I concur with the rest of the court in thinking that the rule must be refused.

Rule refused.

Attorneys for the plaintiff, *Eyre* and *Co.*

COURT OF EXCHEQUER.

Reported by H. LEIGH, and H. F. POOLEY, Esqrs., Barristers-at-Law.

Tuesday, Jan. 28, 1871.

THE ATTORNEY-GENERAL *v.* BLACK.

Income tax—5 *&* 6 *Vict. c.* 35—*Schedules A. and D.*—*Local coal dues levied by the Corporation of Brighton—Liability of to income tax—Rate or duty—Tolls—Tax.*

Under the 13 *Geo.* 3. *c.* 34, *commissioners appointed for improving the town of Brighton were (amongst other things) empowered to levy a duty of* 6*d. on every chaldron of coal, culm, &c. landed at the beach, or brought into and consumed within the town, such duty to be applied by them in erecting and maintaining groyns, &c. against the incursions of the sea. By the* 50 *Geo.* 3, *c.* 38, *the duty was increased in amount, and subsequently, by the Brighton Town Improvement Act* (6 *Geo.* 4, *c. clxxix*), *it was, together with market tolls, and other rates, and duties and assessments, which the said commissioners were by that Act empowered to levy, consolidated into a common fund for the general purposes of the Act, which purposes included, in addition to the erection and maintenance of the groyns, the paving, lighting, watching, cleansing, and otherwise improving the town. By the Brighton Commissioners Transfer Act* 1855, *the said commissioners ceased to act as such, and the corporation and their successors were appointed commissioners in their stead:*

Held, by the Court of Exchequer (*Kelly, C. B., and Martin and Channell, BB.*), *that the coal duty in question was a property in respect of which the corporation were liable and bound to pay income tax, whether as a "hereditament," under schedule A., or as "property or profits" under schedule D, of the Income Tax Act* (5 *&* 6 *Vict. c.* 35.)

INFORMATION by the Attorney-General against the defendant, as town clerk of the corporation of Brighton, for penalties under the statutes relative to the revenue of the Income Tax; and by the consent of the parties, and by order of Martin, B., dated the 9th July 1869, under 22 & 23 Vict. c. 21, s. 10, there was stated for the opinion of the court, without any pleadings, the following

CASE:—

1. The defendant is town clerk of the corporation of the town of Brighton, which belongs to the port or harbour of Shoreham, in the county of Sussex, and is the proper person to make such returns as are required by 5 & 6 Vict c. 35, and the proceeding, although nominally for the recovery of penalties, is in fact brought for the purpose of obtaining the decision of the court on the question at issue between the Crown and the corporation, whether the corporation are liable to pay Income Tax, upon the amount of the rate or duty which they levy and receive in respect of coals, culm, coke, cinders, ashes, and charcoal landed on the beach or brought within the limits of the town of Brighton, by virtue of the powers conferred upon them by the Acts hereinafter mentioned, all of which are to be taken as part of this case.

2. By an Act, 13 Geo, 3 (A.D. 1773), intituled, "An Act for paving, lighting, and cleansing the streets, lanes, and places within the town of Brighthelmstone, in the county of Sussex, for removing nuisances and annoyances, and preventing the like for the future, for holding and regulating a market within the said town, for building and repairing groyns to render the coast safe and commodious for ships and vessels to unload and land sea coal, culm, and other coal for the use of the inhabitants of the said town, and for laying a duty thereon, and for other purposes," powers were given to the commissioners thereunder to pave, light, and cleanse the streets of the town, and for that purpose to assess and levy rates or assessments, not exceeding 3*s.* in the pound in one year, on the occupiers of all property in the town, and to purchase lands for, and to establish a market, the rents and profits whereof, after satisfying the moneys borrowed for purchasing the land and establishing the market, were directed to be paid and applied towards the paving, repairing, lighting, and cleansing the said streets, and in repairing the groyns thereafter mentioned, And, after reciting that the said town was situate by the seaside, and belonged to the port or harbour of Shoreham, and that great part of the said town having been destroyed by the breaking in of the sea, several groyns had been some years since erected, and the coast was now safe and commodious for ships and vessels *to unload and land sea coal, culm, and other coal on the beach of the said town, for the use of the inhabitants thereof;* and that the said groyns were become greatly out of repair, it was further enacted that the said commissioners should be, and they were thereby constituted and appointed trustees for repairing, improving, maintaining, and preserving the said groyns, and erecting and building any new groyns or such other works as to them should seem most proper. And that, for the better effecting and support of the said premises, there should from and after the 24th June 1773, be paid to them and their successors, *the sum of* 6*d. for every chaldron of sea coal, culm, and other coal, that should be landed on the beach of the coast, at the town of Brighthelmstone,* with power to the said trustees and their successors to demand, and take of and from the masters and owners, or other persons having the rule or command of every ship, bark, or other vessel, for every chaldron of sea coal, culm, or other coal, landed or discharged out of any ship or vessel on the said beach or coast of Brighthelmstone, *or otherwise brought into the said town,* within the parish of Brighthelmstone aforesaid, the said sum of 6*d.* And the said Act gave power to the commissioners to enforce the payment of the said duties through the collector or officer of customs of the port or harbour of Shoreham, and to detain and sell the vessel in case of nonpayment of the said rate or duty.

3. Under the above Act the old groyns were preserved and improved, and new ones erected. The rate or duty of 6*d.* in the said Act mentioned granted was duly demanded and paid, and the rents and profits of the market established under the said Act were duly collected and applied, as directed by the Act until the year 1810, in which year an Act, 50 Geo. 3, c. xxxviii., was passed, whereby, after reciting the passing of the former Act of 1773, and that its powers had been found inadequate to answer the purposes required, the former Act was repealed (sect. 1), and larger and more extensive powers were enacted for the government of the said town. By sect. 107, after reciting the appointment by the former Act of the commissioners, as trustees for maintaining and

erecting groyns and other works, &c., and that the said rate or duty had been found inadequate to the charges and expenses of the necessary works, the said commissioners were authorised and required from time to time, as to them should seem necessary, to repair, improve, and maintain, add to, alter, or remove the groyns, walls, or other fences or works already erected and built, or to be made, erected, and built, or to cause to be made, erected, and built, any new groyns or other works whatsoever, which may appear to them necessary, for the safety of town, or any part thereof, or any part of the beach or shore within the said town, and it was thereby enacted that there should be paid to them any *rate or duty* which they should think fit to order and direct, not exceeding the sum of 3*s.* for every chaldron of seal coal, culm, or other coal which should be landed on the beach of the said town, or in any other manner, by land carriage, or otherwise, brought or delivered within the limits of the said town. Additional powers were also given to the said commissioners by sects. 108 to 114, for levying the said rate or duty of 3*s.*, and for borrowing 5000*l.* on the credit thereof; and for the return and payment of a drawback of the whole *rate or duty* paid for every chaldron of coals so landed or unloaded within the town, and which should have been forwarded to any other place for sale or consumption. By sect. 116, after the moneys borrowed upon the credit of the duties and of the expenses incurred in erecting and maintaining the groyns and other works should have been fully paid, the commissioners were empowered to apply any surplus arising from the said duty in aid of the rate for paving, watching, lighting, and cleansing the said town, as to them should seem reasonable and proper. The rate referred to, the commissioners were authorised by other sections of the said Act—viz., 82 to 97 inclusive, to assess and levy on the occupiers of property in the said town to an amount not exceeding 4*s.* in the pound in any one year. Fresh powers were also given by the said Act for enlarging and regulating the said market, and the surplus arising from the said market, or of the rents or tolls thereof, was directed (sect. 106) to be applied either in aid of the rate for paving, cleansing, lighting, and watching the said town, or of the duty by the said Act directed to be levied upon coal and culm, as to the said commissioners should seem reasonable and proper.

4. The said town continued to be governed and regulated by the last-mentioned Act, and the powers of that Act were put in force and acted upon until the passing of the Act next hereinafter mentioned.

5. The Brighton Town Improvement Act (6 Geo. 4, c. clxxix), passed in 1825, repealed (sect. 1) the hereinbefore mentioned Acts of 13 Geo. 3, and 50 Geo. 3, and all matters and things therein respectively contained.

6. By sect. 3 of the said Act (6 Geo. 4 c. clxxix) new commissioners were appointed to carry into effect the provisions thereof.

7 By sect. 117 of the same Act, it was enacted that all the rates, tolls, duties, assessments, and impositions which were by this Act authorised to be rated, levied, assessed, or imposed by the said commissioners (except the rate for watering as aforesaid), should, when received, *be consolidated into and form one fund, and be applicable by the commissioners to be appointed by virtue of this Act for the general purposes thereof.*

8. The general purposes referred to in sect. 117 aforesaid include repairing, lighting, watching, and cleansing the streets, &c. (see sects. 31, 33, 34, 37, 41, 50, 59, 60, 70); the providing of fire engines (sect. 61); the purchase of lands, &c., for widening and improving streets, or for providing a site for a town hall (sect. 97); the erection of a town hall, the extension and enlargement of the market established under the two former Acts, the erection of town pound, and providing a prison (sect. 139); the establishment of an additional market for the sale of provisions, if deemed expedient (sect. 148); the establishment of a cattle, corn, and hay market sect. 149. The rates, tolls, duties, assessments, and impositions mentioned in the said section include the rates or duties levied on coals, coke, culm, cinders, ashes, and charcoal, the tolls of the markets, and all other sums receivable by the commissioners as the governing body of the town, as well as all sums levied by way of rates assessed upon the occupiers of tenements within the limits of the town, except the water rate.

9. By sect. 133 the said commissioners were empowered to levy a rate or assessment not exceeding 4*s.* in the pound upon the tenants or occupiers of all tenements, or hereditaments whatsoever within the said town: Provided that nothing in the said Act contained should extend to charge any agricultural land or buildings.

10. By sects. 162 and 163 it was enacted as follows: Sect. 162, "That it shall and may be lawful to and for the said commissioners, and they are hereby authorised and required from time to time as to them shall seem necessary and expedient, to repair, improve, maintain, or remove the groyns, walls, and other fences and works already erected and built for the protection of the said town from the encroachments of the sea, and also from time to time, as to them the said commissioners shall seem necessary and expedient, to erect, set up, build, repair, and maintain such other groyns, walls, jetties, piers, and works, for the better protection of the said town, or any part of the same, or of the beach or shore thereof, from the encroachments of the sea, and for facilitating the approach to the sea, and the landing of coals and other merchandise on the beach or shore of the said town." And by sect. 163, it was enacted "That there should be paid to the commissioners, any *rate or duty* which they should order and direct, not exceeding 3*s.* for every chaldron of coal or culm; 1*s.* 6*d.* for every chaldron of coke; 1*s.* for every chaldron of cinders and ashes: and 1d. for every bushel of charcoal; and so in proportion for a less quantity of the said several and respective articles *which should be landed on the beach of the said town, or in any other manner, by land carriage or otherwise, brought or delivered within the limits of the said town.*"

11. By sects. 164 and following sects, power was given for securing payment of the said rate or duty similar to the powers for the like purpose contained in the above mentioned repealed Act.

12. By sect. 171 it was provided, that in every case when any coals, culm, or coke should have been landed or unloaded within the limits of the act for the purpose of being forwarded to any other place or places, and *not to be consumed within the said limits*, then and in every such case the collector or treasurer to be appointed by virtue of this Act is hereby directed and required to return

and pay on demand to the owner or owners, or other person or persons on his, her, or their behalf, *a drawback of the whole rate or duty paid* for every chaldron of coals, culm, or coke so landed or unloaded, and which shall have been forwarded to any other place for sale or consumption.

13. The said town was incorporated by a charter of incorporation, dated the 1st April 1854, under an Act, 1 Vict. c. 78, to amend the 6 Will. 4, c. 76, to provide for the regulation of municipal corporations in England and Wales.

14. By The Brighton Commissioners Transfer Act 1855," the Commissioners acting under the Brighton Town Act ceased to act as such commissioners, and the Brighton Corporation and their successors were appointed the commissioners for carrying the Brighton Town Act into execution.

15. The Local Government Act 1858 (21 & 22 Vict. c. 98) was adopted by the corporation in 1860, and the corporation became the local board, and by The Local Government Supplemental Act 1861, a certain provisional order under the Local Government Act 1858, relating to the district of Brighton, and repealing and altering parts of the Brighton Local Acts in force within the district of the Brighton local board, was confirmed and the Local Government Supplemental Act 1861, was incorporated with the Local Government Act, 1858.

16. By the provisional order in the preceding paragraph, the Public Health Act and Local Government Act were, after the passing of an Act of Parliament confirming that order to be incorporated with the unrepealed parts of the local Acts, and the purposes of the unrepealed parts were to be taken and deemed to be purposes of the said Public Health Act and Local Government Act.

17. Sects. 61, 97, and 133 of the Brighton Town Act were repealed by the Local Government Supplemental Act 1861. Sects. 117, 139, 148, 149, 162, 163, 164, and 171, hereinbefore mentioned, of the Brighton Town Act remain unrepealed. Since that time the corporation have levied under the authority of the Public Health Act and the Local Government Act general district rates.

18. Sect. 87 of the Public Health Act authorises the levying of a general district rate as follows: "And be it enacted, that the treasurer shall keep a separate account, to be called the 'District Fund Account,' and the moneys carried to such account under the directions of this Act shall be applied by the Local Board of Health in defraying such of the expenses incurred or to be incurred by the said local board in carrying this Act into execution, and not otherwise expressly provided for, as they may think proper. And the said local board shall from time to time, when and as often as occasion shall require, make and levy, in addition to any other rate, a rate or rates to be called 'General District Rates,' for defraying such expenses as are charged upon that rate by this Act, and such other expenses of executing this Act in any district as are not provided by any other rate, or defrayed out of the district fund account."

19. The following is a summary of the general district account for the borough of Brighton for the year ending 31st Aug. 1866, showing the income and expenditure for that year. Similar accounts exist for the years ending 31st Aug. 1867 and 1868.

(Here follows a debtor and creditor account of the income and expenditure, on the debtor side of which the various items of income are stated, commencing with "general district rate," and then afterwards, and amongst some other items, come the following:—"Coal duties, 10,358*l.* 16*s.* 6*d.*;" "market tolls, 1270*l.* 14*s.* 2*d.*;" "fish market tolls, 217*l.* 15*s.* 9*d.*;" "Town Hall Rooms, 219*l.* 12*s.*;" "White Lion yard and premises, 33*l.* 14*s.*")

20. The commissioners of the town of Brighton, under the powers of the before-mentioned Acts, borrowed meneys for public purposes, on the security of the rates levied under the said Acts, and since the Brighton Commissioners Transfer Act 1855, the corporation has paid off portions thereof, and has borrowed further sums, their actual debt now amounting to 204,722*l.* 6*s.* 8*d.*

21. The corporation, under the powers vested in them, levy rates or duties on coals, culm, coke, cinders, ashes, and charcoal, amounting to between 9000*l.* and 10,000*l.* per annum beyond the costs of the collection, and these rates or duties, with certain market tolls, and rents of lands belonging to the corporation, *in respect of which tolls and rents income tax has always been charged and paid by the corporation*, are carried by the corporation to one fund, which is applied by them towards defraying the expenses under the Brighton Town Act and The Local Government Supplemental Act 1861, and the deficiency of such expenses is in each year defrayed by means of general district rates which are from time to time made by the corporation for that purpose.

22. The corporation deduct the income tax from the interest payable on their general debt. Income tax on the whole of the coal rates or duties was paid by the corporation under schedule A. for the years, ending 5th April, 1858 to 1865, inclusive.

23. For the year ending 5th April 1866, the assessment was made under schedule A.; the corporation appealed to the local commissioners of property and income tax, but the commissioners confirmed the assessment. The corporation did not pay the amount of the duty so assessed, but tendered to the collector the amount of the Income-tax in respect of the interest on their debt, which was refused by the collector.

24. For the years ending 5th April 1867 and 5th April 1868, assessments in default of returns were made on the corporation in respect of the coal rates or duties under schedule D (not schedule A as theretofore). This was in consequence of the Act 29 & 30 Vict. c. 36, s. 8, having passed in 1866.

25. These assessments were appealed from to the local commissioners, who confirmed the assessments, and the corporation did not pay the amounts so assessed, but made tenders to the collector of the Income-tax on the interest of the corporation debt, which was refused.

The question for the opinion of the court is, whether the rates or duties, levied by the Corporation of Brighton on coal, culm, coke, cinders, ashes, and charcoal, in manner above mentioned, are chargeable with the income-tax? If the court shall be of opinion in the affirmative, then judgment shall be entered up for the Crown for 500*l.* 7*s.* 10*d.* (being the amount of the assessments in respect of the coal rates or duties for the three years ended on the 5th April 1868), and costs of suit. If the court shall be of opinion in the negative, then judgment with costs of defence shall be entered up for the defendant, and the said corporation is to pay to the use of Her Majesty the several sums of money tendered by them for the

said three years for the duty in respect of the interest of the moneys borrowed by them, amounting in the whole to 305*l.* 15*s.* 9*d.*

Points for argument for the Crown. 1. That the Brighton coal dues are property or profits chargeable with duty under the Income Tax Acts. 2. That none of the provisions contained in any of the Acts creating the coal dues and regulating their use and application, relieve or except the dues from being chargeable with duty under the Income-tax Acts.

Points for arguments for the defendant. 1. That the coal rates or duties are not profits from or arising out of any "lands, tenements, hereditaments, or heritages" within the meaning of schedule A of the Act 5 & 6 Vict. c. 35. 2. That the coal rates or duties are not profits or gains within the meaning of schedule D of that Act. 3. That the coal rates are rates or assessments not chargeable by that Act as profits within the meaning of the proviso in sect. 102 of that Act.

The *Attorney-General* (Sir R. P. Collier, Q. C.), (with him were the *Solicitor-General*, (Sir J. D. Coleridge, Q.C.), and *C. Hutton*), for the Crown.—The corporation having a statutory power to levy tolls, called "rates" or "duties," upon coals imported or brought into Brighton, the question is whether that is a "hereditament," taxable under the Income Tax Act (5 & 6 Vict. c. 35). By sect. 1 of that Act the several sums to be annually raised are specified in schedules from A. to E. Under schedule A. the duty is imposed "in respect of the property of all lands, tenements, hereditaments, or heritages," which are the widest possible words. Such a toll as this granted to a man and his heirs, or to a corporation and its successors, is a "hereditament," or a "heritage," an incorporeal hereditament, and liable to income tax. It falls under either schedule A. or schedule D. As to schedule A., sect. 60 provides rules for assessing the duties thereunder; and in sub-rule (3) of rule 3, "tolls" are expressly mentioned as subject to the tax. Then, as to schedule D., sect. 100 lays down rules for charging the duties extending to "every description of property or profits not contained in schedules A., B., C., and E., and not specially exempted;" and by the rule in the sixth case, there set out, duty is to be charged "in respect of any annual profits or sums not falling under any of the foregoing rules, and not charged by virtue of any of the other schedules in the Act." These dues or tolls are therefore taxable as a "hereditament" under schedule A, *or* as "a description of property or profits not otherwise charged" under schedule D. They differ in no respect in principle from rents or market tolls, which are admittedly taxable. Under the Act of Geo. 3 the commissioners were empowered to levy 6*d.* a chaldron on coals landed at the beach, to be applied to the maintenance of groyns. By 50 Geo. 3, c. 38, that rate was increased to 3*s.* on coals so landed or brought into the town for consumption, and a drawback was fixed on coals forwarded through the town elsewhere, and the surplus of such duty was to go in aid of the town paving and lighting rate. By 6 Geo. 4, c. clxxix, the coal due was raised to 4*s.*, and "all the rates, assessments, tolls, duties, and impositions," raised for those purposes under the Act were *consolidated into one general fund.* This coal duty is now therefore applicable to all public borough purposes; but whether applicable to one or several purposes is immaterial *in principle. It is a* different kind of tax from rates levied on housekeepers and inhabitants generally, which are a taxing of the community by themselves through their legal representatives. [MARTIN, B.—Does the corporation of London pay income tax on coals imported into the City? *Manisty*, Q. C., contra.—No. As long as they had power to raise and apply the coal duty at pleasure they paid tax; but since the duty was specifically applied to public purposes they appealed, and their appeal was allowed.] The whole question of the revenues of the corporation of London and their liability to income-tax are now, I am informed, the subject of a special case, and will eventually come before this court. The market tolls and rents mentioned in the case are equally applicable to public purposes, and yet income-tax is paid on them. None of these rates or dues can be turned to private uses. They are analogous to tolls levied by the lord of a manor under a Crown grant on all goods of a certain kind imported into the manor. They are as much real property, and so a taxable "hereditament," as the tolls received from ships passing a lighthouse, the profits from which have been held to be real estate, and not personalty: (*Attorney-General* v. *Jones*, 1 Mac. & G. 574; 1 Hall & Tw. 493; 19 L. J. 266, Ch.) [MARTIN, B.—Are not these dues a "tenement? See Co. Litt. sects. 14, 15, note 20 (*a*).]

Manisty, Q. C. (with *Gainsford Bruce*), for the defendant, *contra*, was called on by the court. This is not a toll, nor in the nature of one, but a power to impose a tax. It is as thoroughly a tax as if it were so much in the pound raised on the houses in Brighton for public purposes. Without admitting that under the old Acts which are referred to in the case, this coal rate would have been taxable, we need only consider the 6 Geo. 4, c. clxxix, the only Act (excepting the public Act) now applicable to the matter. Sect. 117 of that Act consolidated these coal due into one common fund with all other "rates and assessments," for the general purposes of the Act, as specified in paragraph 8 of the case, whereby it lost any peculiar or exceptional character as a "toll," even if it ever had any prior to such consolidation. [MARTIN, B.—Your argument would apply to all the tolls and various kinds of corporate property, which, under sect. 92 of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), have been brought into the borough fund. What difference is there between these coal dues and the port and other dues and tolls at Liverpool, and many other large commercial places on which income tax has always been charged and paid?] These dues are similar to rates raised for ordinary borough purposes. Neither of them is in the nature of a "toll," but both form a common borough fund. They are as much a tax on the community for their general purposes as the tax on the houses, &c. which the commissioners have the power to levy; no distinction can be drawn between the two modes of raising money for the common fund. They are in no sense a "toll" or "hereditament," or "property," within the Income Tax Act, but in terms, in substance and in spirit, a power to tax or levy a rate, and if, as I contend, they are themselves a tax, it will be conceded that a tax is not the subject of taxation. The fallacy of the Crown is in calling that a property or "hereditament" which is purely and simply a rate, not arising like "tolls," which are chargeable to income-tax, out of property, e.g., "lands, tenements," &c. These dues come, therefore,

neither within schedule A nor schedule D. Moreover, they are exempt under sect. 102 of the Income-tax Act, by which payment of the tax on interest on money lent on rates or assessments not chargeable by the Act is provided for, showing by implication that rates, such as these coal dues really are, are exempted from the tax.

The *Attorney-General* in reply.—It begs the question to refer to sect. 102. The proviso there shows that, though there may be a class of rates not chargeable as "profits," there may yet be others which are. There is a clear distinction between rates, &c., which are chargeable as "profits," and those which are not. A rate levied by the corporation on householders is the community taxing itself by its elected representatives, and such a rate is not taxable. But these coal dues are a rate or "toll," in the nature of a "customs duty," imposed on all persons, whether inhabitants, strangers, or foreigners. Anyone entering the harbour with a coal ship, and landing coals on the beach, is liable to it. [KELLY, C. B.—Mr. Manisty says, that indirectly it is a tax on the inhabitants consuming coal.] It would be profitless to enter here into a difficult question of political economy, whether the incidence of taxation is upon the importer or consumer. Nothing can be gathered from the use of the word "rate" as shewing that the Legislature meant to place this duty in the same category with ordinary rates; for, in several old statutes, notably in 12 Car. 2, c. 4, s. 6, the word "rate" is used for a customs duty. In the present instance it means not "rate" in the modern sense and use of that word, but simply *pro ratâ*, that is, a payment in proportion to the quantity of coal imported. It is admitted that if this had been a grant to the Duke of Norfolk and his heirs, the toll would have been "profits" liable to income tax. What difference can it make, that, instead of a fixed sum, the grantee has power to fix the amount up to a given *maximum*? To sum up the points contended for by the Crown: First, there is the clearest distinction between ordinary rates and these dues, which are a tax on all the Queen's subjects and foreigners resorting to Brighton, and resemble a toll on all ships coming to a certain port, or passing a lighthouse; secondly, it is conceded that if granted to a private person they would be taxable, and no valid distinction has been established on the score of their being applicable to public purposes.

KELLY, C.B.—I am of opinion that the Crown in this case is entitled to the judgment of the court. In this, as in all other cases, we should look to the substance of the matter before us, and consider, not the mere language of one or another section of an Act of Parliament, but the substantial effect of all the provisions of the Act taken together. Now, in the first place, this is undoubtedly a duty upon coals, amounting to 3*s.* a chaldron, granted by the Acts of Parliament, which have been referred to, to the corporation of Brighton, giving to them an annual income, as stated in the case, of some 10,000*l.* *Primâ facie* their income would, no doubt, be liable to income-tax just as much as if it were that of a private individual. The question, therefore, is whether, in the nature of the duty, the objects to be attained, the purposes to which the duty is to be applied, or —if I may use an expression which belongs, as has been correctly observed by the Attorney-General, rather to the science of political economy than to the law—the "incidence of taxation," there is anything to exempt it from liability to income tax. Whether we look to the one or the other of those considerations, treating them as tests of the liability of the corporation to income tax, I think that no solid argument has been adduced before us against their liability to it. First, it was said that this duty was applicable to purposes to which alone, in general, rates, properly so called, are applied—that is to say, rates imposed not upon *all* the inhabitants, but upon the householders and other rateable inhabitants of a borough, not only for what may be called borough purposes, but for strictly parochial purposes, as for lighting and watching, and so forth. It is true, and I will refer to that consideration hereafter, that the purposes to which this coal duty is to be applied are conjoined. in one of the sections of the Act, with what may be called almost parochial purposes, the coal duty itself being thereby amalgamated with the funds raised in general by ordinary rates upon the rateable inhabitants. But when we come to look at the provisions of the Act, we find that the purposes to which this fund, including in it the sum levied in respect of this duty is applicable, are, in the first place, "repairing, lighting, watching, and cleansing the streets, houses, and other public passages and places;" purposes, no doubt, usually provided for by the ordinary borough rates. But we find also that it is applicable to the much larger and more extensive purposes of "the purchase of lands for widening and improving streets, the providing a site for a town hall, the erection of a town hall, the extension and enlargement of the market (established under the two former Acts), the erection of a town pound, and providing a prison; the establishment of an additional market for the sale of provisions if deemed expedient; and the establishment of a cattle, corn, and hay market." Now, no one can deny that, if this had been a fund created simply and merely for those several last-mentioned purposes, it would have been liable to income-tax. The purposes themselves when looked at, show that the produce of this fund, when it had been applied to those purposes, would itself be rateable. I think, therefore, that coupling the purpose, with the nature of the duty itself, there is no doubt that this rate or duty is liable to income-tax. But then it is said that it is amalgamated with these other funds, for watching and lighting; but in the Municipal Corporation Act, to which my brother Martin referred, there is a similar amalgamation. It might therefore as well be said that landed property of any description, producing large rents to a corporation, shall not be liable to income-tax, because, under the provision of the Municipal Act (s. 92), the profits arising from such property are amalgamated with all the other dues and taxes and rates to which the corporation may be entitled, and are applicable therefore to all the ordinary purposes to which rates alone are usually applicable. With regard to the argument that has been urged upon the word "rate," it is answered, if any answer were necessary, by the reference made by the Attorney-General to the Act of Charles II., where it is quite clear that the term "rate" is applied in several sections, and particularly in the 6th section, to a duty upon commodities imported, which would have been clearly liable to income-tax, if income-tax had been in existence at that period. Taking, therefore, the

whole case together as it is now before us, the only remaining question is, whether it can be contended that this is really and in substance a tax upon the *inhabitants* of Brighton; still more, whether it can be shown to be, as Mr. Manisty has insisted, that it is, a tax upon the *rateable inhabitants* of the place? It is really no such thing. If we look at the ultimate destination of every ton of coal which may be imported into or unloaded within the limits of the Act at Brighton, upon which this duty is levied, we shall find that the incidence of the tax is by no means confined to the rateable inhabitants of the town, nor even to the inhabitants of Brighton at large, but that it must fall upon the consumers, who may live at any imaginable distance from the town, or the limits of this Act. Suppose the, probably not unfrequent, case to occur, of a whole cargo of coals to be imported at Shoreham, consigned to a coal merchant in Brighton; they are conveyed from Shoreham to Brighton, and they pay the duty at the time of their being unloaded within the limits of the Act, whether they go by waggons or by barges, and so by sea, and whether loaded on the beach or unloaded from waggons at the coal merchant's store; there and then it is that the duty attaches and becomes payable. Upon whom, then, does that duty fall? In the first instance, no doubt, upon the coal merchant who has imported the coal; he pays the duty, and if the coal stopped there the duty would be upon him and him alone; but, when we trace it further, as it is necessary to do in order to follow up the argument to its legitimate end, we find that he may, and probably does, sell a portion of these coals to rated inhabitants of Brighton, and if that were necessarily the destination of the whole of the coal liable to this duty, there might be something in the argument which has been urged. But, on the other hand, these coals, thus imported into Brighton, and on which the coal merchant has paid the duty, are sold by him to and consumed by the poor as well as the rich people of the place, and consequently by a class, and probably the most numerous class, of inhabitants of Brighton who are not rateable at all, nor occupiers of houses, nor liable to any single rate made or imposed within the town. But it goes further, because the coal merchant may, and probably does, sell a considerable portion of such coals to persons resident in the neighbourhood of Brighton, but beyond the limits of the Act. If, therefore, this tax falls, as, indeed, the great majority of all taxes do sooner or later fall, upon the consumer, the "incidence of taxation" in this case is not upon the *rated inhabitants* of Brighton alone, nor upon the inhabitants of Brighton at large, but, as to a great portion of the coals, upon persons without the limits of the Act, and not resident in the town at all, but who are simply members of the community at large. The "drawback" is only payable upon coals originally destined for some point without the limits of the Act, and which are merely to be conveyed through Brighton. It seems to me, therefore, that this coal duty is a valuable and profitable source of income to which the corporation and their successors are entitled, for various purposes of the nature to which I have already adverted, and that, upon every principle applicable to the construction of the Income Tax Act, it is a valuable and profitable "hereditament," and as such liable to income tax.

MARTIN, B.—I am also of the same opinion. The first question proposed to us is, whether the rates or duties levied by the Corporation of Brighton upon coals under this Act of Parliament which has been referred to, are chargeable with income tax, and I am opinion that they are. It seems to me that the question depends upon whether they are, and can be designated as 'property or profits,' and that is the real question in the case. By the Act of 5 & 6 Vict. c. 35, the Legislature thought fit to impose upon the subjects of this country an income tax; and it is plain from the enactments of the statute, that they meant to include every species of property and profits whatever. The various descriptions of property, the subject matters to be taxed, are contained in five schedules; the first (A) says that the tax is to be imposed upon all "lands, tenements, and hereditaments;" and I think there is good reason for contending that this rate or tax is a "hereditament." But it is not, I think, material to decide that question now. The second schedule (B.) is in respect of the *occupation* of lands, tenements, and hereditaments, upon which a tax is imposed. The third schedule (C) imposes a tax upon "all profits arising from annuities, dividends, and shares of annuities payable to any person or body." The fourth schedule (D) charges the tax upon "the annual profits or gains arising or accruing to any person from any kind of property whatever, and upon the annual profits or gains arising or accruing from any profession, trade, employment, or vocation." The fifth schedule (E) is in respect of "every public office or employment of profit, and upon every annuity, pension, or stipend payable by Her Majesty." These five schedules include almost every imaginable species of property and profit. But, lest there should be any doubt upon the matter, sect. 100, (schedule D) enacts that "The duties shall extend to *every description of property or profits which shall not be contained in either of the other schedules* and not specially exempted." Now it seems to me to be almost impossible that any net could be spread wider than that is, for it catches "every description of property or profits" whatever, not previously comprised in any of the schedules, which alone seem to include almost everything. The real question then is, whether this coal rate or duty is "property or profits" within this Act of Parliament, the object of which was *to tax everything*. Now, I am opinion that the quality and nature of this rate depend upon the statute of 13 Geo. 3, and not upon the construction of the subsequent statute of Geo. 4, which Mr. Manisty has referred to and so much relied on. That subsequent statute enacted that, for the general benefit of the town, all the property of the corporation, including this duty and the profits of the market, and the rents of certain lands belonging to the corporation were to go into one common fund; and acordingly we have the amounts under each head of income set out in the account in paragraph 19 of the case. First, there is the general district rate; that would be a tax properly so called, and not in my opinion coming within the description of "property or profits." Then come "scavenging, pavements, highways, lighting streets, fees for testing gas meters," and then we have "coal duties 10,358*l.* 10*s.* 6*d.*" That is followed by "market tolls," and then by some other property belonging to them, "Town-hall Rooms" and "White Lion-yard premises." Now all these sources of profit are by the 6 Geo. 4 consolidated into one, but that

has not at all the effect of altering the quality or nature of these particular tolls; and, as my Lord has already stated, the Municipal Corporation Act (5 & 6 Will. 4, c. 76) directs that the rents of land and other property of the corporation shall be brought into the borough fund along with the rates to be raised in the ordinary way, yet no one can contend that, because that 92nd section so enacts, therefore, the property of the Corporation of Liverpool or London, or any other municipal borough, is to escape the payment of income-tax. It is nothing more than enacting that the income of public property shall bear its share of the expenditure of the kingdom. The 13 Geo. 3 was an Act "for paving, lighting, and cleansing the streets, lanes, and places within the borough of Brighthelmstone, in the county of Sussex, for removing nuisances and annoyances, and preventing the like for the future, for holding and regulating a market within the said town, for building and repairing groyns, to render the coast safe and commodious for ships and vessels to embark and land sea coal, culm, and other coal for the use of the inhabitants of the said town, and for levying a duty thereon, and for other purposes." By it commissioners were appointed, to whom powers were given to purchase lands for, and to establish a market in the town. That it seems they have done. They have purchased the land and established the market, and they collect market tolls by virtue of the Act, in regard of which tolls they admit the liability to pay income-tax. With respect, therefore, to one species of property created by the Act, they pay this income-tax. The Act then goes on to provide that these coal tolls shall be applied in repairing certain groyns in such manner as thereinafter mentioned. Then it recites that "the town of Brighthelmstone is situate by the sea, and within six miles of the port or harbour of Shoreham, and belongs to the said port; and great part of the said town having been destroyed by the breaking in of the sea, several groyns were some years since erected, which have preserved the said town, and the coast is now safe and commodious, at several times of the year, for ships and vessels to unload and land sea coal, culm, and other coal, at the beach of the said town, for the use of the inhabitants thereof. And whereas the said groyns are become greatly out of repair, and the inhabitants of the said town are not able to raise money sufficient to repair the same without the aid and authoirty of Parliament." It is then enacted that these commissioners shall be trustees for the purpose of "repairing, improving, maintaining, and preserving the said groyns." And then it proceeds to enact that, after the 20th June 1773, there shall be paid to the said trustees and their successors the sum of 6*d.* upon every chaldron of sea coal which may be landed on the beach of the coast of the town of Brighthelmstone, and they may appoint a person to receive it. And then, to the intent that the rate and duty might be truly paid, it was further enacted, "that no collector or officer of customs of the port or harbour of Shoreham (to which port the said town of Brighthelmstone doth belong and is subject) should give any discharge or take any report outwards for any ship, or permit any ship to leave the port until the master had produced a certificate that the above rate or duty had been paid or secured to be paid;" and it also contained a power enabling the commissioners "to enter any such ship in the event of non-payment of the said rate or duty, and to detain and sell such ship and her furniture for the purpose of realising the said rate or duty." And a power was also given to borrow 1500*l.* on the credit of the rate and duty. It seems to me, therefore, that this is a rate, a tax, or a property, which was given to these trustees absolutely; and if the repair of these groyns would not cost them a farthing, they were, nevertheless, entitled to the duty. They were entitled to receive it, wholly independent of any particular expenses in regard to the groyns; and though it may be said that the consideration for granting the tolls was the repair of these groyns, yet they were nevertheless absolutely entitled to them. As has been said by the learned Attorney-General, I see no distinction between this rate or duty and the rate or duty in respect of a light-house, which is well known to be a most valuable property. The Holyhead corporation had a right to erect lighthouses, and to levy a tax upon ships which passed by within a certain distance from them. That that was a property of the most valuable kind is evidenced by what my Lord stated in the course of this argument, that, in regard to one lighthouse alone, 400,000*l.* was paid to the owner of it upon its being taken possession of by the Government. I also happen to know, from my own knowledge and experience, several cases of the same kind, of corporations and individuals being entitled to payments of this sort in regard to certain duties to be performed, b t still not duties immediately connected with the expenditure of the sum of money received. For these reasons, therefore, and looking at the very general words of this Act of Parliament, and it being the object of the Legislature that every species of "property or profits" should be subject to it, I am of opinion that these coal rates or duties are a species of property falling within the "property or profits," which are the subject-matter for the imposition of the income-tax, and that the corporation of Brighton must pay income-tax upon them. They have paid it for several years, and it seems to me that they must continue to pay it.

KELLY, C. B.—My brother Channell who has just been called away on public duty as Election Judge, before he left the court, desired me to say, that having heard the arguments, he entirely concurred in the judgment which we were about to and have pronounced for the Crown.

Judgment for the Crown.

Attorney for the Crown, *The Solicitor of Inland Revenue*, Somerset House;

Attorneys for the defendant, *Tilleard, Son, Godden*, and *Holme*, 34, Old Jewry; agents for *D. Black*, Town Clerk, Brighton.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Jan. 26 *and* 27, 1871.

FOREMAN AND WIFE *v.* THE MAYOR, &c., OF CANTERBURY.

Local board of health—Liability for acts of their servants.

The defendants, who were the local board for the district of Canterbury, having employed their servants to do certain work upon the roads within such district, such servants left a heap of stones in

the road, without any light or caution being affixed, and the plaintiffs, who were driving along such road upon a dark night, and not being enabled to see such heap of stones, drove against them and were injured:

Held, that the defendants were liable for the negligence of their servants.

Quære, whether they would have been liable if the placing of the heap of stones in the road had been the act of their surveyor.

THIS was a rule calling upon the plaintiffs to show cause why the verdict returned for them should not be set aside, and a new trial had, on the ground of misdirection by the learned judge in holding the defendants, as a local board, to be liable in an action for the act complained of and proved, inasmuch as their liability, if any, as surveyors of the highways, is of a different character, and no liability to an action for damages exists in such a case.

The declaration stated that the defendants wrongfully suffered certain earth, rubbish, and stones, which had been placed by them in a heap on a public highway, to remain there during the night without any guard or light or means to prevent persons from driving against the same, whereby the said plaintiff, Alfred Foreman—who was then with his said wife lawfully driving in his cart drawn by his horse along the said highway, in the night time—drove his said cart and horse against the said heap and upset the said cart, and the said plaintiff Jane was thrown out of the said cart, and seriously and permanently injured and damaged.

The defendants were the local board of health, under the provisions of the Local Government Act 1858; and it appeared that on the evening of the 26th Nov. 1869 the plaintiff, Mr. Foreman, who was a builder and carpenter, was returning from Canterbury towards his own home, about 3 miles distant, together with his wife (the female plaintiff), in his spring cart, at about seven o'clock in the evening, which was very dark, and were proceeding at a moderate pace, when they came to a part of the road where a heap of stones had been placed, and which projected into the road a distance of about 7ft., and so narrowing the road at that part to about 13ft., causing a serious obstruction. Not seeing any obstacle in the way, the plaintiff drove against the stones, and the horse fell forward over them, throwing the cart over on its right side and injuring Mrs. Foreman by falling upon her, and inflicting upon her very serious injuries. The stones had been brought to the spot by a contractor for some works to be done there, where they were at the time of the accident, by the direction and with the consent of the surveyor of the defendants, such spot being within the district over which they had jurisdiction. At the trial it was admitted by the defendants' counsel that if there was any liability at all, the defendants were the parties liable.

Hawkins, Q. C. and *Archibald* showed cause, and referred to

11 & 12 Vict. c. 63, s. 117;
Gibson v. *The Mayor of Preston*, L. Rep. 5 Q. B. 218; 22 L. T. Rep. N. S. 293;
Harnall v. *The Ryde Commissioners*, 4 B. & S. 361;
Southampton Bridge v. *Southampton Local Board*, 8 Ell. & Bla. 801;
Harris v. *Baker*, 4 M. & S.

Denman, Q. C., in support of the rule cited,
Mersey Docks v. *Gibbs*, L. Rep. 1 H. L. 111; 14 L. T. Rep. N. S. 677;
Wilson v. *Mayor of Halifax*, L. Rep. 3 Ex. 119; 17 L. T. Rep. N. S. 660;
Holliday v. *St. Leonard's, Shoreditch*, 11 C. B., N. S., 192; 30 L. J. 360, C. P.; 4 L. T. Rep. N. S. 406;
Young v. *Davis*, 7 Hur. & Nor. 761; 31 L. J. 250, Ex.;

In the course of the argument LUSH, J. referred to sect. 37 of the 11 & 12 Vict. c. 63, as constituting the surveyor an officer whom the local board of health have no authority to dismiss without the consent of the general board of health.

The arguments are sufficiently set forth in the following judgment.

Cur. adv. vult.

Jan. 27.—BLACKBURN, J.—In this case Mr. Denman obtained a rule *nisi* for a new trial, "on the ground of misdirection by the Lord Chief Justice in holding the defendants, as a local board, to be liable in an action for the acts complained of and proved, inasmuch as their liability, if any, as surveyors of the highways, is of a different character, and no liability to an action for damages exists in such a case." [He stated the facts.] The accident having arisen in that way, it is quite clear that the persons who put the stones there were negligent in not putting proper lights to protect passengers coming along the road from the risk of running upon them, and those persons would be liable for that act of negligence; and if they acted as servants of other persons, those who stood in the relation of masters to them would be answerable for the consequences of that negligence. Mr. Denman, in the argument before us, endeavoured to raise a separate point—that the Chief Justice, in leaving the case to the jury, did not expressly ask them whether there was negligence in leaving those stones in the road and not having sufficiently lighted and guarded them. It appears plain enough upon the facts that negligence in some one must have been taken for granted at the trial, and the rule on that ground was refused, and was only granted on the ground I have stated. The local board of health are, by the Public Health Act 1848 (11 & 12 Vict. c. 63), s. 117, made surveyors of highways; and Mr. Denman correctly stated the law when he said that they would not be liable simply because they were surveyors of highways; but there is nothing in the Act which would relieve them, merely because they were surveyors, from liability which they would otherwise incur. In an ordinary case, where the surveyor of highways is acting for a township or parish, he would be clearly liable for any act of his own personal negligence. There is nothing to relieve him from that. If he had left the stones in the road in such a way as has been described, he would be personally liable for negligence. If he was himself the master of the servants, he would be equally responsible for their negligence. But in fact and in practice the surveyor never is the master of the persons who are employed on the roads. There is no matter of law which would prevent him being so. If, by any arrangement he made with the parish, he took upon himself to do the work by his servants, he would be responsible for those servants, though he was surveyor of the highways. But that being an unusual and uncommon state of things, it would require distinct proof to show that the persons who left the stones in that position were his servants, they generally being the servants of the parish, and the parish being a body which cannot be sued. But when it is a local

board who are acting as surveyors, the state of things is in general the other way. The persons who are employed as labourers to mend the highways are in general servants of the local board; although the local board of health are a body who might very well contract with a contractor, yet they are a body who generally do the work themselves, that is, by their servants, and pay those servants. Therefore, generally speaking, as a matter of fact, those who actually do the work, when it is done by a local board of health as surveyors, are servants of the local board of health. That, if it is a disputed fact, requires, of course, proof; but, at the same time, it would be the ordinary state of things. Now, when in the course of the trial evidence was about to be given in support of the case of the plaintiffs to show that the persons who left the stones there were servants of the local board of health, there was an admission made dispensing with further proof; and, after that, the question went upon whether the local board could be made responsible for what has been done. I have already said that it is our opinion that the local board of health incur no such liability merely because they are surveyors. But the local board of health, if they were masters of the persons who were guilty of negligence, would be responsible for their acts, and they are not relieved from that responsibility merely because they are either surveyors or a local board. There was one case cited in the course of the argument (*sup.*), in which the Court of Common Pleas decided that a body like the local board of health, who were made surveyors of highways, were not responsible for the negligence of those who were their servants; and upon looking at the facts of that case it would appear that it would have been an authority directly in point for the present defendants if the case were still an authority at all; but upon looking at the reasons of that decision, we consider it to be overruled by the decision of the House of Lords in the case of *Mersey Docks* v. *Gibbs* (*sup.*). It is not overruled by name, but the principle upon which that case was decided in the House of Lords does overrule it, because it was decided that a public body like the local board of health are answerable for the negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. Of course the individuals composing the body are not responsible; it is the local board of health that are responsible, and they would have to pay the damages out of the funds in their hands as a local board of health. There was one other point which occurred to one of the members of the court, and which was the only reason why we did not deliver judgment at once, and that is this: The 37th section of the Public Health Act 1848 requires the local board of health to appoint a surveyor and other persons named as officers and servants; and at the end of the section it is said that they may dismiss at pleasure all the officers and servants except the surveyor, and the surveyor is not to be dismissed without the approval of the General Board of Health. That being so, it would be a question to consider whether the surveyor whom they are thus required to appoint, and whom they are not allowed to dismiss at pleasure, *is in the* relation of servant to them in such a way as *that, if the matter were being* done by the surveyor, *and the cause of the mischief* were the negligence of the surveyor, the local board of health would be responsible for his negligence. I do not wish to express any opinion as to whether they would or would not be responsible. But if it had appeared that the mischief had been done by the negligence of the surveyor, and that point had been raised, it would have been desirable to consider the question, and determine whether they would be responsible for the act of the surveyor or not. But we think no such question arises in this case. It is probable that the negligence was not that of the surveyor, but of some subordinate who, though appointed by the surveyor, was still the servant of the local board, as much as a guard or a porter on a railway is the servant of the railway company, although they are appointed by the manager of the traffic, or the secretary or some other superior officer. It is probable that the negligence was that of some subordinate; it was a fact exclusively within the knowledge of the defendants, and if their case was that the negligence was the negligence of the surveyor, who, in one view, would not be their servant, that would have been a matter which would have required proof at the trial; and where the admission was made in the general terms it was, it dispenses with this proof; and we think it cannot be said afterwards that there was any misdirection in the judge in not pointing out that distinction, inasmuch as if it had been pointed out at the trial, it probably would have been shown that the negligence was not the negligence of the surveyor, but was the negligence of some undoubted servant of the local board. For these reasons we think the rule ought to be discharged.

Rule discharged.

Attorney for the plaintiffs, *Flint*, Canterbury.
Attorney for the defendants, *Lake*, Canterbury.

Wednesday, April 26, 1871.

REG. (ON THE PROSECUTION OF LOVIBOND) v. PRICE AND OTHERS.

Mandamus — Return — Demurrer — Commissions for inquiring into corrupt practices at elections — Refusal to grant certificate of indemnity reviewable by this court.

The decision of commissioners acting under the 15 & 16 *Vict. c.* 57 *and the* 26 *Vict. c.* 29 (*for inquiring into the existence of corrupt practices in parliamentary elections*), *refusing a witness a certificate under sect.* 7 *of the last-named Act on the ground that he had not answered any one of the questions put to him, the answers to which might criminate or tend to criminate him, is reviewable by this court.*

The prosecutor was examined by such commissioners, and certain questions were put to him, criminating or tending to criminate him, which he alleged he duly answered, but which the commissioners were of opinion he had not answered, and thereupon refused him a certificate of indemnity. A mandamus having been issued commanding them to grant such certificate, and alleging that he had answered every question relating to the matters then inquired into and the answers to which criminated or tended to criminate him, the said commissioners returned that they, after due deliberation and consideration thereupon had, were of opinion and duly adjudged and determined that he had not answered every one of the said questions, the answers to which *might criminate or tend to*

criminate him; and thereupon, and for the reasons aforesaid, they were of opinion and duly adjudged and determined that the said H. L. was not entitled to receive from them, and that it was not their duty to give, and they declined and refused and still refuse to give him such certificate:
Held, upon demurrer, that the return was bad.

IN Hilary Term 1870, this court made absolute a rule calling upon Edwin Plumer Price, Thomas Chisholm Anstey, and Charles Edward Coleridge, Esqrs., the commissioners appointed to inquire into the existence of corrupt practices in the borough of Bridgewater, to show cause why a writ of *mandamus* should not issue directed to them commanding them to grant to Henry Lovibond a certificate of protection and indemnity pursuant to the statute 26 & 27 Vict. c. 29, s. 17: (see the report of the rule, 22 L. T. Rep. N. S. 12.)

The *mandamus* was as follows:

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to Edwin Plumer Price, Thomas Chisholm Anstey, and Charles Edward Coleridge, Esquires, the commissioners appointed pursuant to the provisions of the statute passed in a session of Parliament holden in the 15th and 17th years of our reign, for the purpose of making inquiry into the existence of corrupt practices in the borough of Bridgewater. Whereas, by our royal commission issued for the purpose of causing inquiry to be made into the existence as aforesaid of corrupt practices in the said borough of Bridgewater, you, the said Edwin Plumer Price, Thomas Chisholm Anstey, and Charles Edward Coleridge, Esquires, were the commissioners named in such commission, and we have been given to understand and been informed in our court before us that on the 23rd Aug. last you commenced your inquiry under such commission, at the said borough of Bridgewater, and that one Henry Lovibond, of the said borough of Bridgewater, attorney-at-law, having been duly summoned, personally appeared before you, then being such commissioners as aforesaid, at Bridgewater aforesaid, to be examined by and before you, touching the subject matter of the said inquiry; and that upon such inquiry he was duly sworn, and was required by you to give, and did give on oath, on the 2nd and 3rd Sept. last, certain evidence, and answered every question relating to the matters then inquired into, which he was required by you, as such commissioners, to answer, and the answers to which criminated or tended to criminate him, the said Henry Lovibond; and that he was, in consequence of so answering, entitled to receive from you, and it was your duty to give him, under your hands, a certificate, stating that he was, upon his examination, required by you, the said commissioners, to answer questions relating to the matters aforesaid, the answers to which criminated or tended to criminate him, and that he had answered all such questions. And, whereas, we have been further given to understand that he, the said Henry Lovibond, being so entitled as aforesaid, did in due form apply to you, as such commissioners, for a certificate as aforesaid, and that you, the said commissioners, refused to give him such certificate, and still do refuse to give it, in contempt of us, and to the great damage of him, the said Henry Lovibond, as we have been informed from his complaint made to us in that behalf. Whereupon he hath humbly besought us that a fit and speedy remedy may be applied in this respect, and we, being willing that due and speedy justice should be done in the premises (as it is reasonable), do command you, the said Edwin Plumer Price, Thomas Chisholm Anstey, and Charles Edward Coleridge, as such commissioners as aforesaid, firmly enjoining you that immediately after the receipt of this writ, you do give the said Henry Lovibond such certificate as aforesaid, or that you show us cause to the contrary thereof, lest by your default the same complaint shall be repeated to us, and how you shall have executed this writ, make known to us at Westminister forthwith, returning to us this our writ. And this you are not to omit, &c. Witness, Sir Alexander James Edmund Cockburn, Baronet, at Westminster, the 27th Jan. 1870.

By the Court, NORTON.

The return ran thus:

Return.—We, the commissioners, do most humbly certify and return to our sovereign Lady the Queen, at the time and place in the said writ mentioned, as follows, that is to say, that we, the said commissioners, in the said writ named, were, by warrant under the royal sign manual, dated the 23rd June 1869, duly appointed commissioners (pursuant to the provisions of the statute in the said writ mentioned) for the purpose of making inquiry into the existence of corrupt practices at the last election of members to serve in Parliament for the borough of Bridgewater, and that in pursuance of such appointment, and under the authority of the law in that behalf, the said Henry Lovibond was duly summoned, and appeared and was examined on oath before us in relation to such corrupt practices as aforesaid, and that in the course of such examination the said Henry Lovibond was duly required by us to answer certain questions relating to such corrupt practices as aforesaid, the answers to which might criminate or tend to criminate him; and having so examined the said Henry Lovibond and duly required him to answer such questions as aforesaid, we, the commissioners, after due deliberation and consideration thereupon had, were of opinion and duly adjudged and determined that the said Henry Lovibond had not answered every one of the said questions, the answers to which might criminate or tend to criminate him. And thereupon, and for the reasons aforesaid, we, the said commissioners, were of opinion, and duly adjudged and determined, that the said Henry Lovibond was not entitled to receive from us, and that it was not our duty to give, and we declined and refused, and still refuse, to give him such certificate as in the said writ is in that behalf mentioned.

EDWIN PLUMER PRICE.
For myself and the other commissioners.

To this return there was a demurrer.

The prosecutor's points were, first, that the return made by the defendant to the writ of *mandamus* is bad as containing no legal answer thereto, inasmuch as it neither traverses, nor confesses, and avoids the allegations in the said *mandamus;* secondly, that the adjudication of the said commissioners that the said Henry Lovibond had not answered every one of the said questions is not conclusive in that behalf, and that their finding is subject to be reviewed by this court; thirdly, that this court has power to review the determination of the said commissioners on any question of fact which it is the duty of the said commissioners to determine; fourthly, that upon the facts disclosed it was the duty of the said commissioners to give the said Henry Lovibond such certificate as in the said writ is mentioned; fifthly, that the return of the said commissioners does not traverse or deny the allegation in the said writ that the said Henry Lovibond had answered every question relating to the matters then inquired into which he was required by the said commissioners to answer, and the answers to which criminate, or tended to criminate him, but merely alleges that the said commissioners were of opinion that he had not answered every one of such questions, and adjudged and determined that the said Henry Lovibond had not answered every one of such questions; sixthly, that the said return is bad, inasmuch as it tenders no issue in fact which the said Henry Lovibond can accept, and does not deny as a fact that the said Henry Lovibond had answered all such questions as aforesaid; seventhly, that if the said Henry Lovibond did, in fact, as is alleged in the said writ, answer all such questions (and which fact is not denied by the said commissioners in their said return), the allegation in the return to such writ, that it was the opinion of the said commissioners that he had not so answered, is not a legal answer to such allegation of fact.

The defendants' points were, first, that the

return made by the defendants to the writ of *mandamus* herein contains matter affording a good answer in law to the said writ; secondly, that it was the duty of the said commissioners, and they were bound to determine whether the said Henry Lovibond had answered every one of the said questions, the answers to which might criminate, or tend to criminate him, before granting him such certificate, as in the said writ in that behalf is mentioned; thirdly, that the said commissioners, having adjudged and determined that the said Henry Lovibond had not answered every one of the said questions, the answers to which might criminate, or tend to criminate him, the finding and determination of the said commissioners is conclusive in that behalf, and assuming them to have acted *bonâ fide* in the discharge of their duty (which is not questioned), such finding and determination on a question of fact is not subject to be reviewed by this court; fourthly, that this court has no power to review the determination of the said commissioners on any question of fact which it is the duty of the commissioners to determine; fifthly, that the said commissioners, having adjudged and determined that the said Henry Lovibond had not answered every one of the said questions, the answers to which might criminate or tend to criminate him, the said Henry Lovibond, was not entitled to receive from them, nor was it their duty to give him, such certificate as in the said writ is in that behalf mentioned.

The *Attorney-General* (the *Solicitor-General* and *Archibald* with him) now appeared on behalf of the commissioners in support of the return to the *mandamus*, and stated that the question having been very fully argued by himself and his learned friends upon the rule absolute for the *mandamus*, and having no additional arguments to present to the court, and as the same question arose upon the demurrer which was so argued upon the rule, he did not propose again to argue the matter, but would be content with the judgment of the court being pronounced for the prosecutor without argument (if the court should remain of the same opinion as when the rule was made absolute), so that the case should be taken at once to the Exchequer Chamber, since, should that court affirm the judgment of this court, legislation upon the subject might be instituted.

Henry James, Q. C. (*T. W. Saunders* with him), assented to this, remarking that, when the rule for the *mandamus* was made absolute, their Lordships expressed their views at considerable length, and that whichever party succeeded upon the present argument, resort would be had to a court of error.

COCKBURN, C. J.—Although the decision of this court in ordinary cases making a rule absolute for a *mandamus* is not to be taken as binding the court upon the argument upon the return, since it is merely an expression of an opinion that there is sufficient shown to call for an answer; yet as this case was very fully argued upon the rule, and each member of the court expressed his views very strongly in the prosecutor's favour, and we see and have heard nothing to lead us to the belief that we are likely to change our opinions, there will be no useful end accomplished by a re-argument. Our judgment, therefore, may at once be given for the prosecutor, though this course must not be taken as a precedent.

Judgment for the prosecutor.

In consequence of the course sanctioned by the court, the judgments pronounced by the learned judges upon making the rule for the *mandamus* absolute is to be taken as the judgment now pronounced by them. (See the judgments already reported in *Reg.* v. *Price and others* (*Bridgewater Commissions; Ex parte Lovibond*), 22 L. T. Rep. N. S. 12.)

Attorney for the prosecutor, *John Bishop*, Tudor-street.

Attorney for the Commissioners, *The Solicitor to the Treasury.*

Saturday, April 29, 1871.

CLARKE AND GOODGE (apps.), *v.* STANFORD (resp.)

Hackney carriage—What is a "plying for hire" 32 *&* 33 *Vict. c.* 115, *ss.* 4, 7.

A carriage which is standing in a place to which a certain portion of the public have access, ready to be hired by the public resorting to such place, is a carriage plying for hire, and is therefore a hackney carriage within the meaning of the 32 *&* 33 *Vict. c.* 115, *and must be licensed.*

A railway company arranged with a livery stable keeper that he should supply certain flys to stand in a yard at their station to await the arrival of passengers by their trains. The drivers were not to invite passengers by speech, but were to wait until called for by a servant of the company, or hired by the passenger himself. In pursuance of this arrangement, a fly was so placed:

Held, that this was a plying for hire, which constituted the fly a hackney carriage, requiring a licence.

THIS was a case stated by justices under the 20 & 21 Vict. c. 43, upon a conviction of the appellants (32 & 33 Vict. c. 115) as follows:—

First, the informations charge that on the 18th June 1870 the said Frederick E. Clarke did unlawfully ply for hire, with an unlicensed carriage, at Harrow Railway Station, contrary to the 32 & 33 Vict. c. 115, and also that the said Samuel Goodge, on the said 18th June 1870, did unlawfully act as driver of an unlicensed hackney or stage carriage at Harrow Railway Station, contrary to the 32 & 33 Vict. c. 115; secondly, the following were the facts, as proved:—The London and North-Western Railway Company have a station at Harrow, within the limits of the metropolitan police district, which are those also of the Hackney Carriage Act (32 & 33 Vict. c. 115). The yard in front of the station is inclosed and is their private property. The appellant is a livery stable keeper. The railway company had upon certain terms arranged with the appellant to supply certain broughams, flys, and carriages, part of the same terms being that the said vehicles should stand on the premises of the company within the said yard to await the arrival of passengers by the trains. The appellants' servants who drive the flys were instructed not to invite passengers by speech, but to wait until called by a servant of the company or hired by the passenger himself; when so called the person requiring the fly entered and was driven according to his own directions, and paid the fare; thirdly, it was contended by the respondent that a fly so used was within sect. 4 of the Hackney Carriage Act (32 & 33 Vict. c. 115), which defines a hackney carriage to be "any carriage for the conveyance of passengers which

plies for hire within the limits of this Act, and is not a stage carriage," and therefore requiring to be licensed, and to observe the regulations prescribed by the provisions of that Act; fourthly, It was contended by the appellants that, inasmuch as the fly was in the private yard of the railway company, it was not "plying for hire" within the meaning of the statute above cited; fifthly, our opinion was that the appellants' fly, while waiting in the yard of the railway station, was in fact "plying for hire" within the meaning of the definition of a hackney carriage in sect 4 of the 32 & 33 Vict. c. 115. We were of opinion that the fact that the driver was ready to take up any passenger coming by rail as a fare was sufficient, and that the circumstance that the yard was enclosed and that other hackney carriages were not allowed there was of no moment, and we therefore convicted the appellant Clarke in a penalty of 10*s*., and the appellant Goodge, as such driver, in a like penalty of 10*s*; sixthly, the opinion of this honourable court is requested whether such construction of the said statute is correct.

If, in the judgment of this honourable court, the fly as contended by the appellants was not a hackney carriage plying for hire within the meaning of the said recited statute, then the conviction is to be quashed; but if the opinion of this honourable court should be that under the circumstances above stated the fly of the appellants was a hackney carriage plying for hire within the meaning of the said statute, then the conviction is to be confirmed. Given under our hands this 16th day of November 1870.

EDWARD WM. COX.
IRWIN E. B. COX.

By the 32 & 33 Vict. c. 115 (The Metropolitan Public Carriage Act 1869), power is given to one of the Secretaries of State, who by sect. 6, may from time to time license to ply for hire within the limits of the Act hackney and stage carriages.

By sect. 7 it is enacted that, "if any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding 5*l*. for every day during which such unlicensed carriage plies;" and the driver is also liable to a similar penalty unless he proves that he was ignorant of the fact of the carriage being an unlicensed one.

Bosanquet appeared for the appellants.—This was not plying for hire within the meaning of the Act, which means a holding out to the general public a readiness to take all passengers. Here the carriage was upon the private premises of the railway company, and was there for the purpose alone of taking up passengers who may have come by the trains. The carriage was not plying for passengers, but was upon the premises of the company to accommodate those persons coming by the trains who may have required its use. It is like the case of a carriage going into the courtyard of a nobleman's house at his request, when he has a number of guests more than he can accommodate with vehicles of his own for their departure. The case of *Case* v. *Storey* (L. Rep. 4 Ex. 319; 38 L. J. 113, M. C.; 20 L. T. Rep. N. S. 618) is in point. There it was held that a hackney carriage, whilst on the premises of a railway company by their leave for the accommodation of passengers by their trains, is not "plying for hire" in any "street or place" within the meaning of the Hackney Carriage Acts; and although that case was decided under the 1 & 2 Will. 4, c. 22, s. 4, which enacts that every carriage with two or more wheels which shall be used for the purpose of standing or plying for hire in any public street or road at any place within the distance of five miles from the General Post-office shall be deemed and taken to be a hackney carriage within the meaning of this Act, yet the principle of that case applies to this one, although the words "public street or road," are not in the present statute. In his judgment Kelly, C.B. says: "First, then, was the carriage in this case standing or plying for hire?" Those words must mean that the carriage is to be at the disposal of anyone of the public who may think fit to hire it. I think, therefore, that they are not applicable here. The railway company, it appears, allow a number of cabs to come upon their premises, and there await the arrival of the trains, in order to provide accommodation for the arriving passengers. In one sense these cabs are undoubtedly plying for hire, but they are not so plying in a general sense, but only to such an extent, and subject to such regulations, as the licence given to them by the railway company may admit. To what extent and subject to what regulations must depend upon the particular terms of the licence in each case. For example, there might be an agreement between the company and the cabmen they allowed to enter their station as to the order in which passengers should be taken up, and so forth. But whatever particular arrangement might be made, the hackney carriages subject to it could not be said to be "standing or plying for hire," which must mean ready at any moment to be hired by any one of the public. [COCKBURN, C.J.—That case was decided upon an Act of Parliament in which the words were different. There it was necessary that the plying for hire should be in a public street or road; but under the present Act the plying for hire may be in any place.] The judgment, however, of the Lord Chief Baron is still in point as regards what constitutes a plying for hire. [MELLOR, J.—You say that he was upon the premises of the railway company by agreement with them.] Yes; that is so—[COCKBURN, C.J.—But he was not carrying passengers for them; he was there to carry anyone who came by the railway. LUSH, J.—It would seem as though the Legislature intended to meet such a case as this by making use of the words "any carriage for the conveyance of passengers which plies for hire within the limits of this Act." According to your argument, all the cabs in London would be exempt if they merely went to the stations to take up passengers.] Suppose a fly proprietor had his establishment on the other side of the railway company's premises, and a railway servant goes there and says, "Come for a passenger," he would not be liable as he would be upon the private property of the company, and not liable to be hired by the general public. What difference, therefore, is there if he has his fly ready upon the company's premises? [COCKBURN, C.J.—There is nothing in the Act which says that the plying for hire must be in a public place.] He was merely waiting to be hired in a private place. [COCKBURN, C.J.—It was private property, but a public place.] Merely waiting to be hired cannot be a plying for hire. [LUSH, J.—It is waiting to be hired in a place to which the public resort.]

COCKBURN, C.J.—This is clearly a case within the statute. It is not the same as *Case* v. *Storey*,

because under the Act upon which that decision took place it was necessary that the party should be plying for hire in a public street or road. It is true that the Lord Chief Baron thought that being at the station ready to be hired was not a plying for hire; but we are not bound by that opinion, as it was not necessary to the decision of the case. I think that the words "plying for hire" are satisfied by the facts of this case. The flys are certainly admitted to the station yard by virtue of an agreement with the company, whereby it is stipulated that the vehicles should stand on the premises of the company within the said yard to await the arrival of passengers by the trains, the drivers being instructed not to invite passengers; and although it is not so found by the case, yet I take it that the flys are to ply for hire exclusively for the purposes of the railway, and that it would not be open to them to carry any other portions of the public. Well, but surely this is a plying for hire, for it is a standing in an open place ready to take as a fare any person who may arrive by the trains. I think that when a person has a carriage ready for use at a place frequented by the public, and is willing to carry a passenger, though he does not solicit anyone, he is plying for hire. This statute carefully avoids the difficulty of the former one as exposed in the case of *Case* v. *Storey*, and, I have no doubt, advisedly.

MELLOR, J.—I am of the same opinion. Although in some sense the premises upon which the fly was standing were private property, and the company had a right to exclude persons from it, yet as they allowed a certain number of flys to come there for the purpose stated, it became a public place, and the plying was undoubtedly for hire. The difference between the present and the former statute is, that in the former one "public street or road" are mentioned, whilst in the present one these words are omitted. I must say that I am of opinion that this is a carriage which is liable to the duty. It is allowed to enter the station yard under certain conditions. What is it there for? Why, to be hired. It is then plying for hire. The driver exhibits himself, and is ready to allow his fly to be hired. The fly is in a place where carriages stand to be hired, and I cannot see how this can be anything else than a plying for hire.

LUSH, J.—I am also of opinion that this was a plying for hire. It is no longer necessary that the plying should be in a public street or road. The new Act apparently intentionally excludes that condition. Now this carriage was waiting to be hired by passengers who arrived by the railway. Surely this was a plying for hire.

Judgment for the respondent.

Attorney for the appellants, *Venn*, 3, New-inn, Strand.

Attorneys for the respondent, *Ellis* and *Ellis*, Spring-gardens.

COLEMAN (app.) *v.* BATHURST (resp.)

Game — Reservation of to the landlord — What amounts to—1 & 2 Will. 4, c. 32 (Game Act).

The appellant, who was tenant of a farm under the respondent, as his landlord, entered into an agreement with him that he would not destroy any game, nor keep any hound or other dog destructive thereof, and would at all times at the request of his landlord or his agent forbid any person or persons hunting, shooting, coursing, fishing, or trespassing on the said farm, or any part thereof, and would endeavour to the utmost of his power to preserve all game bred and being thereon. The appellant having killed certain game upon the said farm, and being proceeded against under sect. 12 of the 1 & 2 Will. 4, c. 32 (the Game Act):

Held (per Cockburn, C.J. and Mellor, J., Lush, J. dissentiente), that the agreement did not amount to a reservation of the game to the respondent, and that the conviction of the appellant was therefore erroneous.

1. AT a petty sessions, holden at Salisbury in and for the Salisbury and Amesbury division of the county of Wilts, on the 20th Sept. 1870, an information preferred by Sir Frederick Hutchinson Hervey Bathurst, Bart., hereinafter called the respondent, against John Coleman, hereinafter called the appellant, under sect. 12 of the Act 1 & 2 Will. 4, c. 32, charging for that he the said John Coleman, on the 15th Sept. 1870, in the liberty of Clarendon Park, in the said county of Wilts (he being the occupier of certain land there situate), the right of killing the game upon such land being reserved by his landlord (the said Sir Frederick Hutchinson Harvey Bathurst, Bart.), did then and there unlawfully kill upon such land certain game, to wit, five hares, contrary to the statute in that case made and provided, whereby and by force of the statute the said John Coleman had forfeited a sum of money not exceeding 2*l.*, and for every head of game so killed such sum of money not exceeding 1*l.*, was heard and determined by us, the said parties respectively being then present by their respective attorneys, and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to pay for the said offence the sum of 2*l.*, and the further sum of 1*l.* each for four head of game proved to have been killed by him.

2. And whereas the appellant being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute (20 & 21 Vict. c. 43), duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf; now therefore we, the said justices, in compliance with the said application and the provision of the said statute, do hereby state and sign the following case.

3. Upon the hearing of the information it was proved that the appellant was tenant to the respondent of a farm called Rangers Lodge Farm, situate within the liberty of Clarendon, in the county of Wilts, under the terms and conditions of an unstamped written agreement, a copy of which, signed by the attorneys of the respective parties, is annexed to this case. A duplicate of the said agreement, signed by the agent of the respondent, was delivered to and is in the possession of the appellant.

4. The respondent's attorney tendered the said agreement in evidence, but its reception was objected to by the appellant's attorney, on the ground that it was not stamped. The respondent's attorney contended that the said information was a criminal proceeding within sect. 27 of the statute 17 & 18 Vict. c. 83, and that the said agreement was therefore admissible in evidence, although it was not stamped. He also offered to pay the

penalty and duty on the said agreement in case we were of opinion that the same was not admissible in evidence unless duly stamped. We admitted the said agreement although not stamped, and without payment of the duty or penalty.

5. The respondent's gamekeeper proved that he had known the farm in question for the last six years, during the whole of which time the respondent had exercised the exclusive right of shooting over it. The appellant's attorney objected to this evidence being received.

6. It was also proved that on the 15th Sept. 1870, the appellant shot four hares on the said farm called Rangers Lodge Farm, and that when he was accosted by the respondent's keepers, the said four hares and a fifth also, with a rabbit, were in the appellant's possession, and that he asserted at the time that he had a right to kill game, on the ground that he had taken out a game certificate, and expressed his intention of continuing to do so.

7. It was contended by the appellant's attorney that the exclusive right to the game had not been reserved by the said agreement to the respondent.

8. A majority of the bench were of opinion—first, that the said information was in a criminal proceeding within the meaning of sect. 27 of the 17 & 18 Vict. c. 83, and that therefore the said agreement was admissible in evidence, although not stamped; secondly, that on a true construction of the said agreement the game on the said farm was reserved to the respondent, and we gave our determination against the appellant in the manner before stated.

9. The questions of law arising on the above statement for the opinion of this court are, first, whether the agreement was, under the circumstances herein stated, legally admissible in evidence without being stamped; secondly, whether, upon a true construction of the said agreement, the game was reserved to the respondent.

10. If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion that the game was reserved by the said agreement to the respondent, but that the said agreement being unstamped was not legally admissible in evidence, the respondent is to be at liberty to stamp the said agreement, and thereupon the conviction is to stand. But if the court should be of opinion that the game was not reserved by the said agreement to the respondent, then the said conviction is to be null and void.

Given under our hands this 22nd Nov. 1870, at Salisbury, in the county aforesaid.

For selves and fellow justices, RADNOR.
EDW. HUXMAN.
C. R. SMITH.

The agreement referred to was as follows:—

Memorandum of agreement made and entered into this 24th May 1864, between Sir Frederick Hutchinson Hervey Bathurst, of Clarendon-park, in the county of Wilts, baronet, by John Hayward, his agent of the one part, and John Coleman, of Salisbury, in the said county of Wilts, veterinary surgeon, of the other part, whereby the said John Hayward agrees to let and the said John Coleman agrees to take and rent from the 29th Sept. now next ensuing, all that farm called Rangers Lodge Farm, situate within the liberty of Clarendon in the county of Wilts, &c. (The usual covenants were contained therein, and amongst others the following), "And the said John Coleman also hereby further agrees that he will not destroy any game nor keep any hound or other dog destructive thereof, and will at all times at the request of the said Sir Frederick Hutchinson Hervey Bathurst or his agent forbid any person or persons hunting, shooting, coursing, fishing, or trespassing on the said farm, or any part thereof, and will endeavour to the utmost of his power to preserve all game bred and being thereon.

By sect. 12 of the 1 & 2 Will. 4, c. 32 (The Game Act) it is enacted:

That where the right of killing the game upon any land is by this Act given to any lessor or landlord in exclusion of the right of the occupier of such land, or where such exclusive right hath been, or shall be specially reserved or granted to, or doth or shall belong to the lessor, landlord, or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill, or take any game upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord, or other person having the right of killing the game upon such land, such occupier shall, on conviction before two justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding 2*l*., &c.

Metcalfe appeared for the appellant.—Upon a true construction of the agreement it cannot be said that the game was reserved to the respondent. The appellant merely agreed not to destroy the game.

Lopes, Q. C. (*Bromley* with him) was called upon.—The agreement must be taken as reserving the game to the landlord—no particular form of words is necessary; the agreement really has no meaning unless it was meant to reserve the game to the landlord. The tenant has covenanted not to kill it, then for whom is it reserved? [MELLOR, J.—*Primâ facie* the game belongs to the tenant; and it is for you to show that it belongs to some one else. It might well be that the tenant might undertake to preserve the game without its being in any one else.] How can it be said to be in him when he undertakes not to destroy it, and to do all he can to prevent others from destroying it? [COCKBURN, C. J.—The landlord has stipulated that as long as the lease continues the tenant shall not kill the game; the game is not reserved to him. The right is, in fact, reserved to no one. The landlord has no right to go upon the land. MELLOR, J.—He merely disables the tenant from killing, he does not reserve the game to himself.] The intention of the parties is very clear; it was undoubtedly that the game should not be the tenant's, but his landlord's.

COCKBURN, C. J.—Although the case is not free from doubt, I must say that I do not think that this agreement is sufficient to bring it within the 12th section. The agreement prevents the tenant from killing game, and he certainly commits a breach of that agreement by doing so, for which an action would lie. But the question is, does the agreement bring the case within the 12th section of the Game Act? [His Lordship here read the section.] Now this agreement stipulates that the tenant shall not kill or destroy the game; but it does not go on to give the game to the landlord, or to any other person. It would seem as though the right to the game were in abeyance. The right is incident to the soil, unless there be a stipulation that the tenant is not to have it. I think in this case that the stipulation does not give the game to the landlord, and so, that he has no right to go upon the land to kill it. I think that there should be something more than an absence of a right in the tenant to kill game to bring it within the 12th section. It must be remembered that it is sought to charge this not as a civil, but a criminal offence.

MELLOR, J.—I am of the same opinion. The

only question is, whether game is by this agreement reserved to the landlord? I think that the person who drew up this agreement must have been under the impression that the game in the first instance belonged to the landlord, for all the stipulations seem to point in that direction. It seems to me that this stipulation is nothing more than an engagement to preserve the game, and not to give it to the landlord. The landlord's remedy is an action for a breach of contract. I think the landlord has not reserved the game to himself. If we were to hold that this agreement amounted to a reservation, we should be interpreting words beyond their natural meaning.

LUSH, J.—I am sorry that I cannot concur with the rest of the court, for I am of opinion that this agreement does reserve the game to the landlord. I think we should construe the 12th section as though this were a civil action for a trespass. [His Lordship here read the section.] Now, under what circumstances does the game go to the landlord? For that we must refer to the 8th section. The language of that section shows that the word "reservation" is not to be taken in any merely technical sense, but that the reservation may be any agreement by which the landlord, and not the tenant, is to have the game. We must see what is the real meaning of the agreement. The tenant binds himself that he will not destroy the game nor keep any hound or other dog destructive thereof, and will at all times, at the request of the said Sir Frederick Bathurst, or his agent, forbid any person or persons hunting, shooting, coursing, fishing, or trespassing on the said farm or any part thereof, and will endeavour to the utmost of his power to preserve all game bred and being thereon. Now, it is true that it does not go on and say in words that he will reserve the game for the landlord, or that the landlord should have the game; but I cannot see what the agreement is for, if the game is not reserved to the landlord.

Judgment for the appellant.

Attorneys for the appellant, *Taylor, Hoare,* and *Taylor,* for *Wilson, Thring,* and *Nodder,* Salisbury.

Attorney for the respondent, *Charles McWhatman,* Salisbury.

HARGREAVES (app.) *v.* DAWSON AND OTHERS (resps.)

Beer-house — Application for a certificate — Old licence—Forfeiture of—New application for a certificate—Refusal.

Although, by virtue of sect. 19 *of the* 32 *&* 33 *Vict. c.* 27, *justices cannot refuse to grant a certificate in respect of a house which was licensed on the* 1*st May* 1869, *except for one of the causes mentioned in sect.* 8, *yet if the licence has been actually forfeited, they may treat a subsequent application for a certificate as an original application, and may exercise a discretion in refusing it.*

The house of the appellant had an existing licence on the 1*st May* 1869, *but at the licensing meeting in the following August the said licence was lost on account of the personal misconduct of the then tenant. At the licensing meeting in Aug.* 1870 *the present appellant applied for a certificate, which was refused, on the ground that he had not shown the necessity for such a house in the neighbourhood:*

Held, that the magistrates were justified in treating such application as an original one, and in exercising their discretion in refusing it.

At the general annual licensing meeting and special sessions for granting licences to keepers of inns, alehouses, and victualling houses in England, holden at Bradford, in and for the borough of Bradford, in the county of York, on the 30th Aug. 1870, the said John Hargreaves, hereinafter called the appellant, applied for a certificate under 32 & 33 Vict. c. 27, for the sale of beer to be consumed on the premises, at a certain house in the said borough, known by the name of the "Turk's Head." It was proved in evidence on the part of the appellant that on the 1st May 1869 a licence was in force in respect to the said house for the sale by retail therein of beer to be consumed on the premises, which said licence was on account of the personal misconduct of a former occupier lost at the Brewster Sessions, held in the month of Aug. 1869, and that the appellant and the said house, in respect of which he applied, were duly qualified as by law is required. The justices were satisfied with the evidence produced on the part of the appellant of his good character, and no evidence was offered, nor was it proved that the said house or any adjacent house or shop owned or occupied by the appellant was of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character, nor that the applicant having previously held a licence had forfeited it for his misconduct, or that he had through misconduct at any time previously been adjudged disqualified from receiving any such licence, or from selling any beer, cider, or wine, and no evidence was offered on the part of the appellant showing the necessity of a house licensed to sell beer on the premises in the neighbourhood. But upon the hearing of the application, the justices refused to grant the certificate as applied for, and the appellant gave notice of appeal on the following grounds:

1. That I am aggrieved by the said decision which you have come to, and that the authority or certificate to the said house, situate in Birksland-street, in New Leeds, in the township and borough of Bradford aforesaid (and formerly kept as a beerhouse, and called the Turk's Head Inn beerhouse), should have been granted to me at the said general licensing meeting.
2. That your refusal to grant the said authority or certificate was contrary to law.
3. That there was no valid reason to warrant your refusal to grant the said authority or certificate.
4. That I, as a matter of right and of law, was legally entitled to require that the said authority or certificate should be granted to me.
5. That no sufficient ground was alleged by you for refusing to grant the said authority or certificate.
6. That the said decision which you came to in respect of my said authority or certificate is arbitrary, unjust, and unfair, and not impartial.
7. That the decision, order, or determination which you came to in respect of the granting of the said authority, certificate, or licence to the said house, situate in Birksland-street, in New Leeds, in the township and borough of Bradford aforesaid, at the said general annual licensing meeting, is illegal, and contrary to the spirit and tenor of the several statutes in that case made and provided.
8. That I was entitled to such authority or certificate according to the evidence I adduced before you.
9. That your refusal to grant the said authority or certificate was contrary to the evidence.
10. That in refusing to grant authority or certificate, you acted under certain erroneous impressions which should not be entertained in adjudicating upon matters at a general annual licensing meeting.

An order of a judge was then obtained under sect. 11 of the 12 & 13 Vict. c. 45, that the facts

should be stated in the form of a special case for the opinion of this court, which case was stated as follows:

It is contended on the part of the appellant that as he produced satisfactory evidence of his good character, that as it was not proved that the house in respect of which he applied, or any adjacent house or shop was of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character, or that the appellant had forfeited a previous licence for misconduct, or had through misconduct been previously adjudged disqualified from receiving any licence, or from selling beer, cider, or wine, and that as he the appellant proved that he and the house in respect of which he applied, were duly qualified as by law is required, and that on the 1st May 1869 a licence was in force with respect to the said house for the sale by retail of beer to be consumed on the premises, it was not lawful for the justices to refuse his application for a certificate, and that such house, so long as it is duly qualified as by law is required, and is not frequented by persons of bad character, but is occupied by an owner with whose character the justices are satisfied, has a vested interest in such certificate; which contention is disputed by the respondents, who allege that, as during the latter part of the year 1869, and the first part of the year 1870, a licence was not in force in respect of the said house, they were authorised in considering the application for a certificate by the appellant as an original one, and in requiring the appellant, on applying for a certificate, to satisfy them of the necessity for such a licensed house in the neighbourhood.

The question for the opinion of the court is, whether it was lawful for the justices to refuse an application for a certificate, it having been proved that a licence was in force in respect of the said house on the 1st May 1869, and the grounds specified in sect. 8 of the statute 32 & 33 Vict. c. 27, having been disposed of to their satisfaction.

By sect. 19 of the 32 & 33 Vict. c. 27, it is enacted that—

Where on the 1st May 1869 a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine, to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine, to be consumed on the premises, in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act: Provided that, where a person licensed in respect of such house or shop to sell therein by retail beer, cider, or wine, to be consumed on the premises, is convicted after the passing of this Act of more than one offence against the tenor of his licence, or of more than one offence for which any penalty is imposed by any of the said recited Acts, the justices by whom such person is convicted may, if they think fit, order that the house or shop shall for the purposes of this section be thenceforth deemed to be a house or shop in respect of which no licence for the sale by retail of beer, cider, or wine was in force at the time of the passing of this Act, &c.

Hannay appeared for the appellant.—The magistrates were wrong in refusing the certificate, as the house had a licence on the 1st May 1869, and two convictions had not taken place, as mentioned in the proviso of the 19th section. It could not have been the intention of the Legislature that with regard to an old licensed house, if the landlord turns out of possession a tenant who has misconducted himself, *the landlord is to forfeit* the advantage of the licence, though he himself may take possession and seek for a renewal of the certificate. [LUSH, J.—The case states that the licence was lost. How was it lost by the former tenant?] That does not appear. The case merely states that the licence was lost in consequence of the personal misconduct of a former occupier. The Act never intended to prevent the owner from getting a good tenant where there has been a bad one whom he has turned out. The magistrates treated the application of the appellant as an original application. [COCKBURN, C. J.—Does not the 19th section imply that there is an existing licence?] The applicant applied as soon as he had any power to do so. He had first to turn out the tenant who had misconducted himself. [COCKBURN, C. J.—The section surely applies only to the renewal of licences. Can it be said that this was an application for a renewal when a twelvemonth had elapsed for the refusal to renew the former certificate?] The object of the Legislature was to protect the interests of old licensed houses. In *Reg.* v. *The Justices of Lancashire* (23 L. T. Rep. N. S. 461), Lush, J., in giving judgment, says: "When on the 1st May 1869 a licence is in force with respect to any house, for the sale by retail of beer to be consumed upon the premises, it shall not be lawful to refuse an application for a certificate for the sale of beer to be consumed on the premises, except on one or more of the grounds upon which a licence to sell beer, to be consumed off the premises, may be refused." In the present case there was no objection whatever to the appellant, but the magistrates chose to treat the application as though the house had never had a licence.

Campbell Foster, for the respondents, was stopped by the court.

COCKBURN, C.J.—I am of opinion that the magistrates were right. The house certainly had a licence on the 1st May 1869, and if at the next licensing day an application had been made by the appellant for a certificate, and it had been refused, the magistrates may have been wrong, and they may have been compelled to grant it. It was the intention of the Legislature to put the granting of certificates in the discretion of the magistrates, with this exception, that where the house had a licence on the 1st May 1869, they shall not be at liberty to refuse the certificate, except upon one of the grounds mentioned in the 8th section. The existing licences, therefore, were not to be interfered with except for the cause mentioned. That provision, however, cannot be made to extend to cases where the licence has dropped. In such a case the magistrates have still a discretion to exercise. In the present case the certificate was not renewed in 1869, and when, therefore, the appellant came in 1860 for a renewal of the certificate, the magistrates were justified in treating it has an original application, and in exercising their discretion with respect to the wants of the neighbourhood.

MELLOR, J.—I am of the same opinion. It is not disputed that in the case of a new application the magistrates have a discretion as to granting or refusing a certificate. In this case the old licence was forfeited, and was at an end. In the succeeding August another application was made to the magistrates for a certificate. The magistrates, considering this to be a new application, and the wants of the neighbourhood not requiring such a house, they

exercised their discretion in refusing the certificate; and in this I think they were justified.

LUSH, J.—I am also of the same opinion. It is clear from the construction of the 19th section that it was not intended that magistrates should put an end to the then existing licences without a cause; but when for any sufficient cause the licence has been put an end to, then they are at liberty upon any fresh application to exercise their discretion.

Judgment for the respondents, with costs.

Attorneys for the appellant, *Terry* and *Robinson*, Bradford.

Attorney for the respondent, *G. B. Mossman*, Bradford.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

REGISTRATION APPEAL.

Jan. 20 *and April* 24, 1871.

ROLLESTON (app.) *v.* COPE (resp.).

*Vote for a county—Shares in a building society—Value of freehold—*8 *Hen.* 6 *c.* 7.

The claimant had, in 1863, *conveyed three houses, of which he was owner in fee, to a building society, by way of mortgage, as security for* 300*l. advanced to him by the society. He was bound by the deed and the rules to pay monthly instalments of* 3*l.* 9*s. for ten years. He was in actual possession of the property and had paid* 350*l., which was the whole amount then due. He had two years' payments still to make, but he might redeem the mortgaged property for a present payment of* 73*l.* 1*s.*

The annual value of the houses was 31*l.* 4*s.*

The annual payments by the claimant were 41*l.* 8*s., of which two-thirds was paid in discharge of principal and the remainder as interest upon the advance.*

The revising barrister refused to allow the claim to vote:

Held, that the claimant's interest in these houses was of the value of 40*s. by the year, at the least, above all charges, according to* 8 *Hen.* 6, *c.* 7; *and that he was therefore entitled to o vote for the county.*

Robinson *v.* Dunkley, 15 *C. B., N. S.*, 478, *confirmed.*

AT a court holden for the revision of the list of voters for the parish of St. Mary, in the southern division of the county of Leicester, one James Cope duly objected to the name of Benjamin Rolleston being retained on the list of voters for the said parish. The name of Benjamin Rolleston (hereinafter called the claimant) appeared upon the list of voters entitled to vote thus:—

Christian and Surname of the Claimant at full length.	Place of Abode.	Nature of Qualification.	Street, Lane, or other like place in the Parish.
Benjamin Rolleston.	26, Asylum-street.	Freehold houses	71, 73, 75, Asylum-street.

The facts of the case as proved before the revising barrister were as follows:

The claimant, Benjamin Rolleston, is a member of a freehold building society called the Leicester Permanent Benefit Building Society, established *under 6 & 7 Will. 4, c. 32, in* which society he held *three shares.*

In the month of February, in the year 1863, the claimant was possessed of three freehold tenements, and was desirous of borrowing the sum of 300*l.* in respect of his said three shares in the said society, and in consideration of the society advancing him that sum, he executed a mortgage in fee of the said freehold tenement to the society to secure the subscriptions, payments, redemption moneys, and fines in relation to the sum of 300*l.* by monthly instalments of 3*l.* 9*s.*, extending over a period of ten years.

The mortgage deed provided that, if during the above mentioned period the mortgagor neglected for four consecutive calendar months to pay all the subscriptions and payments, and to perform the regulations which, on his part as a shareholder and mortgagor, were by the rules of the society directed to be paid and performed, the society should enter into possession of the premises and sell and dispose of them.

The claimant has duly paid all the interest due under the mortgage deed, and has always been and now is in the actual possession of the property.

The periodical payments made by the claimant have amounted to 350*l.* in the whole. The claimant has two years' annual payments still to make, but he may redeem the mortgaged property for a present payment of 73*l.* 1*s.*

The annual value of the freehold tenements is 31*l.* 4*s.*, and the annual payment made to the society is 41*l.* 8*s.* This last-mentioned payment is made generally in reduction of the sum borrowed, and in discharge of the claimant's payments and subscriptions, in accordance with the rules of the said society.

The interest, which is not more than 7 per cent. for the term of years, is capitalised and added to the sum borrowed.

The receipts given by the society to the claimants do not show what sum is received for interest, and what is received for principal, but if the annual payment of 41*l.* 8*s.* were apportioned, two third parts would be paid in discharge of principal, and one third part in payment of the interest.

It was contended on behalf of the claimant that only so much of the annual payment as represented the interest on the loan, as in the case of a common mortgage should be deducted from the annual value, and if this were done, the claimant has a freehold of 40*s.* annual value in the said freehold houses.

It was contended on behalf of the objector, that the whole of the payments to the said society, on whatever account they are made, should be set-off against the annual value of the property, and if this were done, the claimant has not a freehold of 40*s.* annual value in the said tenements.

The Revising Barrister was of opinion, that in accordance with the decided cases, the whole amount of the payments to the society was a charge upon the estate, and should be deducted from the annual value thereof, and that such deduction reduced the value of the estate below 40*s.*, and he erased the name of the claimant off the list of voters.

Other appeals were consolidated.

If the court should be of opinion that only so much of annual payments as would represent the interest on the loan, as in the case of an ordinary mortgage, should be deducted from the annual value of the claimant's property, then the names of the said B. Rolleston and the other persons

mentioned in the schedule, were to be restored to the lists of voters; if otherwise, then their names were to be erased.

J. O. Griffits, for the appellant, argued that as in the case of an ordinary mortgage, the interest only should be considered a charge upon the land—the payment of principal is a mere investment for the benefit of the estate. He cited the cases afterwards reviewed in the judgments of the court.

Quain, Q. C., for the respondent, relied upon the words of the statute 8 Hen. 6, c. 7, and the earlier authorities decided upon this point.

Griffits in reply.

Cur. adv. vult.

April 24.—BOVILL, C. J.—The claimant being a member of and holding shares in a building society, was the owner and in possession of certain freehold houses, in respect of which he claimed to be on the register of county voters. These houses he had conveyed by way of mortgage to the society as security for 300*l.* advanced to him, and by the mortgage-deed and rules of the society, in order to redeem the property, he was bound to pay, during a period of ten years from 1863, to the society monthly instalments of 3*l.* 9*s.* —which amounted to the sum of 41*l.* 8*s.* in each year; and in case of certain defaults the society might enter upon the houses. At the time in question the claimant had paid 350*l.*, and two years remained during which he would have to pay the monthly instalments, or he might then have redeemed the property by a present payment of 73*l.* 10*s.* The annual value of the houses was 31*l.* 4*s.* It was contended for the claimant that only such sum as would be equivalent to interest on the loan ought to be deducted from the annual value to the claimant. The learned revising barrister was of opinion that the whole of the payments ought to be deducted in accordance with two decisions of this court, and he disallowed the claim to vote. The appellant relied upon another and later decision of this court which he contended overruled the two previous cases. The question submitted to us is whether only so much of the annual payments as would represent interest on the loan should be deducted, and upon the result of our opinion on that point this appeal is made to depend. The statute of 8 Hen. 6, c. 7, requires that the voter "shall have free land or tenement to the value of 40*s.* by the year at the least, above all charges," and declares that "such as have the greatest number of them that may expend 40*s.* by year and above, as afore is said, shall be returned by the sheriffs of every county knights for the Parliament." The sheriff is also empowered "to examine upon the Evangelists every such chooser how much he may expect by the year;" and the Act declares "that he which cannot expend 40*s.* by year, as afore is said, shall in no wise be chooser." The property therefore must be of the value of 40*s.* a year at the least, above all charges within the meaning of that enactment. The statute 28 Geo. 3, c. 36, s. 6 treats the interest of the voter as one which must be of the value of 40*s.* by the year over and above the interest of any mortgage upon the estate, and also above all outgoings payable in respect of the said estate. Under the provisions of different statutes and ultimately by the Registration Act of 6 Vict. c. 18, s. 74, a person who has mortgaged his estate, but continues in possession, is entitled to the franchise, though his equitable estate must be of the same value that would be requisite if he were still the owner of the legal estate: (see *Copland* v. *Bartlett*, 6 C. B. 18; and *Barrow* v. *Buckmaster*, 12 C. B. 664.) It has also been decided that expenses incurred in increasing the annual value must be deducted, because they are absolutely necessary in order to produce such value, such as the cost of manuring and cultivating land and the maintenance and repairs of houses and buildings (*Hamilton* v. *Bass*, 12 C. B. 631), the cost of collecting rents when such an expense is found to be necessary (*Sherlock* v. *Steward*, 7 C. B., N. S., 21), and when the property is let to a tenant the amount of the tenant's rates, if and when the landlord has undertaken to pay them: (*Moorhouse* v. *Gilbertson*, 14 C. B. 70.) Other cases have been dicided on the ground that the deductions sought to be made were charges within the meaning of the statute, such as a rentcharge (*Copland* v. *Bartlett* 6 C. B. 18, and the cases there cited by Mr. Badeley), and *Barrow* v. *Buckmaster* (12 C. B. 664), the yearly interest secured by a mortgage (*Moore* v. *Carisbrooke* 12 C. B. 661), and yearly interest actually paid by agreement, where the principal was secured by the mortgage: (*Lee* v. *Hutchinson*, 8 C. B. 16.) The same rule I apprehend would apply to the case of annuities or other annual sums charged upon the property; but, in the case of an ordinary mortgage it has never been supposed that the whole principal money must be deducted in the year when it is due or becomes payable. There are also three important cases directly bearing upon the present question, and each of them decided with reference to building societies. The first is the case of *Copland* v. *Bartlett*, where the claimant, being a member of a building society, had obtained a conveyance of the property, and had executed a mortgage to the trustees. The amount of the purchase money secured was 65*l.*, and the claimant was bound by the mortgage deed to pay 15*s.* a month (equal to 9*l.* a year); whilst the annual value of the property was only 8*l.*, but if only interest on the 65*l.* was to be deducted there would have been a clear yearly value of 40*s.* This court decided that these monthly payments were a charge upon the property, and that they must be taken into account in ascertaining the annual value, and so they reduced the annual value below 40*s.*; the vote was disallowed. The next case was *Beamish* v. *Stoke* (11 C. B. 29). The annual value of the property there, was 6*l.*, and it was mortgaged to the trustees of the building society; the amount due upon the mortgage for principal was 47*l.* 10*s.* 3*d.*, and the payment which the claimant was bound to make of 4*s.* 6*d.* weekly on account of principal and interest amounted to 11*l.* 14*s.* per annum. This sum was apportioned by the secretary as follows: namely 8*l.* 18*s.* 9*d.* in part liquidation of the principal of the mortgage debt; 6*s.* for incidental expenses of working the society; and 2*l.* 10*s.* for premium or interest on the principal remaining unpaid. It was not disputed that the 6*s.* and the 2*l.* 10*s.* should be deducted, and the only question submitted to the court was whether the payment in part liquidation of the principal ought to be deducted in ascertaining the annual value. The court decided that the whole of these weekly payments constituted a charge upon the property, and must be deducted, notwithstanding a part of them was made for repayment of the principal.

The last of the three cases is *Robinson* v. *Dunkley*, which came before this court in 1863, and is reported in 15 C. B., N. S., 478. In that case the claimant, who was a member of a building society, had executed a mortgage to them. The amount advanced in the first instance was 73*l.* and he was bound to make monthly payments amounting in the whole to 4*l.* per annum. The property was of the value of 3*l.* per annum. On the 31st Jan. preceding the registration he had paid the whole amount owing by him with the exception of 2*l.* This sum would be payable by him by monthly payments during the following six months, and was in fact paid by the month of July. The revising barrister expressly found as a fact that the 71*l.*, having been paid before the 31st Jan., and the remaining 2*l.* by July, the claimant had a freehold prior to the 31st Jan. of the value of 40*s.* per annum, and, therefore, he retained his name on the list of voters. This case was decided in favour of the respondent on the appeal. It was contended before us that this latter case was at variance with the previous decisions, and virtually overruled them. It is difficult to reconcile those decisions, and still more difficult to distinguish the present case in principle from *Robinson* v. *Dunkley*. The question is, no doubt, involved in much doubt, and but for the decision in the last case, I should have had no hesitation in acting as the revising barrister has done in this case upon the authority of *Copland* v. *Bartlett* and *Beamish* v. *Stoke*, and upon the reasons of the very learned and eminent judges who decided those cases. The later case, however, of *Robinson* v. *Dunkley* having been decided, I think it is better to abide by that decision; there are also strong arguments in support of it, and applying it to the present case, the result will be that, the payments made by the claimant representing a greater value than 40*s.* a year, the decision of the revising barrister must be reversed, and the claim to vote allowed. The question in these cases in future for the revising barrister to consider will be whether taking the payments which have been made for principal or purchase-money into account, and deducting the proper annual sums independently of the payments on account of principal, the claimant's interest in the property is of the value of 40*s.* by the year. If his interest in the property be found to be of that value he will be entitled to the franchise, otherwise his claim to be placed on the list of voters must be disallowed.

WILLES, J.—I am of the same opinion. This case ought to be decided according to the construction of the statutes and their application to the substantial interest of the mortgagor, not his dry legal as distinguished from his equitable estate. The statute of Hen. 6 would exclude him from the franchise, because of his not having the legal estate. The subsequent statutes have corrected this, and the effect of them is to treat the mortgagor as having the freehold subject to a charge of the principal money, or so much as remains unpaid, and of the interest. In an ordinary mortgage, payment of the principal may be enforced at any time after the day it falls due, but no regard is paid to that incumbrance provided that the statute of Hen. 6 is in other respects satisfied. To satisfy that statute two conditions must be fulfilled. First, the land must be freehold to the annual value of 40*s.* at the least above all charges, in the original "*outre les reprises*," a term never applied that I can find to a payment which redounds to the permanent benefit of the owner of the land, as building a house or the like, but only to such payments as rentcharges, ordinary repairs, and taxes, and by analogy to interest, the payment of which, once made, is so much spent and gone, neither enjoyed by nor invested for the owner or mortgagor; secondly, the voter must be able to spend—that is, have for his own benefit, 40*s.* by the year. It follows, therefore, that to vote in respect of an equity of redemption, first, that estate must be of the value of 40*s.* by the year; and, secondly, the voter must have in respect thereof a present benefit or capacity of benefit of 40*s.* by the year. If the land is mortgaged up to its full value, or to such an amount that the equity of redemption is not worth the purchase of 40*s.* a year, the first condition is not fulfilled. This was the case supposed by Wilde, C.J., in *Copland* v. *Bartlett* (6 C. B. 23) when he asked "How was the right to vote formerly dealt with where the property in respect of which the vote was claimed was charged up to the full value? My impression is that the vote was never allowed." And the same opinion was expressed by Jervis, C.J., in *Beamish* v. *Stoke* (11 C. B. 37), when he said "The case does not find that that which the party has already paid towards the purchase-money is worth 40*s.* a year in perpetuity:" and Maule, J. said "Suppose a man agreed to stand in the claimant's shoes, would it be worth his while to give 40*s.* a year for his interest in the land?" This consideration was sufficient for the decision of those cases, which, though they raised and decided the question whether principal could be deducted, did so upon statements of fact not showing that the principal paid had created an interest worth 40*s.* a year beyond repairs. Between those cases and the present, there are striking and cardinal differences of fact. No doubt expressions were used by the judges indicating an opinion that the payments on account of the principal were to be considered as charges, which unquestionably they were in one sense, viz., that unless enough had been paid on account of principal to make the equity of redemption worth the purchase of a perpetual 40*s.* a year, there was nothing to satisfy the first conditions in the statute. The concurrence of V. Williams, J., in *Robinson* v. *Dunkley* (15 C. B., N. S., 478), is conclusive as to the true scope of the authority. In the present case both conditions are fulfilled, The mortgage is for 300*l.*, principal to be repaid with interest in ten years by instalments of 3*l.* 9*s.* a month, making 41*l.* 8*s.* a year, or, in all, 414*l.*, so that the proportion of principal to interest is ascertained by the deed, and it is found as a fact. The property can, in fact, be redeemed for a present payment of 73*l.* 10*s.*, the payments remaining to be made, if paid as to-day, amounting to 82*l.* 16*s.* The amount of value above all charges, except the mortgage, is 31*l.* 10*s.*, so that the equity of redemption, if sold at the ridiculously low price of five years' purchase, would produce a sum sufficient to pay off the whole remaining charges, and leave a balance which, if invested in Consols, would produce more than 40*s.* a year. Why? for this simple reason, because the payments made by the mortgagor were not all "reprises," but to the extent of the two-thirds, or thereabouts, paid (and found by the case to have been paid) on account of principal, they were investments, and permanently

beneficial investments, by and for the mortgagor, as much, or rather more, than if he had paid them into his bankers, to be ready for the mortgagee when he chose to call for his money. Each of those payments was a purchase for the mortgagor of so much of the mortgage interest in the land, and each of them added to the value of the mortgagor's estate, now accrues to his benefit. Each of them was therefore "expended" by and for him, each would, in a properly kept account, go to investment of capital, and would not be mere outgoings; that is not if there was a "reprise" in the proper sense of something taken back for the mere temporary use of the land. As for the payments being pre-appointed to be made on certain days, this cannot alter their judicial character. The payment of the principal is invariably pre-appointed for some day. It is for the convenience of the parties, not to alter the relation between them, that several days are mentioned instead of one. It follows from what has been said, that the second condition of the statute Hen. 6, c. 7, as modified by the subsequent Acts giving the franchise to a mortgagor, is also complied with, because, deducting from 41*l.* 8*s.* the two-thirds which the case finds to be referable to principal, there remains 13*l.* 16*s.*, which, deducted from 31*l.* 10*s.* leaves a clear substantial present annual income of 17*l.* 14*s.* In effect and substance the claimant has a freehold worth, at twenty years' purchase, 630*l.*, less 73*l.* 10*s.* 557*l.* 10*s.*, and deducting out of the two years' payments that remain, which can properly be called "reprises," he can expend 17*l.* 14*s.* by the year. Thus, both upon the reason of the matter, and according to the distinct authority of Erle, C. J., and his companions in *Robinson* v. *Dunkley* (15 C. B., N. S., 478), the decision against the right to vote was wrong, and ought to be reversed.

M. SMITH, J.—I am of the same opinion, and in consequence of the previous decision in this court I desire to add the reasons for my judgment. The claimant, who is the appellant, being seised in fee of land and houses, mortgaged them by a deed dated the 12th Feb. 1863, to the Leicester Building Society to secure 300*l.*, advanced by the society on three shares held by the claimant as a member of the society, to be repaid with capitalised interest, in ten years by monthly payments of 3*l.* 9*s.* The mortgage was in fee, subject to a proviso for redemption upon payment by the claimant during ten years of the subscription, redemption moneys, and fines, payable by him in respect of his three shares, according to the rules of the society, and certain tables annexed to them; and the deed provided that when the 300*l.* and all other payments should have been satisfied, the security should be in a certain prescribed manner discharged. A power was contained in the deed enabling the trustees, in case of default in the payment of the instalments, to take possession of the property and sell the same to satisfy what might be due on the security. The case finds that the claimant has always been in the actual possession of the property, that he has kept up the payment of all his instalments, having paid in all 350*l.*, and that he was entitled to redeem the property by a present payment of 73*l.* It is also found that the annual value of the property is 31*l.* 4*s.* The revising barrister further finds, which the mortgage deed and rules enable him to do, that the interest which is not more than 7 per cent., is capitalised for the whole term, and added to the sum borrowed, and that although no apportionment is made in form, yet if the monthly instalments, which amount to the annual payment of 41*l.* 8*s.*, were apportioned, two-thirds of it would be paid in discharge of principal, and one-third only in payment of interest. It is obvious from these findings that in substance two-thirds of the annual payment of 41*l.* 8*s.*, viz., 27*l.* 12*s.* goes in every year to reduce the principal, and so to increase the beneficial interest of the claimant in the estate, and that one-third viz., 13*l.* 16*s.* only is attributable to interest, and that this latter sum when deducted from 31*l.* 4*s.*, the annual value of the property, leaves 17*l.* 8*s.*, as the clear beneficial annual value of the estate to the claimant. The revising barrister held in accordance with what he considered to be the effect of the decided cases, that the whole amount of the payments to the society was a charge upon the estate, and should be deducted from the annual value, and that as this deduction would reduce such value below 40*s.*, the name of the claimant should be erased from the list of voters. But, on the other hand, he found, as the fact undoubtedly is, that if so much only of the annual payments as represented the interest on the loan ought to be deducted from the annual value, then the claimant had a freehold of the annual value of 40*s.*; and if this court should hold that this was the proper deduction, he declared that the name of the claimant was to be restored to the list. It appears to me that this last declaration of the revising barrister ought to prevail, for on the above facts and findings I come to the conclusion that the claimant has a freehold of the value of more than 40*s.* by the year above all charges. The question to be decided is whether so much of the above annual payment as represents the repayment of the principal of the mortgage debt is a charge within the meaning of the statute 8 Hen. 6, to be deducted from the annual value of the freehold. The 8 Hen. 6, c. 7, requires the voter to "have free land or tenement to the value of 40*s.* by the year above all charges" (*outre les reprises*). The 6 Vict. c. 18, s. 74 (after reciting 2 Will. 4, c. 45, ss. 23 and 26), enacts that "No mortgagee of any lands or tenements shall have any vote" . . . . "for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof, but that the mortgagor in actual possession or in receipt of the rents and profits thereof shall and may vote for the same, notwithstanding such mortgage." These are the statutes to be expounded. The statute 6 Vict. expressly enacts that a mortgagor in possession shall vote notwithstanding the mortgage, and as a consequence notwithstanding the mortgage debt. It has been settled, and, although at one time much questioned, it is not now disputed, that the interest of the mortgage debt is a charge to be deducted from the annual value of the land. It was so decided by several election committees (see the cases collected in Rogers on Elections). The Act 28 Geo. 3, c. 36, s. 6, required a declaration from the voter that he had "an estate of the clear yearly value of 40*l.* over and above the interest of any money secured by mortgage upon the said estate." This enactment, whilst it is a clear statutory declaration that the interest on a mortgage debt is to be deducted from the annual value, amounts by necessary im-

plication to an equally clear declaration that the money secured by mortgage, that is, the principal, need not be deducted. If the principal of the mortgage debt were to be deducted in estimating the yearly value of the land, few mortgagors in the year when the principal fell due, or in any future year whilst it remained due, would be entitled to vote, for the principal would in almost all cases exceed the yearly value of the estate. It is clear that this was not the intention of Parliament, for, as I have already observed, it would be opposed to the express enactment of 6 Vict. c. 18, s. 73, that a mortgagor in possession may vote, notwithstanding the mortgage, which, of course, assumes the existence of the mortgage debt. Then can it make a substantial difference that the principal money is to be repaid by periodical instalments, biennial, annual, monthly, or otherwise? It is equally the principal money, and so far from this distinction creating a difference adverse to the right to vote, it surely is in favour of the mortgagor that he is not liable to pay the whole principal at once. If the question had been *res integra*, I confess I should have felt little hesitation in coming to a conclusion in favour of the claimant, but former decisions of this court undoubtedly occasion some difficulty. In *Copland* v. *Bartlett* there was a monthly payment of 15*s*., but the case did not contain any finding to distinguish principal from interest, as the present case does, and the court likened the whole payment to a payment of interest on a mortgage, and so gave judgment against the right to vote. The next case (*Lee* v. *Hutchinson*) is not an authority against the respondent. It decided no more than that the interest on the mortgage-money must be deducted from the annual value. The observations made by Jervis, C. J., and Maule, J., on the statute 28 Geo. 3, c. 36, are consistent with a decision in favour of the present claimant. In the case of *Beamish* v. *Stoke*, the mortgage-deed provided for a weekly contribution of 4*s*. 6*d*., which, when paid, was appropriated by the secretary to three objects, viz.: first, to payment of interest; secondly, to the mortgagor's share of the incidental expenses of the security; and thirdly, the remainder to reduce the principal. The court, although so much of the payment as was appropriated to interest did not reduce the value below 40*s*., held that, inasmuch as the whole payment did so reduce it, the claimant was not entitled to vote. The judges there said, "that the case was governed by *Lee* v. *Hutchinson*, which only followed *Copland* v. *Bartlett*." Now, certainly in *Lee* v. *Hutchinson*, in which the interest alone exceeded the annual value, the point assumed to have been decided by it did not arise. It may be observed also, that in *Beamish* v. *Stoke*, the value of the equity of redemption was not found. In the course of the argument of that case, Jervis, C.J. said, p. 37, "The case does not find that that which the party has already paid towards the purchase money is worth 40*s*. a year in perpetuity." In the present case the facts are found from which it distinctly appears that what the claimant has so paid is worth much more than 40*s*. a year. But whatever may be the true effect of the cases on which I have now commented, I think that the later case of *Robinson* v. *Dunkley* has shaken, and in my opinion overthrown, their authority, supposing they are to be construed as the respondent seeks to do. In *Robinson* v. *Dunkley*, the society had advanced to the claimant 73*l*., and by his mortgage to the society he was to repay the amount by monthly sums amounting to 4*l*. a year. The deed did not apportion the payment between principal and interest. It appeared that the value of the land was only 3*l*. per annum, and that in the qualifying year the monthly sums were payable, so that if the full amount of them was deducted from such value, a clear 40*s*. did not remain to the voter for that year—but as it also appeared that 71*l*. of the principal had been paid off on Jan. 31, the court held that the revising barrister was right in finding that the claimant had a freehold of the value of 40*s*. per annum, and in retaining his name on the list of voters; inasmuch as, notwithstanding that the annual payment exceeded the annual value for that year, the claimant had a clear beneficial interest in the land, beyond the encumbrance, of more than 40*s*. by the year. It being plain that the monthly payments in the case of *Robinson* v. *Dunkley*, would if deducted have reduced the value in the particular year below 40*s*.; it follows that if the case of *Copland* v. *Bartlett* was decided on the ground that the whole of these payments are to be deducted from the annual value, whatever may be the value of the equity of redemption, then the decision in the latter case is opposed to that *ratio decidendi* and overrules it, and if that was not the *ratio decidendi* in *Copland* v. *Bartlett*, then that case is not necessarily in opposition to the rights of the claimant in the present appeal, where the revising barrister has found that after deducting the charge for interest there is an annual value accruing to the mortgagor of more than 40*s*. I own that I can interpret *Robinson* v. *Dunkley* in no other way than as a decision that so much of the monthly payment as represents a repayment of principal money did not form a charge on the annual value. It is true that in that case a large amount of the principal money had been paid off, but so long as the whole mortgage debt remaining due does not reduce the value of the equity of redemption below 40*s*. by the year, and the interest does not absorb it, the largeness or smallness of the amount paid off cannot make an essential difference. Treating the question on principle, I confess I can see no distinction between a mortgagor who has to repay the mortgage debt in a single sum, and one who has to repay it by periodical payments, except one in favour of the latter. In substance the latter would be from the nature of things in a sounder position, for he would on payment of each instalment relieve his land of its burden and increase the beneficial value of it, whilst the former was suffering the whole burden to remain upon it, and this anomaly would occur from a contrary view, viz., that a man who had borrowed 100*l*. on his land, payable by instalments, and had paid off 90*l*., would have no vote, whilst the man who borrowed 100*l*., payable in one sum, and had paid off nothing, would be entitled to vote. But in neither case, as it seems to me, can the principal debt be properly deemed a charge on the annual value. It is a charge on the corpus of the estate, and every payment of an instalment of it is so much added to the beneficial interest of the mortgagor. If, indeed, the whole mortgage-debt is so large in proportion to the estate that it would cover the full value of it, or so nearly as not to leave a beneficial interest of the yearly value of 40*s*. to the mortgagor, then there would be an entire failure of such an interest

in the freehold as would entitle the mortgagor to a vote. In the present case, the principal debt does not produce this consequence, and, for the reasons above referred to, I think the decision of the revising barrister should be reversed.

BRETT, J.—I agree entirely and absolutely in the judgment given by my brother Willes. I can see no answer to the argument used in that judgment. The only doubt I have had in this case, and I must confess it was a very strong one, was whether the court could be allowed to come to that decision after the cases of *Copland* v. *Bartlett*, and *Beamish* v. *Stoke* had been accepted for so many years as treating the principal as a necessary part of the case, and after the rights of so many persons had been decided on the faith of that interpretation.

Judgment for appellant.

Attorney for appellant, *T. A. Tibbits*, for *Harvey*, Leicester.

Feb. 13 *and April* 29, 1871.

VESTRY OF BERMONDSEY (apps.) *v.* RAMSAY (resp.)

Metropolis Local Management Acts Amendment Act 1862 (25 *&* 26 *Vict. c.* 102, *ss.* 77, 96)—"*Present or any future owner*"—*Res judicata.*

Sect. 77 *of the Metropolis Local Management Act* 1862 (25 *&* 26 *Vict. c.* 102) *makes certain expenses recoverable by a vestry "from the present or any future owner of the property. . . . . either by action at law or in a summary manner before a justice of the peace at the option of the vestry." Sect.* 96 *of the same Act empowers the vestry to require the payment "either from the owner or from any person who then, or at any time thereafter, occupies the premises," and provides "that such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the Act":*

Held, that the obligations imposed by the Act, and the remedies given by the Act to enforce them, are independent and cumulative, and the remedies may be resorted to in succession until the charge is satisfied by payment, subject when necessary to the equitable jurisdiction of the court to restrain vexatious actions.

In 1866 *the vestry of B., having paved a street, recovered under sect.* 77 *judgment against S., who at that time was the owner of certain premises abutting on the street, for his proportion of the expenses of such paving. Nothing, however, was ever realised under the judgment, and the vestry never took any steps to enforce it, nor had they issued execution, or registered the judgment in order to charge the premises as against a mortgagee or purchaser. The premises were subsequently bought by H., and the respondent became occupier of them as tenant to H.*

Held, that the judgment recovered by the vestry against S. was no bar to an action by the vestry against the respondent in respect of the same proportion of the expenses of such paving,

CASE stated by the judge of the Southwark County Court.

1. This is an action brought in the Southwark County Court of Surrey by plaint issued on the 1st Oct. 1869, to recover the sum of 38*l.* 5*s.* 4*d.*, being the proportion of the expense of paving a thoroughfare lately known as St. James-street, but now called Layard-road, in the parish of Bermondsey, under the provisions of the 18 & 19 Vict. c. 120, and the 25 & 26 Vict. c. 102, and was heard before Charles S. Whitmore, Esq., the judge of the said Southwark County Court of Surrey, on the 11th Nov. 1869, when the following state of facts was found:—

2. The plaintiffs are the vestry of the parish of Bermondsey, in the county of Surrey, and the defendant is the occupier of the premises 7, Layard-road, aforesaid.

3. A notice of the intention of the plaintiffs to pave the said street was served upon John Richardson Soper on the 10th March 1866, he then being the owner of the said premises; and he was required to pay the amount of the estimated proportion of the cost of the work on the 10th April following.

4. The said John Richardson Soper having made default in the payment of his proportion as aforesaid, an action was commenced against him in the Court of Common Pleas for the recovery of the said amount, and judgment was signed in the said action on the 6th Nov. 1866, for the sum of 38*l.* 5*s.* 4*d.* for debt, and 25*l.* 2*s.* 2*d.* costs, but no execution was issued or other proceedings taken thereon. Such judgment was consented to by the said John Richardson Soper on the understanding that it should not be enforced for a certain period, and immediately afterwards the said John Richardson Soper executed a deed of arrangement which was duly registered, but nothing has ever been paid to the plaintiffs under the said deed.

5. Subsequently to the execution of the said deed of arrangement the premises came into the possession of the Rev. John Milner, who was the mortgagee of the said premises.

6. On or about the 24th Oct. 1866, the said Mr. Milner, the mortgagee, sold the said premises to Mr. Thomas Herbert, who is the present owner thereof, and subsequently application was made by the said vestry to Messrs. Morris, Stone, Townson, and Morris, the solicitors for the said J. Herbert, for the payment of the said estimated proportion, but the said vestry were never paid the same, or any part thereof.

7. The said John Milner still retains in his hands a sum of money due and owing to the said John Richardson Soper, greater in amount than the said estimated proportion for which such judgment as aforesaid was recovered against the said J. R. Soper by the said vestry, but the said vestry, as such judgment-creditors have not taken any steps in exercise of the powers vested in them by the Common Law Procedure Act 1854, to attach such debt due to the said judgment-debtor in the hands of the said John Milner.

8. The said vestry never received any notice that the said John Milner retained such sum of money as in paragraph 7 mentioned, nor were the said vestry at any time, before the action commenced against the present defendants, informed thereof by the said John Milner or any person on his behalf, neither did the said facts in any other manner come to the knowledge of the said vestry, previously to the commencement of the said action.

9. The said vestry have never issued any writ of execution under the said judgment against the said premises.

10. On the 15th April 1869, a notice was served on the said Thomas Herbert, the then owner of the premises, requiring him to pay the said sum of 38*l.* 5*s.* 4*d.*, but nothing was ever paid by him, or on his behalf.

11. On the 16th July 1869, a notice was served on the defendant, who was the then occupier of the said premises, pursuant to the 96th section of the 25 & 26 Vict. c. 102, requiring her to pay the said amount of 38*l.* 5*s.* 4*d.*, and further giving her notice not to pay any rent to her landlord without first deducting the said sum of 38*l.* 5*s.* 4*d.*

12. Application was made to the defendant by the plaintiffs to disclose the amount of the rent payable by her in respect of the said premises, but she wholly refused to disclose the same.

Upon the above state of facts judgment was given for the defendant, but on the application of counsel for the plaintiffs the judge of the said Southwark County Court reserved for the opinion of this court the following question: Whether the plaintiffs having proceeded and obtained judgment against a former owner of the said premises for the amount of the proportion of the expenses of paving the said street, and the said judgment being still unsatisfied, and the plaintiffs having taken no proceedings to enforce the same against the said judgment-debtor, and not having issued execution and registered the same in order to charge the said premises as against a mortgagee or purchaser in manner provided by the statues 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, the said plaintiffs are entitled to proceed against a subsequent owner or occupier under the provisions of the said before mentioned Act or Acts for the recovery of the said amount of the proportion of expenses of paving the said street. If the Court of Common Pleas shall be of opinion that the obtaining of the said judgment against the said John Richardson Soper does preclude the plaintiffs from proceeding as above mentioned, then the judgment in favour of the defendant to stand with costs of suit. But it otherwise then the judgment to be entered for the plaintiffs for 38*l.* 5*s.* 4*d.* with costs of suit.

Wills (*E. Thomas* with him), for the appellants, cited Woodfall's Landlord and Tenant, 1867, edited by Cole, pp. 204, 209.

Poynter for respondent, cited *Vestry of St. Pancras* v. *Batterbury* (26 L. J. 243, C. P.)

Cur. adv. vult.

April 29.—M. SMITH, J., delivered the judgment of the court (Willes, M. Smith, and Brett, JJ.).—In this appeal from the judge of the Southwark County Court, which was argued before my brothers Willes and Brett and myself, the question is whether an unsatisfied judgment recovered by the vestry for 38*l.* 5*s.* 4*d.*, in respect of the expense of paving a street under the Metropolis Local Management Acts, against a former owner of the tenements occupied by the respondent, as tenant under a succeeding owner, is a bar to an action against the respondent as such occupier. The 25 & 26 Vict. c. 102, s. 77, makes such expenses recoverable "from the present or any future owner of the property" . . . . "either by action at law or in a summary manner before a justice of the peace, at the option of the vestry." The 96th section empowers the vestry to require the payment "either from the owner or from any person who then or at any time thereafter occupies the premises," and enacts "that such owner or occupier shall be liable to pay the same, and the same shall be recovered in the manner authorised by the Act." The occupier is only liable under the provisions of the Act to the *extent* of rent actually due or accruing due after notice, and he is empowered to deduct the payments from his rent. The charge of 38*l.* 5*s.* 4*d.* became payable in 1866, when Soper was owner, and a judgment was obtained in this court against him in an action for that amount on the 6th Nov. 1866. Herbert subsequently became owner, and the respondent occupied the premises as his tenant. It is not contended that under the circumstances stated in the case, the respondent would not as the present occupier be liable to pay the unpaid proportion of the paving rate, unless the judgment recovered against Soper is a bar to an action. The statute 25 & 26 Vict. c. 102, for the first time gives a remedy by action to recover those charges. The question therefore to be decided, viz., whether the judgment obtained against the former owner is a bar to the remedy by action against the occupier, is one of the first impression, and it is necessary to ascertain the nature of the obligation imposed by the above-mentioned statute. In the first instance the statute creates a personal obligation on the owner "present or future," and further, to secure the payment, imposes a kind of indirect charge on the land. The 96th section imposes the obligation to pay, and gives the remedy against either the owner or any person who then, "or at any time thereafter, occupies the premises." These obligations, and the remedies given to enforce them, appear to us to be independent and cumulative, and, as a consequence of so holding, we think the remedies may be resorted to in succession until the charge is satisfied by payment, subject when necessary to the equitable jurisdiction exercised by the court to restrain vexatious actions. The obligation is clearly not a joint obligation, and the owner and occupier could not be sued together. And this being so, there is no objection of a technical kind arising from a change of remedy to prevent the occupier being sued after a judgment against the owner. And we see no substantial ground arising from the nature of the obligation according to our interpretation of the statute, to render the judgment alone without satisfaction a good answer. No doubt in the case of a joint liability giving a joint cause of action against several, the recovery of judgment against one of the obligees is a bar to an action against the other: (*King* v. *Hoare* 13 M. & W. 494.) But this is not so where the liability is joint and several, or where several parties are independently and collaterally bound by the same obligation. The principle is well expressed by Lord Ellenborough, C. J. in *Drake* v. *Mitchell* (3 East, 251). In that case one of these joint covenantors had given a bill of exchange for the debt secured by the covenant, on which bill judgment was recovered, and it was held that this judgment was no bar to an action of covenant against the three. Lord Ellenborough said, "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party, and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have." In the present case, the judgment recovered against the owner has created a change of remedy *quoad* him;

but we think it does not operate to affect the collateral concurrent remedy against the occupier. The principle is illustrated by the familiar instance of actions against the several parties to a bill of exchange, and by the cases, which have a close analogy to the present, of principals and sureties in which the recovery of judgment against one party is no bar to actions against the other. For these reasons, we think the appellants are entitled to maintain the action, and, consequently, that the judgment given for the defendant must be reversed, and the judgment entered for the plaintiffs, with costs.

Judgment for appellants.

Attorneys for plaintiffs, *Drew* and *Wilkinson*.

Attorneys for defendants, *Morris, Stone, Townson*, and *Morris*.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, April 22, 1871.

(Before Bovill, C. J., Martin and Bramwell, BB., Byles and Blackburn, JJ.)

Reg. *v.* Thoman.

Indictment—Malicious injury—Statement of the amount of damage done.

In an indictment under 24 & 25 Vict. c. 97, s. 51, for maliciously damaging personal property, the damage exceeding 5l., it is not necessary to allege the value of the articles injured, but only that the amount of the damage done to the several articles exceeded 5l. in the aggregate.

Case reserved for the decision of this court.

At the general quarter sessions of the peace holden by adjournment at St. Mary, Newington, in and for the county of Surrey, on Monday, the 6th Feb. 1871, Margareth Thoman was tried and convicted upon the following indictment:—

Surrey.—The jurors for our lady the Queen, upon their oath present, that Margareth Thoman, on the 30th Jan. 1871, in and upon three frocks, six petticoats, one flannel petticoat, one flannel vest, one pinafore, one jacket, one pair of knickerbockers, one flannel night gown, one woollen cape, one sash, one table cloth, one sheet, three hats, and one brooch of the value of twenty pounds, and of the property of Gilbert Alder, unlawfully and maliciously did commit certain damage, injury, and spoil to an amount exceeding five pounds, by unlawfully and maliciously cutting and destroying the same against the form of the statute in such case made and provided.

At the trial the prisoner's counsel objected that the indictment was bad, because the value of the articles damaged was ascribed to them collectively and not individually, and he contended that the value of each class of article ought to have been stated separately.

The court overruled the objection, but reserved the point for the decision of the court for consideration of Crown Cases Reserved.

Judgment upon the prisoner was respited until the decision of such court should be known, and the prisoner was committed to the custody of the governor of the common gaol at Newington, in the said county.

Wm. Frdk. Harrison, Chairman.

Morgan Thomas (*Poulter* with him) for the prisoner.—By the 24 & 25 Vict. c. 97. s. 51, "whosoever shall unlawfully and maliciously commit any damage, injury, or spoil upon any real or personal property, &c., to an amount exceeding 5*l*., shall be guilty of a misdemeanor." Value, therefore, is of the essence of the offence, and a value should be put on each article alleged to be injured in the indictment. In *Rex* v. *Forsyth* (Rus. & Ry. 274), the prisoner (a bankrupt) was indicted under the Bankruptcy Act for concealing property to the amount of 20*l*., and the value was ascribed to all the articles collectively, and it was held necessary to make out the offence as to every one of the articles. [Martin, B., referred to the 14 & 15 Vict. c. 100, s. 23, which enacts (*inter alia*) that no indictment shall be insufficient for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil in any case where the value or price, or the amount of damage, injury, or spoil is not of the essence of the offence.] That does not apply where value is of the essence of the offence, as in this case. [Bovill, C.J.—The amount of damage is of the essence of the offence here, and not the value of the several articles damaged.] In *Reg.* v. *Williams*, (9 Cox Crim. Cas. 338), it was held that damage committed at several times in the aggregate, but not at any one time exceeding 5*l*., will not sustain an indictment under 24 & 25 Vict. c. 97, s. 51.

Royles, for the prosecution.—The value of the articles damaged is not the essence of the offence, but the amount of the damage done is.

Bovill, C.J.—We are all of opinion that it was not material to allege the value of the several articles in the indictment, but only to allege that the amount of the damage exceeded 5*l*. The conviction must therefore be affirmed.

Conviction affirmed.

Reg. *v.* Bailey.

Embezzlement—Clerk and servant—Traveller and collector.

The prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary, but was paid by commission. The prisoner might get orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time—the whole of every day, to their service:

Held, that the prisoner was a clerk and servant within the Embezzlement Clause, sect. 68 of 24 & 25 Vict. c. 96.

Case reserved for the decision of this court.

The prisoner was tried before me at the Michaelmas Quarter Sessions of the peace, holden by adjournment at Sheffield, in and for the West Riding of the county of York, on the 28th Nov. 1870, upon an indictment which charged him with having feloniously embezzled several sums of money, the property of Joseph Hall, and another, his masters.

The prosecutors, the said Joseph Hall and Charles Haslehurst Greaves, who carried on business in partnership in Sheffield as brewers and wine and spirit dealers, under the firm of William Greaves and Company, employed the prisoner from 1861 to 1866 as traveller and bookkeeper, at a weekly wage of 15*s*. The prisoner then left the prosecutors' service and took other employment.

About three years after this the prisoner was again engaged by Messrs. Greaves and Company on a fresh agreement. The terms (which were not in writing) are stated in the evidence of Joseph Hall to have been as follows:—

The prisoner was employed as traveller to solicit orders for, and to collect the moneys due on the execution of such orders by the firm, and to pay over to the said Joseph Hall, or to Charles Haslehurst Greaves, or to the clerk at the brewery in Sheffield, the total net amount of the moneys so collected by the prisoner on the evening of the day when such moneys were so received by him, or on the day following, in case the prisoner should then be travelling at a distance from the brewery. In case the prisoner had neither received money nor obtained orders, he was not expected to go to the brewery that day, but when he came there it was his duty to enter in the cash book of the firm the name and address of the customer from whom he had received any money, the amount, the date of the receipt, and the discount allowed (if any) to the customer, and to pay over to the firm the net amount of the money received by him, the discount being deducted. Every three months the prisoner had an account given to him of the various sums then owing by the customers to the firm, and it was the prisoner's duty to deliver these accounts, and apply for payment from the customers on presenting them. In case such accounts were not paid, the firm enforced payment thereof. The prisoner had no authority to retain in his hands moneys belonging to the firm. He had to travel in the town of Sheffield and neighbourhood. His district comprised about six miles round Sheffield, and included the town of Rotherham. He was to be exclusively in the employment of the firm, to whom he was to give the whole of his time—the whole of every day. The prisoner had no salary, but was paid by a commission of 5 per cent. on all orders for goods he obtained for the firm, and an additional 5 per cent. on the amount of cash collected by him on payment by the customers for the goods supplied by the firm on such orders. The firm were to pay to the prisoner his commission every week, but this was not always done with regularity, and the prisoner was not always regular in his attendance at the brewery, and, although the firm complained of his irregularity, they did not discharge him.

It was further stated by Joseph Hall on cross-examination, that the prisoner could get orders when and where he pleased within his district, and that he had to collect money as soon as he could, and as he chose. His duty was to go to both old and new customers of the firm, and to collect money when and where he thought proper; he was not bound by particular orders, he was at liberty to dispose of his time as he pleased, but he was to employ the whole of it in the service of the firm.

It was proved and admitted by the prisoner on 21st Oct. that he had retained in his hands, and had not accounted for, several sums of money which he had received from the firm by virtue of the before-mentioned employment; the three sums charged in the indictment had been received by the prisoner on the 26th May, the 1st June, and 26th Aug. respectively.

During the course of the case the counsel for the prisoner called my attention to *Reg.* v. *Bowers* (*L. Rep.* 1 Cr. Cas. Res. 45; 10 Cox C. C. 250), *and at the close of the case for the prosecution it* was contended that the prisoner was not a clerk or servant to the prosecutors within the meaning of the statute 24 & 25 Vict. c. 96.

I declined to stop the case, and directed the jury to decide whether the prisoner had been proved by the evidence of Joseph Hall to be a servant to the prosecutors or not. The jury found the prisoner guilty, judgment being respited until the opinion of the Court of Criminal Appeal is pronounced upon the above objection, and defendant is on bail.

The question for the opinion of this honourable court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant to the prosecutors, so as to be liable to be convicted of the crime of embezzlement.

WALTER SPENCER STANHOPE, Chairman.

No counsel appeared to argue for the prisoner.

Forbes, for the prosecution.—The conviction was right. This case is distinguishable from *Reg.* v. *Bowers*, where the prisoner was paid by commission, and was at liberty to get orders or not, as he pleased, for in the present case the prisoner was bound to devote the whole of his time to the prosecutors' service. In *Reg.* v. *Turner* (22 L. T. Rep. N. S. 278) it was held by Lush, J., that a traveller who was bound to "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the prosecutor, and who was not without the prosecutor's written consent to take or execute any order for vending or disposing of similar goods to the prosecutors for or on account of himself or any other person, and who was to be paid by commission, and to render weekly accounts, was a clerk or servant within the 24 & 25 Vict. c. 96, s. 68. [BRAMWELL, B.—The effect of the agreement here is that the prisoner was not to be told how he was to work, but still he was to do it. BLACKBURN, J.—He was a servant to do this kind of work, but might use his own discretion as to the way of doing it.] In *Bower's* case it was optional with the prisoner whether he got any orders at all. [BOVILL, C.J., referred to *Reg.* v. *Tite* (L. & C. 13; 8 Cox Crim. Cas. 458.) A traveller paid by commission and employed to get orders and to receive payments was held to be a clerk or servant, although he was at liberty to receive orders for other persons also. In this case the prisoner was bound to devote the whole of his time to the prosecutors.]

BOVILL, C.J.—The evidence in this case clearly showed that the prisoner was a clerk or servant within the statute. There is nothing in the evidence inconsistent with that relation. *Reg.* v. *Tite* conclusively shows that the prisoner was a clerk or servant. The conviction will be affirmed.

Conviction affirmed.

REG. *v.* TOWNLEY.

Larceny—Animals feræ naturæ.

Rabbits were netted, killed, and placed in a place of deposit, e.g., a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers, who had previously found the rabbits and lay in wait for the poachers,

Held, that this did not amount to larceny.

CASE reserved for the opinion of this Court by Blackburn J.

The prisoner and one George Dunkley were indicted before me at the Northampton Spring Assizes for stealing 126 dead rabbits.

In one count they were laid as the property of William Hollis, in another as being the property of the Queen.

There were also counts for receiving.

It was proved that Selsey-forest is the property of Her Majesty.

An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of Her Majesty was given in evidence, which I thought amounted in legal effect merely to a licence to Mr. Hollis to kill and take away the game, and that the occupation of the soil and all rights incident thereto remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

The evidence showed that Mr. Hollis's keepers, about eight in the morning on the 23rd Sept., discovered 126 dead and newly killed rabbits and about 400 yards of net concealed in a ditch, in the forest, behind a hedge, close to a road passing through the forest.

The rabbits were some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

The keepers lay in wait, and about a quarter to eleven on the same day Townley and a man, who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley, and came into the forest, and went straight to the ditch where the rabbits were concealed, and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrongdoer became the property of the owner of the soil, in this case the Queen (*Blades* v. *Higgs*, 32 L. J. 182, C. P.; 7 L. T. Rep. N. S. 798, 834); and that even if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.

1 Hale P. & C. 510, and *Lee* v. *Risdon* (7 Taunt. 191) were cited.

The jury, in answer to questions from me, found that the rabbits had been killed by poachers in Selsey-forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them, knowing that they had been so killed, but that it was not proved that Dunkley had any such knowledge.

I thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It is to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them.

The question for the Court is whether on these facts the prisoner was properly convicted of larceny.

The prisoner was admitted to bail.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C. J.—[After stating the facts.] The first question that arises is as to the nature of the property. Live rabbits are animals *feræ naturæ*, and are not the subject of absolute property; though at the same time they are a particular species of property *ratione soli*, or rather the owner of the soil has the right of taking them, and as soon as he has exercised that right they become the absolute property of the owner of the soil. That point was decided in *Blades* v. *Higgs* (*sup.*) as to rabbits; and in *Lonsdale* v. *Rigg* (26 L. J. 196, Ex.), as to grouse. In this case the rabbits having been killed on land the property of the Crown, and left dead on the same ground, would therefore in the ordinary course of things have become the property of the Crown. But before a person can become convicted of larceny of a thing attached to the soil, there must not only be a severance of the thing from the soil, but a felonious taking of it also after such severance. Such is the doctrine as applied to stealing trees and fruit therefrom, lead from buildings, fixtures, and minerals. But if the act of taking is continuous with the act of severance, it is not larceny. The case of larceny of animals *feræ naturæ* stands on the same principle. Where game is killed and falls on another's land, it becomes the property of the owner of the land; but the mere fact that it has fallen on the land of another does not render a person taking it up guilty of larceny, for there must be a severance between the act of killing and the act of taking the game away. In the present case we must take it that the prisoner was one of the poachers, or connected with them. Under these circumstances, we might come to the conclusion that it was a continuous act, and that the poachers netted, killed, packed up, and attempted to carry away the rabbits in one continuous act, and therefore that the prisoner ought not to have been convicted of larceny.

MARTIN, B.—I am of the same opinion. It is clear that if a person kills rabbits, and at the same time carries them away, he is not guilty of larceny. Then, when he kills rabbits and goes and hides them, and comes back to carry them away, can it be said that is larceny? A passage from Hale's P. C. 510—"If a man comes to steal trees, or the lead off a church or house, and sever it, and after about an hour's time or so come and fetch it away, it is felony, because the act is not continuated, but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was argued by the Court of King's Bench, 9 Car. 1, upon an indictment for stealing the lead off Westminster Abbey"—was relied on by the prosecution. There is also a dictum of Gibbs, C.J., to the same effect in *Lee* v. *Risdon* (7 Taunt. 191). I am not insensible to the effect of those dicta; but here we must take it as a fact that the poachers had no intention to abandon possession of the rabbits, but put them in the ditch for convenience sake; and I concur in thinking that the true law is that, when the poachers go back for the purpose of taking them away, in continuation of the original intention, it does not amount to larceny.

BRAMWELL, B.—Our decision does not appear to me to be contrary to what Lord Hale and Gibbs, C.J., have said in the passages referred to. If a man, having killed rabbits on the land of another, gets rid of them because he is interrupted, and then goes away and afterwards comes back to remove the rabbits, that is a larceny; and so, if on being pursued he throws them away; and it is difficult to perceive any dis-

tinction where the owner of a chattel attached to the freehold finds it on his land severed, and the person who severed afterwards comes and takes it away. It is in those cases so left as to be in the possession of the true owner, and the Act is not as Lord Hale expresses it, continuated. In this case, however, the rabbits were left by the poachers as trespassers in a place of deposit, though it happened to be on the land of the owner; and it is just the same as if they had been taken and left at a public house, or upon the land of a neighbour. If they had been left on the land of a neighbour or at a public house, could it have been said to be larceny? Clearly not; and if not, why it is larceny because the poachers left them in a place of deposit on the owner's own land? It seems to me that the case is not within the dicta of Lord Hale and Gibbs, C. J., but that here the act was continuated, and that there was an asportation by the poachers to a place of deposit, where they remained not in the owner's possession.

BYLES, J.—I cannot say that I have not entertained a doubt in this case; but upon the whole I think that this was not larceny. The wrongful taking of the rabbits was never abandoned by the poachers, for some of the rabbits were in their bags. It could hardly be said that if a poacher dropped a rabbit, that could convert it into larceny, yet that would follow if the conviction were upheld.

BLACKBURN, J.—I am of the same opinion. Larceny has always been defined as the taking and carrying away of the goods and chattels of another person; and it was very early settled where the thing taken was not a chattel, as where a tree was cut down and carried away that was not larceny, because the tree was not taken as a chattel out of the owner's possession, and because the severance of tree was accompanied by the taking of it away. The same law applied to fruit, fixtures, minerals, and the like things, and statutes have been passed to make stealing in such cases larceny. Though in the House of Lords, in *Blades* v. *Higgs*, it was decided that rabbits killed upon land became the property of the owner of the land, it was expressly said that it did not follow that every poacher is guilty of larceny, because, as Lord Cranworth said, "Wild animals, whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples, which he has gathered from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property; and the same principle is applicable to wild animals." The principle is as old as 11 Year Book (par. 33), where it is reported that a forester who had cut down and carried away trees could not be arraigned for larceny, though it was a breach of trust; but it was said it would have been a different thing if the lord of the forest had out down the trees and the forester had carried them away, then that would have been larceny. So that in the case of wild animals, if the act of killing and reducing the animals into possession is all one and continuous, the offence is not larceny. The jury have found in this case that the prisoner knew all about the killing of the rabbits, and that they were lying in the ditch. It is clear that during the three hours they were lying there, no one had any physical possession of them, and that they were still left on the owner's soil; but I do not see that that makes any difference. Then there is the statement from Hale's P. C. 510, where it is said that larceny cannot be committed of things that adhere to the freehold, as trees, or lead of a house, or the like, yet that the Court of King's Bench decided that, where a man severed lead from Westminster Abbey, and after about an hour's time came and fetched it away, it was felony, because the act is not continuated but interpolated; and Lord Hale refers to Dalton, c. 103, p. 166. And Gibbs, C. J. expressed the same view very clearly in *Lee* v. *Risdon*. Now, if that is to be understood as my brother Bramwell explained, I have no fault to find with it; but if it is to be understood that the mere fact that the chattel by the has been left for a time on the land of the owner, and so has remained the owner's property, and that the person coming to take it away could be convicted of larceny, I cannot agree with it as at present advised. If we are to follow the view taken by my brother Bramwell of these authorities, they do not apply here, for no one could suppose that the poachers ever parted with the possession of the rabbits. I agree that in point of principle it cannot make any difference that the rabbits were left an hour or so in a place of deposit on the owner's land. The passage from Lord Hale may be understood in the way my brother Bramwell has interpreted it, and if so the facts do not bring this case within it.

Conviction quashed.

COURT OF EXCHEQUER.

Reported by H. LEIGH and H. F. POOLEY, Esqrs., Barristers-at-Law.

SECOND DIVISION OF THE COURT.

April 25 *and* 27, 1871.

DRIVER v. THE KINGSTON HIGHWAY BOARD.

District Highway Board—Power of to repair roads in district — Parish adopting Local Government Act 1858 *— Effect of on power of board to repair —Ultra vires—Liability of board for materials for repairs supplied to their order—Highway Act* 1862 (25 *&* 26 *Vict. c.* 61), *ss.* 17, 20, 21, 41— *Construction.*

In Dec. 1865, *the defendants* (*the K. Highway Board*), *having jurisdiction under the Highway Act* 1862 (25 *&* 26 *Vict. c.* 61), *over a district comprising, amongst other parishes, the parish of W., advertised for tenders for the supply of materials for repairing the roads in W. in* 1866, *in answer to which the plaintiff sent in a tender, which was accepted, whereupon a contract for such supply was entered into by him with the defendants. In Jan.* 1866 *the defendants approved their surveyor's estimate of the approximate amount of expenditure for the several parishes, and by their direction a call of* 768*l. was made upon the parish of W., one moiety of which the parish paid in Feb.* 1866, *the other moiety, after a dispute as to their liability, being paid by them in* 1867.

On the 24th March 1866, *the parish of W. passed a resolution, under sect.* 41 *of the Highway Act* 1862, *adopting the Local Government Act* 1858, *and the statutory requirements having been complied with, a notice, signed by the Home Secretary, appeared in the "London Gazette," on the* 11*th May* 1866, *that at the expiration of two months from the passing of such resolution the said Act*

of 1858 *would have the force of law within the parish of W. On the* 26*th July* 1866 *the defendants received notice from the local board of the adoption by the latter parish of the Local Government Act* 1858.

Up to that date (26*th July* 1866) *the defendants continued to repair the W. roads,* with materials supplied by the plaintiff to their surveyor's order, *just as if W. had not adopted or intended to adopt the Local Government Act* 1858, *and without being requested by the W. Local Board to do such repairs. The amount of materials supplied by the plaintiff for* 1866 *exceeded the amount contemplated by the estimate and contract at the beginning of the year; but there was nothing unusual in that fact, inasmuch as for the previous years* 1864, 1865, *the plaintiff, under contracts similar to the present one, had supplied and been paid by the defendants, for materials so supplied by him, in excess of the amounts estimated for those years.*

In an action for goods sold and delivered, &c., the plaintiff sought to recover the price of the materials so supplied by him from the 1*st Jan. to* 26*th July* 1866, *which he contended the defendants were liable to pay, inasmuch as he had no notice of W. ceasing to be a member of the K. Highway District, or that he was to discontinue supplying the materials; but, on the contrary, he continued to supply to order, through the surveyor of the defendants, materials which the defendants used, but in any event they were liable to pay him up to the* 24*th May, until which date the plaintiff alleged the parish of W. continued to be a member of the K. Highway Board. The defendants denied their liability on the ground that by adopting the Local Government Act* 1858 *on the* 24*th March, W. thenceforth ceased to form part of the K. Highway District, and the defendants had no longer any power to repair roads in that parish, or to make calls on W. in order to pay the plaintiff; and that the plaintiff could not recover from the defendants for any portion of the materials supplied for W. subsequently to the* 24*th March.*

Upon a special case, stating all the above facts, it was

Held by the Court of Exchequer (*Martin and Bramwell, BB.*), *that the plaintiff was entitled to recover from the defendants the whole amount of his claim, and that the defendants had not, in repairing the roads in W. between the* 24*th March and the* 24*th May, or between the* 24*th May and the* 26*th July, acted* ultra vires, *so as to prevent the plaintiff from recovering the price of the materials so supplied by him during either of those periods:*

Per Martin, B.—It is a question of fact; and on the facts stated, the court should find a verdict for the amount claimed as for goods bonâ fide supplied to the order of a person authorised by the defendants to give it, and used for their purposes:

Per Bramwell, B.—The words, "upon such adoption being made," in sect. 41 *of the Highway Act* 1862, *must mean "upon such adoption* coming into operation," *and therefore the resolution of the parish of W., on the* 24*th March, to adopt the Local Government Act* 1858, *did not amount to an adoption of it, nor did the parish "cease to form part of the K. Highway District," within that section, until the expiration of two months from such date; and although, on such adoption, the parish ceased to form part of the district, yet it is, by sect.* 41, *to be "subject to the payment of any contribution due from the parish to the board at the time of such adoption." The defendants, therefore, were bound to repair the W. roads, if not to the end of the year, at least to the extent of the funds they had received for that purpose:*

Quære, whether, if fresh funds had been necessary for the repairs after the 24*th May, the board would, under the circumstances, have had power to raise them in the way prescribed by sect.* 21 *of the Highway Act* 1862.

THIS was an action by the plaintiff to recover 341*l.* 12*s.* 8*d.* for goods sold and delivered, &c., and for work and materials done and provided by the plaintiff for the defendants, and for money due on accounts stated, to which the defendants pleaded never indebted; payment before action; and a set-off; on which plea issue was joined. At the trial before Keating, J., and a special jury, at the spring assizes (1870) for Surrey, at Kingston, a verdict by consent was entered for the plaintiff for the full amount claimed, subject to a reference to a legal arbitrator, to whom the cause and all matters in difference between the parties were referred, with power to the arbitrator to direct the verdict to be entered for the plaintiff or the defendant, as he should think proper, and to state a special case for the opinion of the court as to the whole or part of the claim; and the arbitrator, having entered upon the arbitration, and heard evidence on both sides, made his award in the form of the following

SPECIAL CASE.

1, 2, 3. The plaintiff is a carman and contractor at Wimbledon, and the defendants are the Kingston Highway Board. The Kingston highway district, in the years 1865, 1866, had jurisdiction over seventeen parishes, including the parish of Wimbledon, out of which jurisdiction in the years from 1866 to 1870, five parishes, including Wimbledon, passed as hereinafter mentioned; but during 1864, 1865, and part of 1866, Wimbledon parish formed part of the Kingston Highway Board.

4. John Niblet was surveyor to the said board during the whole of the time, and continued so to the end of the year 1869.

5. On the 30th Nov. 1865, Niblet made a report to the Kingston Highway Board of the estimated amount of materials which would be required for the year 1866 for the repair of the roads in the various parishes of the district. This estimate for Wimbledon parish was as follows:

Mitcham gravel, 800 cubic yards, at 5*s.* 6*d.*, 220*l.*;
Wimbledon ditto, 800 ditto, at 3*s.* 3*d.*, 130*l.*

6. The Kingston Highway Board advertised for tenders for the supply of materials for the repairs of the roads in, amongst other parishes, Wimbledon parish. The plaintiff tendered for Wimbledon parish, and his tender was accepted. A copy of the document containing the specification, form of tender, schedule of prices, and the contract entered into by the plaintiff with the Kingston Highway Board for the supply of 600yds. of Wimbledon gravel, or thereabouts; and 600yds. of Mitcham gravel, or thereabouts, for Wimbledon parish, is annexed to and forms part of this case, and is marked A.

7. The Kingston Highway Board, on the 25th Jan. 1866, expressed their approval of their surveyor's estimate of the approximate amount of expenditure for the several parishes of their district, and directed calls to be made upon the several parishes, and, amongst others, a call of 768*l.* upon

the parish of Wimbledon. The parish of Wimbledon paid one moiety of their call in or about Jan. or Feb. 1866.

8. On the 24th March 1866, the parish of Wimbledon, under sect. 41 of the Highway Act 1862 (25 & 26 Vict. c. 61) passed a resolution adopting the Local Government Act 1858. Wimbledon is a parish containing a population exceeding 3000.

9. A copy of such resolution appeared in the *Surrey Comet*, which circulates in the parish of Wimbledon, on the 31st March 1866, and 14th April 1866, in the following form:

Wimbledon.

We, George Pollock and Michael Ogden, churchwardens, do hereby give notice that the Local Government Act 1858 was, on the 24th March inst., duly adopted in this parish, by a resolution of the overseers and ratepayers. GEO. F. POLLOCK.

Dated this 26th March 1866. MICHAEL OGDEN.

10. On the 11th May 1866, there appeared in the *London Gazette* the following notice, signed by the Secretary of State for the Home Department.

Local Government Act 1858.

Notice of adoption of Act by Wimbledon, Surrey.

Whereas the Local Government Act 1858 was duly adopted on the 24th March 1866, by the parish of Wimbledon, in the county of Surrey, and notice of such adoption has been given, and the other requirements of the said Act have been duly complied with, and whereas the period fixed by the said Act, for appeal against the resolution for the adoption of the said Act by such parish, has now expired, and no such appeal has been made, now, therefore, I, as one of Her Majesty's Principal Secretaries of State, do hereby give notice that the Local Government Act 1858, has been duly adopted within the said parish of Wimbledon, in the county of Surrey, and that, in accordance with the provisions thereof, the said Act will, at the expiration of two months from the date of the passing of the aforesaid resolution, have the force of law within such parish.

Given under my hand this 11th May 1866.

(Signed) G. GREY,
Home Office, Whitehall.

11. On or about the 26th July 1866, the Kingston Highway Board received a letter from Mr. John Sidney Smith, the chairman of the Wimbledon Local Board, giving notice that the parish of Wimbledon had adopted the Local Government Act 1858, and asking the Kingston Highway Board to render their accounts.

12. The Kingston highway board continued to repair the roads in Wimbledon parish up to the 26th July 1866, *with materials supplied by the plaintiff to Niblet's order*, just as if Wimbledon parish had not adopted, or intended to adopt, the Local Government Act 1858, and without being requested by the Wimbledon Local Board to do such repairs.

13. The plaintiff seeks to recover in the present action the price of the materials so supplied up to the 26th July 1866. The particulars are more specifically set forth in the next paragraph.

14. The plaintiff supplied

		£	s.	d.
Between 1866. Jan. 1 and March 24.	347yds. Mitcham gravel amounting, at 5s. 6d., to	95	8	6
	464yds. Wimbledon gravel at 3s. 3d.	75	8	0
		£170	16	6
Between 1866. Jan. 1 and March 24.	869yds. Mitcham gravel at 5s. 6d.	238	19	6
	635yds. Wimbledon gravel at 3s. 3d.	103	3	9
		£342	3	3
Between May 24 and July 26.	450yds. Mitcham gravel at 5s. 6d.	123	15	0
	180yds. Wimbledon gravel at 3s. 3d.	29	5	0
		£153	0	0

Or, combining the two last-mentioned intervals between

		£	s.	d.
Jan. 1 and July 26.	1319yds. Mitcham gravel at 5s. 6d.	362	14	6
	815yds. Wimbledon gravel at 3s. 3d.	132	8	9
		£495	3	3

The following note was written by the arbitrator in the margin of p. 3 of the draft special case:

I have obtained the amounts between Jan. 1 and March 24 from the highway board book. The other figures are from Mr. Buckston's summary.—L. S.

15. There was nothing unusual in the fact that the materials supplied in 1866 exceeded the amount contemplated by the estimate and contract at the beginning of the year, inasmuch as in the years 1864, 1865, during which the plaintiff had supplied the Kingston Highway Board, as ordered by their surveyor for the repairs of the roads in Wimbledon parish, under contracts substantially similar to that for 1866, the amount actually supplied had exceeded, though not to such an extent as in 1866, the amount estimated and contracted for; and the Kingston Highway Board paid the plaintiff for all the materials so supplied during these years 1864, 1865.

16. The plaintiff also seeks to recover in this action the sums of *4l.* 1*s.* for team work done for the Kingston Highway Board, and *5l.* 4*s.*, for three years' rent of a store let to the Kingston Highway Board. Copies of the particulars of this claim in respect of these matters, with dates, are annexed to and form part of this case. For the purposes of this case it is to be taken that these particulars are correct, and that the work charged for was done for the store let to the Kingston Highway Board, for the purpose of the repair of the roads in Wimbledon parish.

17. The plaintiff received payments from the Kingston Highway Board, on account of materials supplied for the repairs of the roads in Wimbledon parish in the year 1866, amounting to 227*l.* 14*s.* 3*d.* —viz., 97*l.* 7*s.* 9*d.* on the 22nd Feb., and 130*l.* 6*s.* 6*d.* on the 26th April 1866.

18. The payments so received by him from the board, as will be seen from paragraphs 14 and 17, more than covered his claim for gravel supplied up to 24th March 1866, the day on which the parish of Wimbledon passed their resolution adopting the Local Government Act 1858, as mentioned in paragraph 8.

19. Towards the end of 1866 litigation ensued between the Kingston Highway Board and the Wimbledon Local Board, respecting the second moiety, amounting to 384*l.*, of the call made as in paragraph 7 above mentioned, which second moiety had not been paid by Wimbledon parish, and which that parish declined to pay on the ground that it did not become due till July 1866, after the adoption of the Local Government Act 1858, in Wimbledon parish. Ultimately, in the course of the year 1867, this second moiety was paid to the Kingston Highway Board.

20. The Kingston Highway Board alleged, and still allege, that on taking an account between the Kingston Highway Board and the parish of

Wimbledon, the amounts received by the Kingston Highway Board in respect of Wimbledon parish during the whole time of its connection with the Kingston Highway Board did not cover the total expenditure of the Kingston Highway Board in respect of that parish, irrespective of the plaintiff's present claim, to meet which the Kingston Highway Board had therefore no funds; that after the adoption of the Local Government Act 1858 by Wimbledon parish, the Kingston Highway Board had no power to make further calls on Wimbledon parish for the purpose of paying the plaintiff, nor could they make calls on the other parishes remaining in their district for that purpose; that where a parish under the jurisdiction of a highway board adopts the Local Government Act 1858, and thereby becomes exempt from future calls of such highway board, and all debts incurred on behalf of that parish have not been paid, and the highway board has no funds in hand belonging to such parish, the creditor or creditors cannot recover such debt or debts from the highway board at all; and that the local board of Wimbledon ought to pay the plaintiff's claim, inasmuch as the Kingston Highway Board were obliged to repair the roads in Wimbledon parish until they received the notice from the Wimbledon Local Board on the 26th July 1866, mentioned in paragraph 11 of this case. The Local Board of Wimbledon refused to pay, and gave as a reason that they had paid the amount of the rate made by the Kingston Highway Board for the year 1866, which rate they alleged was sufficient to cover the amount actually expended by the Kingston Highway Board on the roads in Wimbledon parish in that year. A copy of a letter of the 13th June 1868, addressed by the clerk of the Kingston Highway Board (Mr. James Bell) by direction of the Kingston Highway Board, to the Secretary of State for the Home Department, and also a copy of a letter of March 1868 from the clerks to the Wimbledon Local Board (Messrs. Batt and Son) to the Home Office, are annexed and form part of this case (Appendix D and E), for the purpose of showing the grounds taken by the two boards, but not for the purpose of showing how the accounts actually stood between the Kingston Highway Board and Wimbledon parish.

21. It is now contended, on behalf of the Kingston Highway Board, that they acted *ultra vires*, in repairing the roads in Wimbledon parish, after the 24th March 1866; and *à fortiori* in repairing them after the 24th May 1866; and therefore, that they are not legally liable to pay the plaintiffs for the materials supplied after either of these dates, and that they have no power to raise funds for such a purpose.

22. The plaintiff had no knowledge of the facts stated in paragraphs 5, 7, and 11, nor of the state of the account between the Kingston Highway Board and the parish of Wimbledon, nor was he shown to have had any knowledge of the facts stated in paragraphs 8, 9, and 10.

The first question for the opinion of the court is, whether the Kingston Highway Board acted *ultra vires* in repairing the roads in Wimbledon parish, during the interval between the 24th March 1866 and the 24th May 1866, so as to prevent the plaintiff from recovering in this action the price of the materials supplied by him as above-mentioned.

The second question is like the first, substituting for the interval therein mentioned the interval between the 24th May and the 26th July 1866.

If the court answers the first question in the negative and the second in the affirmative, the verdict for the plaintiff is to stand; but the damages are to be entered for the sum of 123*l.* 14*s.*; that is to say, the aggregate of the three sums:

	£	*s.*	*d.*
	4	1	0
	5	4	0
and	342	3	3
	351	8	3
Less the sum of	227	14	3
	£123	14	0

If the court answers both questions in the negative, then the verdict for the plaintiff is to stand; but the damages are to be entered for the sum of 276*l.* 14*s.*, that is to say, the aggregate of the three sums

	£	*s.*	*d.*
	4	1	0
	5	4	0
and	495	3	3
	504	8	3
Less the sum of	227	14	3
	£276	14	0

If the court answers both questions in the affirmative, then the verdict for the plaintiff is to stand; but the damages are to be entered at £9 5*s.*, the aggregate of the sums of 4*l.* 1*s.* and 5*l.* 4*s.*

If, according to the answers given to the above questions and the above directions, the damages are entered for any sum beyond the sum of 9*l.* 5*s.*, then the defendants are to pay the plaintiff the costs of this reference and award; but if, on the contrary, the damages are entered for the said sum of 9*l.* 5*s.*, then each party is to pay his or their own costs of the reference, and one moiety of the costs of this award.

The plaintiff's points for argument:—First, that he is entitled to recover the whole amount of his claim, inasmuch as the whole of the gravel supplied by him was so supplied in pursuance of a contract between him and the defendants, and according to the orders and directions of their surveyor, and the whole of such gravel was used by the defendants; secondly, that the plaintiff received no notice from the defendants that the parish of Wimbledon had ceased to be a member of the Kingston Highway Board, and no notice was given by the defendants to the plaintiff to discontinue the supply of gravel for the use of the said parish, after it had ceased to be a member of such board, but the defendants, through their surveyor, still continued to order and direct the supply and delivery of the gravel as if the parish had continued to be a member of the said highway board; thirdly, that in any event, the plaintiff is entitled to the amount claimed to be due to him up to the 24th May 1866, inasmuch as the parish of Wimbledon continued to be a member of the Kingston Highway Board until that date.

The defendant's points for argument—First, that, by passing the resolution to adopt the Local Government Act, the Wimbledon parish, on the 24th March 1866, ceased to form part of the district under the defendant's management; secondly, that the defendants could not, after the 24th March

1866, repair or cause to be repaired any roads in Wimbledon parish; thirdly, that the defendants were a board, constituted under Act of Parliament for certain specific purposes, of which, since the 24th March 1866, the repairing of roads in Wimbledon parish was not one, and that they are consequently not liable, under the facts stated in the case, for the price of materials after the 24th March 1866; fourthly, that it is consistent with the case, as stated, that a large part of the materials supplied by the plaintiff after the 24th March 1866, were supplied under a supposed contract or contracts with the defendants made after that date, and which, after that date, they were in law incapacitated from making; fifthly, that the defendants could not after the 24th March 1866, contract with the plaintiff for repairing the roads in Wimbledon parish; sixthly, that on the 24th May 1866, the Wimbledon parish ceased to form part of the district under the defendants' management; seventhly, that on the 24th May 1866, the Wimbledon parish adopted the Local Government Act, within the meaning of 25 & 26 Vict. c. 61, s. 41. (Points 8, 9, 10, and 11 were precisely similar to points 2, 3, 4, and 5 above mentioned, substituting only the date of the 24th May 1866 for the 24th March 1866.)

Prentice, Q.C. (with him was *Hance*), on the part of the plaintiff, contended that the plaintiff was entitled to recover from the delendants the full amount of his claim for gravel *bonâ fide* supplied to the order of their surveyor, and used for the repair of roads within their district, during the entire period from the 1st Jan. to the 26th July. As to that portion supplied from 1st Jan. to 24th March, no question was now raised. With respect to the period from the 24th March to the 26th July it was submitted that the plaintiffs were liable, the goods having been supplied to their order, and used for repairing their roads, and the plaintiff having up to the 26th July had no notice that Wimbledon parish had ceased to be a member of the Kingston Highway Board, or that he was to discontinue the supply of gravel. But, in any case, for the gravel supplied in the interval between the 24th March and the 24th May the defendants were liable, because the parish of Wimbledon did not cease to be a member of the highway board, and the adoption by them of the Local Government Act 1858 was not complete and operative, until the expiration of two months from the 24th March, the date of their resolution to adopt it. During these two months, if the Kingston board were not liable for the repairs, the roads must have gone unmended, for Wimbledon parish had no authority to repair them. [BRAMWELL, B.—Your argument is, some one must have had the duty and liability of repairing the roads. Wimbledon parish could not do it, therefore the Kingston Highway Board must do so—that is, up to the 24th May.] Just so. He cited and referred to the

Local Government Act 1858 (21 & 22 Vict. c. 98), ss. 19 and 20;
Highway Act 1862 (25 & 26 Vict. c. 61), s. 41;
Highway Act Amendment Act 1864 (27 & 28 Vict. c. 101), s. 32.

Denman, Q.C. (with him was *Castle*), for the defendants *contra*, urged the argument contained in their points, and contended that Wimbledon having by their resolution on the 24th March to adopt the Local Government Act, ceased then *and there to form part of the* highway district, the *defendants were then functi officio*, and could *not thenceforth legally do* any repairs to the Wimbledon roads; and having done them, as the plaintiff also did, without knowledge of the facts of the case, no contract was thereby effected. The plaintiff and the defendants were *in pari innocentiâ* as regards notice up to the 26th July. The materials were delivered on the Wimbledon roads and used there. The user therefore was that of Wimbledon. [BRAMWELL, B.—The plaintiff's point, I should say, was simply this, work done and payment due unless cause to the contrary be shown.] This is shown to the contrary, that all these things were done in pursuance of the Act. Sects. 3, 9, and 17 of the Highway Act 1862 (25 & 26 Vict. c. 61) refer wholly and solely to parishes within the district, and the defendants contend that sect. 41 of that Act, under which Act alone this district is rated, is strong to show that Wimbledon had ceased to form part of the district. By that section a stop was put to the district as far as Wimbledon was concerned, and to all repairs of the road in Wimbledon parish by the district highway board. [BRAMWELL, B.—The emphatic words of sect. 41 "*shall* cease to form part of such district" must have reference to something future and not to past matters.] We say that *this* is something future. There was not a sum due from the parish at that time, and we could not be reimbursed for it, and so it cannot be to be paid by us. [BRAMWELL, B.—You admit that up to the 24th March the plaintiff is entitled to recover?] Yes, and that has been paid. The plaintiff relies on sects. 19 and 20 of the Local Government Act 1858 (21 & 22 Vict. c. 98), and says that notwithstanding the strong words in sect. 41 of the 25 & 26 Vict. c. 61 (The Highway Act 1862), there was no adoption of the Act of 1858 by Wimbledon until *after* the 24th March. But the defendants, on the other hand, say that, upon the parish of Wimbledon ceasing, as we contend that on the 24th March it did cease, to be in the Kingston Highway District, every clause of the Act, as far as Wimbledon is concerned, fell to the ground, inasmuch as everything to be done by the highway board under the Act must be done *in the highway district*. Therefore what was done after the 24th March was clearly *ultra vires* of the Kingston Highway Board.

MARTIN, B.—I am of opinion that the plaintiff in this case is entitled to the judgment of the court in his favour. There are two questions submitted to us by the arbitrator on the special case for our determination; the first is, whether or not the Kingston Highway Board acted *ultra vires* in repairing the roads in the parish of Wimbledon, in the interval between the 24th March and the 24th May 1866, so as to prevent the plaintiff from recovering, in this action, the price of the materials supplied by him during that period, as mentioned in the special case? The second question is like the first, except that, for the interval between the 24th March and the 24th May, as above mentioned, the interval between the 24th May and the 26th July should be substituted. Now, in my opinion, the plaintiff is entitled to recover on both heads of claim. In my opinion it is materially a question of fact, and turns upon the 12th and 15th paragraphs of the special case stated by the learned arbitrator. The 12th paragraph finds that "the Kingston Highway Board continued to repair the roads in Wimbledon parish, up to the 26th July 1866, with materials supplied by the plaintiff to Niblet's order" (he was the surveyor of the defen-

dants), "just as if Wimbledon parish had not adopted, or intended to adopt, the Local Government Act 1858, and without being requested by the Wimbledon Local Board to do such repairs;" and the 15th paragraph finds that "there was nothing unusual in the fact that the materials supplied in 1866 exceeded the amount contemplated by the estimate and contract at the beginning of the year, inasmuch as in the years 1864, 1865, during which the plaintiff had supplied materials to the Kingston Highway Board, as ordered by their surveyor for the repairs of the roads in Wimbledon parish, under contracts substantially similar to that for 1866, the amount actually supplied had exceeded, though not to such an extent as in 1866, the amount estimated and contracted for; and the Kingston Highway Board paid the plaintiff for all the materials so supplied during those years, 1864, 1865." Upon those two findings of the arbitrator, I am of opinion that we, if sitting here as a jury on the facts, ought to find a verdict for the plaintiff for the amount claimed, as for goods sold and delivered upon an order given by a person competent, and authorised by the defendants, to give it; and that that is the true and real liability upon the defendants on the facts stated. It was as much an ordinary case of goods sold and delivered as in the case of an action against a city company for provisions supplied for one of its feasts, or for any other matter done by a corporation in the way of its business by its public officer. The only answer set up to that is that this was a matter *ultra vires* of the highway board. Now I confess, for my own part, that I do not, and never did, well understand what *ultra vires* means, and I cannot say that I have been much enlightened on the point by the argument in the present case. There was a case not very long ago before the Court of Exchequer, in which Sir Charles Taylor brought an action against the Chichester and Midhurst Railway Company, to recover a sum of money on a contract. I recollect, and no doubt my brother Bramwell, who, as well as myself, was a party to the judgment in that case, recollects it also, that the Court of Exchequer, after an argument of three days upon the doctrine of *ultra vires*, failed to comprehend it, and eventually gave judgment in favour of Sir Charles Taylor. The case went up to error, and the Court of Exchequer Chamber held that the contract was *ultra vires*, and our judgment was reversed; but I am bound to say that I never quite understood that judgment. The case then went up to the House of Lords, and there the decision of the Exchequer Chamber was reversed, and I see that Lord Westbury prefaces his judgment on this point by stating that "It is impossible for anyone, who rightly apprehends the meaning of the term *ultra vires*, to entertain any reasonable doubt about the matter; the whole thing is mere imagination about the agreement being *ultra vires*, and about the company committing a breach of trust. It proceeds only from a want of more accurately understanding the meaning of terms, and the rules by which they are applied." (*a*) Now, if a person who is competent to contract, and is by law competent to do so without fraud, enters into a contract, I own I cannot see how, because such person has exceeded that which he ought to do, it therefore ceases to be his contract. It may be said that it does so cease, but to my mind it is very difficult to comprehend it. But I think that even Mr. Denman will admit that he has no very strong argument to support the doctrine of *ultra vires* in the present case. My judgment in this case is founded on this, that this is an ordinary action for goods sold and delivered, the goods having been ordered by a person who, there is the strongest evidence to show, had authority to order them; and they were supplied and were used *bonâ fide*, and without any fraud, for the purposes of the defendants' board; and nothing has been shown or said to satisfy me that there is any rule of law, of reason, or of common sense, which should excuse them, as the persons whose servant so ordered these goods, from paying the price of them. If the highway board *has* gone beyond its authority in the matter, it must do as other people must do in such a case, namely, take the consequences of their own voluntary act.

BRAMWELL, B.—I am of the same opinion, and think that the plaintiff in this case is entitled to our judgment. And first, with reference to the objection which has been raised that the highway board acted *ultra vires* in this matter, I think I understand what that term means. I may observe that I was engaged in, I believe, the first case in which the point was raised as to the competency of a railway company to make a contract, and I was surprised at the decision. I refer to the case of *The East Anglian Railway Company* v. *The Eastern Counties Railway Company*, in the Common Pleas (11 C. B. 775; 21 L. J. 23, C. P.), which, I think, was the first time that the question of *ultra vires* was raised, and the objection was taken, and was upheld by the court, that a railway company, incorporated by Act of Parliament, and having a common seal, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated. But the question which arose in that case is not, to my mind, the same as that which arises here; and I am strongly inclined to think, if nothing else had appeared in this case, except that the Kingston Highway Board had ordered gravel to be purchased for the repairs of the roads not within their district, that that would have been *ultra vires*, and that the person who supplied the gravel could not have recovered, because this board is only competent to contract with reference to the purposes and within the district for which it is created; and I should have thought that it could have no more power to bind itself to pay the people by whom the gravel was supplied in a parish which was not a member of the board, or within its jurisdiction, than it could have power to contract for building a bridge in a different county. However, I think the question is not so bare a one as I have supposed, and it appears to me that different considerations arise here. Now, as to the first period of time in dispute, that, namely, from March 24th to May 24th, I confess that I have never had a doubt about it, and I do not see how a doubt can be entertained on the matter, except by doing the Legislature a very grievous wrong. The facts upon that part of the case, are clearly

(*a*) The case referred to by the learned Baron, *Sir Charles Taylor, Bart.* v. *The Chichester and Midhurst Railway Company*, is reported in the Exchequer, 14 L. T. Rep. N. S. 437; 1 H. & C. 409; in the Exchequer Chamber, 16 L. T. Rep. N. S. 703; 36 L. J. 201, Ex.; L. Rep. 2 Ex. 356; and in the House of Lords, 23 L. T. Rep. N. S. 657; 39 L. J. 217, Ex.; L. Rep. 4 Eng. & Ir. App. 628.

these, that the defendants would have been liable to repair the roads in Wimbledon parish up to the 24th May, unless the Local Government Act had before that time been adopted by Wimbledon parish, within the meaning of the Highway Act 1862 (25 & 26 Vict. c. 61). Then Mr. Denman says it was adopted before that time, because the resolution to adopt it, which was passed two months previously, was in fact the adoption of it. But the resolution to adopt is not in my opinion the adoption within the statute. When we come to look at the Act of Parliament, the Local Government Act 1858 (21 & 22 Vict. c. 98), under which this resolution was passed, it is clear that it is a resolution which is to be operative only in case something else does not happen. It may be appealed against, it may be reversed; and a variety of other matters may take place, and it is not until two months after the resolution to adopt the Act, that the Act is so adopted as to have the force and effect of law in the parish (sect. 20). Indeed, Mr. Denman himself says, in effect, that, until the expiration of these two months, Wimbledon parish could not have repaired its roads. If he does not admit it, he does not, at all events, deny that for two months it would have been impossible for the Wimbledon board to act. The consequence of that would be that if the district highway board could not act for these two months, then, whatever might be the state and condition of the roads in Wimbledon parish, they must, during that period, go unrepaired. Can anyone suppose that such an absurdity as that is to be found in the Act of Parliament? and are we to do the Legislature the wrong of supposing them to have passed an Act having such a preposterous effect? I think the 41st section of the Highway Act 1862 (25 & 26 Vict. c. 61), puts the matter in the true light, where it says: "Upon such adoption being made, such parish, or part of a parish, shall cease to form part of such district." That must mean "upon such adoption *coming into operation*." Therefore, as to the first point, with reference to the period from the 24th March to the 24th May, I cannot come to any such conclusion as the defendants would desire me to do. But with respect to the other point my opinion, I confess, is not so clear. At the same time, I have a strong opinion that the plaintiff is entitled to judgment on that point as well as on the other, and upon this ground, if we look at the Act of Parliament which regulates these districts for the purpose of repairing the highways (25 & 26 Vict. c. 61), we see that it is evidently contemplated that there will be certain annual expenses, and that there is to be an annual estimate of the expense of keeping the roads in repair. I do not say that it is necessary, or that the district board ought, at the beginning of every year, at once to levy the full estimated amount; on the contrary, it is obvious that they may levy it at different times and in different portions. Further, it is manifest that, if the sum first estimated should not prove to be enough, then there may be a further sum levied by precept to the overseers provided it does not exceed a certain amount; and although that may be so, it is manifest that the statute contemplated certain annual expenses and a certain annual sum; and it is also manifest that it was intended by the statute that the work should not be done upon credit, but that the highway board should put themselves in funds at the first for the work that would have to be done subsequently, because in the same way as a poor-rate ought not to be retrospective, so neither ought a highway rate to be; and what ought to be done is, that the money should be collected and received for the repairs to be done thereafter. It is necessary to refer to the statute (25 & 26 Vict. c. 61) to see these different things, and I would refer to the 17th section, in which it is said that "it shall be the duty of the district surveyor of such parish to submit to the board, at their first meeting in every year, an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district of the board, and to deliver a copy of such estimate," and so forth; and by sect. 20 it is provided that "the salaries of the officers appointed for each district, and any other expenses incurred by any highway board, for the common use or benefit of the several parishes within such district, shall be annually charged to a district fund, to be contributed by, and charged upon, the several parishes within such district, in proportion to the average of the expenditure incurred during the three last preceding years, in such parishes respectively, in maintaining and keeping in repair the highways thereof." And then, by sect. 21, it is enacted that, "For the purpose of obtaining payment from the several parishes within their district, of the sums due from them, the Highway Board shall order precepts to be issued to the overseers of the said parishes, stating the sum to be contributed by each parish, and requiring the overseers of such parish, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board; and the overseers shall comply with the requisition of such precept by paying the sums to be contributed by their respective parishes, out of any moneys in their hands applicable to the relief of the poor; but no contribution required to be paid by any parish, at any one time in pursuance of this Act, shall exceed" the sum therein specified, and so on. I do not think that one need go farther with the sections of the Act of Parliament, but if that be so, then the consequence is that the parish of Wimbledon, at the beginning of 1866, ought to have been called upon, as they were in fact called upon, to contribute a certain sum, which was divided, for the convenience of those who had to pay it, into two sums, which, however, might have been received by the defendants at the outset. They were also liable to a charge which is to be annual, for the salaries of the officers. Now, is it conceivable, if that be so, if the Wimbledon board at the commencement of the year pay all this money, and then afterwards, in the month of March the two months came into operation, so that the Local Government Act 1858 is adopted—is it, I say, conceivable, that the Kingston Highway Board are to keep all the money that is to be paid to them, estimated and received upon the footing that the roads will be repaired by them for the whole year, and that then the Wimbledon parish, having paid the Kingston board for repairs for a year, are nevertheless, after that, to repair the roads in their own parish? It seems to me that such a state of things is impossible. To make such a consequence follow would require the most stringent and peremptory words in the Act of Parliament. But the only words that are relied on are these, I think, in the 41st section of the 25 & 26 Vict. c. 61, "any parish, or part of a parish, in-

cluded in a highway district, *may adopt* the Local Government Act in the same manner and under the same circumstances, in and under which it might have adopted the same, if it had not been included in such district; and *upon such adoption being made*, such parish, or part of a parish, shall *cease to form part* of such district." So it does. It does not form part of that district any longer; but it is nowhere said that the district board shall not repair the highways, and receive the money when the precept is issued. Nothing of the sort is there. On the contrary, the section proceeds immediately to say, "subject nevertheless to the payment of any contribution that may at the time of such adoption be due from such parish or part of a parish to the highway board." Well, it may be said, if the argument is a well founded one, then the consequence would follow that if, in the latter half of the year, it had been found that the estimated sum was not enough, the Kingston board would have been unable still to go on repairing the highways, and have a further claim on the Wimbledon board. I am not at all sure that that might not be answered in the affirmative; but it is enough to say that the question has not arisen here. It may somehow or the other be that the defendants could not get at the Wimbledon board under these circumstances; but all that we have to do now is to decide this particular case; and although sect. 41 says that "on the adoption of the Act," which I will say was on the 24th May, "*the parish shall cease to be a part of the district*," yet it does not say that the district board shall not repair those roads, the price of repairing which it has received; and therefore as it would have been a gross injustice if it had said so, we certainly ought not to interpolate these words into the Act. I think, therefore, that it follows from these different considerations, that the Kingston Highway board were bound to repair the roads in the parish of W., I am inclined to think to the end of the year; but, if not to the end of the year, at all events to the extent of the funds that they had received for that purpose. They have not shown that they have gone beyond those funds. Whether or not, if any fresh funds were necessary in order to repair to the end of the year, the defendants had power, under the circumstances, to raise such fresh funds in the manner before alluded to, I will not positively decide, though I am not at all sure that they had not such power. It is enough to say that, to the extent of the funds they had, they were bound. The consequence is, that they had power to order the gravel here, and so the order was not *ultra vires*, and therefore they must be answerable for the debt; and our judgment must be for the plaintiff for the full amount.

Attorneys for the plaintiff, *Dixon* and *Tempany*, 10, Bedford-row, W.C.

Attorneys for the defendants, *Bell* and *Newman*, 21, Abchurch-lane, E.C.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Wednesday, May 3, 1871.

ADAMS (app.) v. MASTERS (resp.)

*Game—Trespass in pursuit of—Bonâ fide claim of right—Jurisdiction of justices—*1 *&* 2 *Will.* 4, *c.* 32, *s.* 30.

The respondent laid an information against the appellants under sect. 30 *of the* 1 *&* 2 *Will.* 4, *c.* 32 (*The Game Act*), *for trespassing in pursuit of game. At the hearing he gave evidence that the lords of the manor had in the year* 1815 *granted the right of shooting, down to the present time, and that he was then renting the shooting of them. On the part of the appellant it was alleged that he had a lease from the said lords of the manor of the lands said to be trespassed upon, dated* 1859, *in which there was no reservation of a right to the game, and that the alleged trespass was committed in the assertion of his right to the game. The justices having convicted the appellant:*

Held, that under the circumstances the claim of right having been bonâ fide made, the jurisdiction of the justices was ousted.

THIS was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of the appellant, as follows:—

At a petty sessions holden at Axbridge, in and for the division of Axbridge, in the county of Somerset, on the 26th Sept. 1870, an information preferred by John Masters, hereinafter called the respondent, against Thomas Adams the younger, hereinafter called the appellant, under sect. 30 of the statute 1 & 2 Will. 4, c. 32, charging for that the said appellant did within three calendar months last past, to wit, on the 9th Sept. 1870, at the parish of Wedmore, in the said county of Somerset, unlawfully commit a trespass by being in the daytime of the same day upon certain closes of land in the possession and occupation of John Hawkins, Robert Millard, George Day, Thomas Comer, Robert Duckett, Samuel Sparks, and Charles Champeny, in search of game (woodcocks, snipes, quails, landrails, and conies), without the licence or consent of the owner of the land so trespassed upon or of any person having the right of killing the game upon such land, or of any other person having a right to authorise the said appellant to enter or be upon the said land for the purpose aforesaid contrary to the statute in such case made and provided, whereby and by force of the said statute the said appellant had forfeited a sum of money not exceeding 2*l.*, to be applied as the statutes in that behalf made and provided direct, was heard and determined by us the said justices, the said parties respectively being then present. At the hearing of the aforesaid information it was admitted by the appellant that he was upon the lands in question and for the object in question; and that the said lands formed a parcel of the manor of Blackford, in the county of Somerset, but it was stated by him, and not disputed by the respondent, that he was there in company with, and under the authority of, William Shartman Glanvile, Esq. That the said William Shartman Glanvile, by his solicitor, asserted that he had a *bonâ fide* legal right to be upon such lands by himself, his friends, and servants, for the purpose of taking game, and that the said William Shartman Glanvile, and his ancestors, had enjoyed

such right for at least twenty years without interruption, and that he had the consent of the tenants of the said land, and whose names are mentioned in the aforesaid information, as the possessors and occupiers thereof, and in whose leases (made since the passing of the 1 & 2 Will. 4, c. 32) was no reservation of the right of sporting to their landlord. No evidence was given or tendered by or on behalf of the appellant or the said William Shartman Glanvile in support of such assertions and allegations, but an adjournment was asked for that such evidence might be produced, which adjournment was refused by us.

On behalf of the respondent, it was stated and not disputed by the appellant that he was acting as gamekeeper to Charles Augustus Homfray, Esq., by whose authority and direction the above information was laid, and that the said Charles Augustus Homfray had rented the shooting over the said land from the landlords thereof who are lords of the said manor of Blackford, who had not however reserved to themselves, as before stated, the right of sporting over the said land in the leases to the said tenants before mentioned. It was proved at the said hearing, by the production of leases by the respondent, that the exclusive right to the shooting over the said lands had been granted by the landlords, lords of the manor, and owners in fee of the said lands, from the year 1815 downwards to the present time. The leases to the tenants and occupiers aforesaid are not rack-rent leases, but leases granted in consideration of the payment of a fine and an annual chief rent and land tax, and are for a term of twenty-one years, commencing from the 29th Sept. 1859.

No other leases than those before referred to were produced, and those leases besides containing grants of the right of hunting, hawking, fishing, and fowling, also contained demises of certain lands within the manor. Under these circumstances, and on this evidence, it was contended on the part of the appellant that he had proved the right of the said William Shartman Glanvile, to the sporting over the said land, and that consequently he, the appellant, being in company with the said William Shartman Glanvile, could not be a trespasser upon the said land, and that even if such proof was not established to our satisfaction, yet, that he being there under a *bonâ fide* claim of right, our jurisdiction was ousted, and we ought not to convict him of the alleged offence. We, however, being of opinion that the grant by the landlords and lords of the manor, to the said Charles Augustus Homfray of the exclusive right which he claimed to sport over the said land, precluded all other rights including those claimed by, or under the said tenants, found that the appellant was guilty of the offence alleged in the said information, and adjudged him to pay a fine of 5*s.* for the said offence, granting him at the same time this case for the opinion of your honourable court. A similar information was laid against the said William Shartman Glanvile by the respondent, but the hearing thereof stands adjourned until the decision of your honourable court.

The questions of law arising on the above stated case for the opinion of the court, therefore, are: First, were we the said justices empowered in law to convict, and ought we to have convicted the appellant in respect of the said alleged trespass? or, secondly, was our jurisdiction taken away by the statement and evidence before us, and were there any circumstances in the case as brought before us which ought to have made us refuse to convict the appellant, or refuse to exercise our jurisdiction in the case? Whereupon the opinion of the Court of Queen's Bench is asked whether or not we, the said justices, were correct in our determination as aforesaid, and as to what further should be done or ordered by the said court in the premises. And the court is humbly solicited according to the power vested in the court by the said statute (20 & 21 Vict. c. 43), to remit the case to us, the said justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit. Given, &c.

Grantham, appeared for the appellant.—The justices should not have convicted after the appellant had set up a claim of right. The case finds that the tenants of the manor had leases in which there was no reservation to the landlords of the game. The tenants, therefore, were entitled to claim a right to the game, and the justices could not try that question.

T. W. Saunders, for the respondent, was called upon.—The justices were right in convicting. The claim set up by the appellant was merely that in a lease granted in 1859 there was no reservation of the game; but the respondent proved that the lords of the manor had granted the right to the game on the manor to parties through whom he claimed as long ago as the year 1815, and that such grant was in force down to the present time. The only proof adduced was that of the respondent. The appellant did not produce even his lease. [BLACKBURN, J.—I should doubt that upon the statement in the case, which implies that he did produce his lease, for it states the contents.] The justices conceived that as the right to the game had been granted away as long since as 1815 the appellant, whose lease commenced only in 1849, could have no right to the game, and the absence of any express reservation was accounted for by this, that the lords of the manor had no right themselves in any game, either to grant or reserve. [COCKBURN, C. J.—But the appellant might fairly have assumed, that as his lease did not reserve the right to the game, he himself had a right to it. It does not appear that he was aware of any right in anyone else.] It is immaterial whether he was aware of the rights of others or not, if he had no legal right in himself. His trespass need not have been wilful. This was decided in *Morden* (app.) v. *Porter* (resp.) (29 L. J. 213, M. C.), where it was held that it is not necessary in order to support a conviction under sect. 30 that the defendant should have intended to commit or have been conscious that he was committing a trespass. In that case Williams, J., said, "I may intimate my opinion that it is quite immaterial whether the defendant was or was not conscious that he was committing a trespass, as the Act says that any person going upon land in the daytime in search of game under circumstances that make him a trespasser civilly shall be liable to be convicted. [COCKBURN, C.J.—That was a case where he was actually trespassing without a claim of right. Here he sets up a claim which is *bona fide*. BLACKBURN, J.—And which may in truth be very well founded.] That cannot be, for the case finds that the lords of the manor had granted the right to the shooting from the year 1815 down to the present time. [BLACKBURN, J.—That may be, but it does not state that the grant of the shooting was to the respondent or

anyone through whom he claims.] That was so in fact, and if there is any doubt upon it, the case could be sent back to the justices to have this fact stated. [COCKBURN, C.J.—We should hardly be justified in doing so in a case of this sort.] The justices evidently were satisfied that the right of shooting was in the respondent.

COCKBURN, C. J. (a.)—It may be so that he has this right, but the question is whether the appellant who had no knowledge of it ought to have been convicted of a trespass? If he had been served with any notice by the respondent showing that the right to the game was in him, it might have been otherwise. But upon the facts as stated in the case it is clear that the claim of right was made *bonâ fide*, and under circumstances which warranted the appellant in believing that he had a right to the game. The conviction, therefore, cannot be supported.

Judgment for the appellant.

Attorneys for the appellant, *Lustey* and *Morley*, for *Millard*, Axbridge.

Attorneys for the respondent, *Kimber* and *Ellis*, for *J. F. Bailey*, Blackford.

Saturday, April 21, 1871.

WHITING (app.) *v.* CARPENTER (resp.)

The Harbours, Docks, and Piers Clauses Act 1847—*Appointment of meters—Purpose of appointment—Obligation to employ.*

By the Harbours, Docks, and Piers Clauses Act 1847 (10 *Vict. c.* 27), *it is enacted by sect.* 82 *that when a sufficient number of weighers have been appointed by the undertakers under the powers of this and the special Act, the master of any vessel, or the owner of any goods shipped, unshipped, or delivered within or upon the harbour or dock or pier shall not employ any person other than a weigher or meter licensed by the undertakers or appointed by the Commissioners of Her Majesty's Customs to weigh or measure the same, under a certain penalty. The Mayor and Corporation of Portsmouth were, under an Act of Parliament passed in the year* 1839, *entitled to the right to take certain dues in respect of vessels lading or unlading upon or from the wharves of the harbour; a subsequent Act passed in the year* 1868, *giving the corporation additional powers, and conferring upon them the exclusive appointment and regulation of meters and weighers within the harbour, and incorporating the* 81*st and* 82*nd section of the Harbours, Docks, and Piers Clauses Act* 1847. *The corporation thereupon made certain bye-laws for the appointment, government, and payment of meters. In the year* 1807 *the corporation granted a lease to a Mr. Burridge (through whom the respondent claimed) for* 999 *years of certain premises, in which there was a proviso that all such goods, wares, and merchandise as shall be proved to be bonâ fide the sole property of the said Burridge, his executors, administrators, or assigns, who shall be legally and beneficially entitled to the said premises when such goods, &c., shall be landed, shipped, or unshipped, brought to, carried, or laden to, upon, or from certain premises in the harbour mentioned, shall be freed and discharged from all wharfage, average, petit customs, and other duties usually paid at any time or times heretofore, or which at any times hereafter during the said respective terms shall become due or payable to the said mayor, aldermen, or burgesses. The respondent unloaded a cargo of coals at the premises in the harbour in question, for his own use, and did not employ a corporation meter:*

Held, that he was under no legal obligation to employ such meter.

THIS is a case stated by justices.

At a petty sessions holden at the Sessions Room at the borough of Portsmouth on the 18th April 1870, an information preferred by Edmund Whiting, chamberlain to the mayor, aldermen, and burgesses of the borough of Portsmouth, and on their behalf (hereinafter called the appellant), against Thomas Carpenter (hereinafter called the respondent, under sect. 82 of the 10 Vict. c. 27), charging that he the said Thomas Carpenter, on the 26th March last, did weigh a large quantity of coals forming part of the cargo of a vessel called the *Robert*, then lying and being for the purpose of discharging in the harbour of Portsmouth in the said borough, to wit, in a certain place there called the Camber, part of the said harbour, the said Thomas Carpenter not being licensed by the council of the said borough, nor appointed by the Commissioners of her Majesty's Customs, to weigh and measure the same, contrary to the Harbours, Docks, and Piers Clauses Act 1847, and which information was heard and determined by us the said parties respectively, being then present, and upon such hearing we dismissed the said information.

In the year 1839, by an Act of Parliament, intituled "An Act for Enlarging the Town Quay of the Borough of Portsmouth, and for Improving that portion of the Harbour of Portsmouth called the Camber," there were then certain clauses inserted in that Act which gave to the mayor, aldermen, and burgesses, acting by the council of the borough, the right to take and receive dues in respect of vessels lading or unlading upon or from the wharves of the corporation, to be made by virtue of that Act, or in the said Camber, certain tonnage rates, and also in respect of merchandise landed upon or shipped from the said wharves or elsewhere upon the banks and shores of the said borough, within the limits of the same, certain other rates called wharfage rates.

In the year 1868 another Act of Parliament, intituled "The Portsmouth Camber Quays Act 1868," was passed, which did not repeal the Act of 1839, but incorporated certain clauses of it, and gave additional powers to the mayor and corporation for the collection of the same dues as were payable under that Act in respect of a new wharf erected outside the limits of the Camber at a place called Flathouse, as set forth in sect. 20 of the Act of 1868—that is to say, from and immediately after the passing of this Act the corporation may demand and take for and in respect of all vessels unlading from or upon the new wharf recently constructed at that part of the borough called Flathouse, and now belonging, to, or which may hereafter be constructed or acquired by, the borough, the tonnage fees due on sums specified in the second schedule to the Act of 1839; and they may also demand or take for or in respect of all goods, wares, merchandise, commodities, and things, except the personal luggage of passengers, which shall be laden or unladen, landed or shipped, upon or from any such wharf or quay as in this section

(a.) MELLOR and HANNEN, JJ., were sitting in the Bail Court.

before mentioned, the full amount of the rates or sums specified in the third schedule to the Act of 1839, and the full amount of such rates or sums upon things not specified in the said third schedule as are payable under sect. 64 of the same Act. But nothing in this Act shall be deemed or construed to affect the exemption contained in sect. 68 of the Act of 1839, or any person entitled to such exemption by virtue of any lease or leases, and such exemption shall be deemed to extend to this Act in respect of the matters or things to which such exemptions extends, so long as the said lease or leases shall continue.

By sect. 27 of the same Act it is enacted, the corporation shall (except as hereinafter mentioned) have the exclusive appointment and regulation of meters and weighers within all parts of the harbour and borough of Portsmouth, and for that purpose sects. 81 and 82 of the Harbours, Docks, and Piers Clauses Act 1847 shall be incorporated with this Act, and for the purposes thereof the expressions "limits of the harbour, dock, and pier," and "harbour, or dock, or pier" in those sections shall mean and include all parts of the harbour and borough of Portsmouth, provided always that nothing in this section contained shall extend or be construed to extend to the weighing or meting of coals unladen or landed for the use and service of the Portsea Island Gas Company, at their works, or for the use and services of the port of Portsmouth and Ryde Steam Packet Company at such company's wharf, unless either of the said companies shall become sellers of coal; nor shall anything in this section extend or be construed to extend to coals or other goods, wares, merchandise, commodities, and things landed on any part of the shores of the said harbour, other than so much of the shores of the island of Portsea as are within the borough of Portsmouth.

The corporation under the Act of 1868, and sects. 81 and 82 of the Harbours, Docks, and Piers Clauses Act 1847 incorporated therein, made certain bye laws for the government of meters to be appointed under the said Act, and fixing thereby the rates to be paid to them for weighing and measuring goods, and which bye laws were confirmed by the Privy Council on the 11th Nov. 1869; and with the bye laws are published and incorporated the 81st and 82nd sections of the Harbour, Docks, and Pier Clauses Act 1847 as follows:

Sect. 81.—Where under the special Act the undertakers have the appointment of meters and weighers, the undertakers may appoint and license a sufficient number of persons to be meters and weighers within the limits of the harbour, dock, and pier and remove any such persons at their pleasure, and may make regulations for their government, and fix reasonable rates to be paid or other remuneration to be paid to them for weighing and measuring goods.

Sect. 82. When a sufficient number of meters have been appointed by the undertakers under the powers of this and the Special Act, the master of any vessel or the owner of any goods shipped or unshipped or delivered within or upon the harbour, or dock, or pier, shall not employ any person other than a weigher or meter licensed by the undertaker, or appointed by the Commissioners of Her Majesty's Customs to weigh or measure the same; and if in such case any person other than a meter or weigher licensed by the undertakers, or a meter or weigher appointed by the commissioners of Her Majesty's Customs, shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall, for every such offence, be liable to a penalty not exceeding 5*l.*, and the weighing or measurement of any such goods by any such person shall be deemed illegal.

It was under the above section (82) that the respondent was summoned for having acted as a meter in contravention of the same.

The following evidence was adduced in support of the information:—

Mr. John Howard, the town clerk of the borough, being sworn, stated that as such he has the custody of corporation charters, muniments, and other documents. He produced the Acts of Parliament of 1839, 1847, and 1868, a copy of the bye-laws made by the council of the borough for the regulation and payment of meters appointed under the incorporated sect. 87 of the Harbours Act 1847, under the seal of the corporation, with the allowance of the same by the Privy Council; and the minute book of the council containing the appointment of meters by the corporation. He also stated that one Thomas Martin, a witness, was one of the meters.

On cross-examination he stated that when the Act of 1868 was going through Parliament the Screw Collier Company (a company then in existence at Portsmouth) presented a petition against it; originally as the bill was drawn there was no exemption clause (excepting the payment of dues or sums from persons holding leases); that the repetition of the exemption contained in the Act of 1839, although considered unnecessary by the promoters, was afterwards inserted as set forth in the proviso to sect. 20.

Mr. Edmund Whiting, on being sworn, stated that he was chamberlain of the borough, that a copy of the bye laws was and is now posted at the chamberlain's office, and other parts of the town quays, and that he has held the office for six years past. On cross-examination he stated he was chamberlain before the Screw Collier Company existed. He has presented bills for wharfage tolls to Mr. Frost (the respondent's master), but the same have not been paid. There is a heap of mud outside the Baltic Wharf, the existence of which prevents vessels coming alongside. Under the directions of the town clerk, he prohibited Mr. Frost interfering with the soil of the Camber. The notice was verbal, and Mr. Frost ceased from moving it. The removal of the mud would be the business of the corporation. The ship *Robert* was some distance from the wharf, and was approached by planks laid on tressels, which rested on the walls of Mr. Frost's wharf. The coals in question which were meted by the respondents were landed from the ship over such planks, and a small portion put in a waggon and taken away, and the remainder put into Mr. Frost's store. Vessels came in as close as they could, and were wharfed. A vessel could not get in near to the wharf because of the mud. Mr. Frost had on some occasions employed a corporation meter. Tonnage dues were payable when vessels entered the Camber. Thomas Martin, on being sworn, stated he was a corporation meter. (He produced his appointment dated the 10th March last.) On the 26th March he went to the Baltic Wharf and went on board the *Robert*, a schooner lying alongside there between six and seven a.m. He saw the respondent weigh certain of the coals in question, which after being weighed were carried on shore and put into Mr. Frost's stores, and witness saw a three ton waggon containing coals sent away from the store. He followed the waggon, and the coals were delivered at the union workhouse.

The facts as alleged were admitted by the solicitor for the respondent, and that the defendant was not appointed to weigh by the Commissioners of Her Majesty's Customs, and that a sufficient number of meters had been appointed as required by sect. 82 of the Harbours, Docks, and Piers Clauses Act 1847, and all other formal matters.

For the defendant, Mr. Mark Edwin Frost stated that he was the owner of the Baltic Wharf. He had recently purchased it from the Screw Collier Company. Respondent was in his employ as a servant, and was so on the day named in the information. No tolls have been paid to the corporation on goods landed at the wharf. He never employed a corporation meter. He attempted to remove the mud outside the Baltic Wharf when the same belonged to the Screw Collier Company. There is a mud bank which prevents vessels getting to within 90 ft. of the wharf. Claims for tolls have been demanded from him (these items were produced to the witness). These bills for tolls have been asked for but had not been paid, as he had always disputed his liability, and they had not been enforced. When the Act of 1868 was passing, the Screw Collier Company petitioned against it, and the exemption clause from payment of toll by virtue of any lease or leases as contained in sect. 68 of the Act of 1839 was repeated. [Witness produced the original lease, dated the 1st June 1801, for 999 years, granted by the corporation to William Burridge, a copy of which lease is hereto annexed, and forms part of this case.]

The proviso in the said lease as to exemption from toll was read, and is as follows :—

Provided always, and it is hereby agreed and declared by and between the said parties, that all such goods, wares, and merchandise as shall be, and shall to the satisfaction of the said mayor, alderman, and burgesses, or their wharfinger for the time being, be proved to be *bonâ fide* the sole property of the said Wm. Burridge, his executors, administrators, or assigns, who shall be legally and beneficially entitled to the premises hereinbefore mentioned and intended to be hereby demised when such goods, wares, and merchandise shall be landed, shipped, unshipped, brought to, carried, or laden, to, upon, or from any wall, wharf, or other erection, and also to, upon, from, or under the said stage or any part thereof; shall be freed and discharged from all wharfage, cranage, pettit customs, and other duties usually paid at any time or times heretofore, or which at any times hereafter during the said respective terms shall become due or payable to the said mayor, alderman, and burgesses, their successors or assigns.

Witness, in continuation of his evidence, stated that he was the owner of the wharf, the assignment to him was completed, and the legal estate was vested in him; the estate was unincumbered, and he was legally and beneficially entitled to the property; that he does not ordinarily weigh coals when discharging from a vessel at his wharf, but accepts the quantity as specified in the invoice or bill of lading; he weighs coals at his store before they are sent out. There was a stage originally outside the wharf, and the mud which accumulated arose underneath the stage, which belonged to the corporation. Witness is a seller of coal; he never landed anything on his wharf but what was *bonâ fide* his own property. A corporation meter had been employed by captains of vessels discharging a cargo at the wharf, but in such cases the captains paid the meters. The ship *Robert* was not weighed out. Respondent weighs coal out of the store. The respondent was and is in his employ, and the cargo of coals on board the *Robert* belonged to witness.

We, however, being of opinion that the Baltic Wharf being now the property of Mr. Frost, under the lease referred to, he was entitled to the exemption from tolls of all description, and, being so, it carried meterage with it; meterage being, in our judgment, a toll or a rate, as set forth in the third bye law made by the corporation under the Act of 1868; that Thomas Carpenter, the respondent, was the servant of Mr. Frost; that Mr. Frost was exempt, and that the coals on board the ship *Robert* were his property, and that when he unshipped the coals in question upon his wharf the employment of a corporation meter to weigh was not required by him, and was therefore unnecessary; and that the respondent might meter his master's coals: gave our determination against the appellant in the manner before stated.

The question of law arising on the above statement for the opinion of the court therefore is, first, whether meterage is such a toll or rate as is contemplated in the exemption contained in the lease of 1801; secondly, whether, the wharf in question being private property held under a lease from the corporation, the employment of a corporation meter was compulsory under the Harbours, Docks, and Piers Clauses Act 1847 as to coals landed from vessels berthed at such wharf, the coals not being then and there sold, but partly put into store, and partly delivered into carts.

Lopes, Q.C. (*Warry* with him) appeared for the appellant.—The justices below were wrong in refusing to convict; for, although the lease by the corporation of Portsmouth to the respondent granted in 1801 exempts him from wharfage, cranage, and pettit customs, he is not exempt from the payment of metage which is imposed for other purposes than those specified in the lease. The words of the lease do not include metage; the provisoes, therefore, of the Harbour, Docks, and Pier Clauses Act 1847 are in force, and the respondent was liable to be convicted as having acted as a meter without being duly appointed. Metage is not appointed for the purposes of the Corporation, but for those of the public. [LUSH, J.—At the time of the granting of the lease there was no metage; the lease, therefore, gives the respondent perfect liberty.] Metage is really not a toll at all but a remuneration. [LUSH, J.—But the respondent imports his own coal for his own use.] The object was to provide remuneration to the meters for their services. [COCKBURN, C. J.—If it were necessary that the goods should be weighed, then they must be weighed by the proper person. But where no measurement of the goods is required, it cannot be necessary to employ a meter.] Meters are to be appointed, and it is right that they should have the weighing of goods and the receipt of the metage. Metage was never a duty payable to the corporation, and it was such only that was intended to be exempted by the lease. The words of the 82nd section are certainly large enough to include this case. The Act contemplated the appointment of a number of persons who should be competent as meters, and it provided also for their remuneration.

Brown, Q.C. (*Bullen* with him), for the respondent, were not called upon.

COCKBURN, C.J.—It appears to me that these

meters were not appointed for the purposes of the public, but were to afford their services only when required. When the statute is carefully looked at, it clearly means this, that it is only when duties are payable, that those who have the control of the harbour shall appoint meters. It is plain that the Legislature has not thought fit to make any provision with respect to harbours where dues are not collected. It is, of course, necessary where dues are to be collected that persons should be appointed to ascertain what is due. But as regards the general public, it is not necessary where no dues are payable that any such provision should exist. If any consignee of goods requires the services of such a person, he must select the one pointed out by the statute, and pay him; but if he does not require such services, it is altogether otherwise. In this case, therefore, I cannot see that the Act of Parliament intended to impose the liability contended for. The respondent here is a person who, by his lease from the corporation, is exempt from all liability for dues in respect of goods brought to his premises. Being exempt by his lease, the Act of Parliament recognises that exemption. That being so, the respondent was under no obligation to employ a corporation official.

MELLOR, J., concurred.

LUSH, J.—I am of the same opinion, and I may add, that I think it is clear that the employment of meters was not intended as between buyers and sellers, but as between importers and the corporation.

Judgment for the respondent.

Attorney for the appellants, *Howard*, Portsmouth.

Attorney for the respondent, *H.* and *W. H. Ford*, Portsea.

Wednesday, April 26, 1871.

COOK (app.) *v.* THE IPSWICH LOCAL BOARD OF HEALTH (resps.)

Public Health Act 1848 (11 *&* 12 *Vict. c.* 63), *ss.* 69, 120—*Local Government Act* 1858 (21 *&* 22 *Vict. c.* 98), *ss.* 63, 64, 65—*Jurisdiction of justices—Remedy of person aggrieved—Appeal to the Secretary of State* (24 *&* 25 *Vict. c.* 61), *s.* 16.

Sect. 69 *of the Public Health Act* 1848, *empowering the local board to give notices to the owners or occupiers of premises in streets not sewered, &c., to their satisfaction, requiring them to sewer, &c., the same; and on the default of the owners and occupiers to execute the works themselves, proceeds to enact as follows:—"And the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner."*

Sect. 64 *of the Local Government Act* 1858, *provides that "all questions referable to arbitration under the Public Health Act* 1848, *may, when the amount in dispute is less than* 20*l., be determined by two justices in a summary manner:"*

Held, that the justices are not empowered to inquire into the question of the actual expenditure by the board either as arbitrators under the latter Act, or as the justices to enforce the payment; that their duty in this respect is simply ministerial and not judicial; the remedy of a person aggrieved being by addressing a memorial to the Secretary of State, as provided by 11 *&* 12 *Vict. c.* 63, *s.* 120, *and* 21 *&* 22 *Vict. c.* 98, *s.* 65.

Semble, that the justices cannot take upon themselves the double capacity of arbitrators to settle the disputed proportion, and of justices to make the order for enforcing payment. 24 *&* 25 *Vict. c.* 61, *s.* 16, *requiring the deposit of the plans, &c., in the office of the local board is directory merely; and the remedy of any person aggrieved by the non-compliance is by addressing a memorial to the Secretary of State.*

Bayley *v.* Wilkinson (10 *L. T. Rep. Rep. N. S.* 543; 16 *C. B., N. S.*, 161), *followed and discussed.*

CASE stated by the justices of Ipswich under 20 & 21 Vict. c, 43.

The facts of the case, as far as they are material for the purposes of the present report, were as follows:—

On the 27th April 1868 the respondents served upon the appellant, an owner of property in a street within their disirict, called Purplett-street, a notice under sect. 69 of the Public Health Act 1848, requiring him to repair his part of the street, specifying the dimensions, admeasurements, and other particulars, the works to be executed in accordance with a plan and section then lying for inspection at the office of the respondents' surveyor, at the Town-hall.

Similar notices were served upon the other owners in Purplett-street, and also upon the owners in a street adjoining at right angles, called Kemp-street.

The owners failing to comply with the notices, the respondents executed the works in the two streets themselves. And the surveyor apportioning the gross costs incurred in the two streets, *pro ratâ* among all the owners, served the appellant with a notice requiring him to pay his proportion so ascertained to be 20*l.* 2*s.* 1½*d.* The appellant on the 4th Nov. 1868, gave notice that he intended to "dispute and resist the payment." Whereupon he was summoned to appear before the justices, and at the hearing took the following objections:

1. That the notice of the 4th Nov. 1868 required the matter in dispute to be referred to arbitration under sect. 69 of 11 & 12 Vict. 63, and that the justices had no jurisdiction.

2. That the apportionment of expenses upon which the information was founded was bad and invalid, because the gross costs of the two streets was apportioned *pro ratâ* among all the owners of premises in the two streets, instead of apportioning the expenses exclusively incurred in Purplett-street among the owners of premises in that street, and the expenses exclusively incurred in Kemp-street among the owners of premises in that street.

3. That the plans and sections had not been deposited in the office of the local board within the meaning of sect. 16 of 24 & 25 Vict. c. 61.

As to this objection it appeared that the plans and sections were deposited at the office of the surveyor, at the Town-hall, which was a different office to that where the rest of the board's business was transacted. It also appeared that the appellant had in fact inspected them there.

4 and 5 were founded upon slight variances which appeared between the works as described in the notice, and those described by the plans and sections, and also between the works described in

the plans and sections and the notice and the work actually done by the board.

6. That the board were bound to contract for the works.

The justices dismissed this summons on the second objection, and gave the appellant a certificate under 11 & 12 Vict. c. 43, s. 14. The surveyor then, correcting his error, made a fresh apportionment, and on the 23rd Feb. 1869 served the appellant with a notice demanding payment of his share, amounting to 19*l.* 11*s.* 10½*d.* The appellant, on the 10th Nov. 1869, gave notice that he disputed the proportion and the amount thereof.

He was accordingly summoned again to appear before the justices on the 18th Nov. 1869; and at the hearing was stated in the case to have raised the same six objections as are above mentioned, and also to have objected:

7. That the justices had already heard and determined an information and complaint for the same matter between the same parties.

8. That the information had not been laid within nine months of the service on the appellant of the notice of the surveyor's apportionment, as provided by 11 & 12 Vict. c. 43, s. 11, and 21 & 22 Vict. c. 98, s. 63.

9. That the justices were wrong in declining to inquire whether the amount of 250*l.* 9*s.* 8*d.*, which the surveyor stated had been expended in Purplett-street had been actually so expended, and in not allowing the appellant to cross-examine the surveyor as to the items forming the said sum.

The justices overruled all these objections; and having ascertained by calculation that the surveyor's apportionment of the sum of 250*l.* 9*s.* 8*d.* among the owners of premises in Purplett-street was accurately made, and that the appellant's proportion according to his frontage was 19*l.* 11*s.* 10*d.*, made an order for payment by the appellant of such sum and costs, and in case of default that the same should be levied by distress. From which order this case was an appeal.

Bulwer, Q.C. (*Graham* with him), for the appellant, contended that the notice of the 11th Nov. 1868, given by the appellant to the respondents was a notice of a dispute requiring to be settled by arbitration under the 69th section of the Public Health Act 1848; that the surveyor had no authority to make a fresh apportionment, and the justices no jurisdiction to make the order appealed from. [BLACKBURN, J.—The appellant in the notice only says, "I intend to dispute and resist the payment of the sum charged," which clearly does not amount to a dispute of the apportionment. And at the time of making the second apportionment there had really been no apportionment, the first being in valid.] Then the justices exceeded their jurisdiction in making this order, for the appellant, having given the notice of 18th May 1869, disputing the proportion, their only duty was *quâ* arbitrators under 21 & 22 Vict. c. 98, s. 64, to settle the proportion. They had no authority to act in the double capacity of arbitrators to settle the proportion, and of justices to make the order for payment. They should have settled the proportion, and then, if the appellant did not pay within three months, issue a fresh summons to compel him: (*Bayley* v. *Wilkinson*, 10 L. T. Rep. N. S. 543; 16 C. B., N. S., 161.) [LUSH, J.—This point is not raised in this case.] The justices were wrong in refusing to allow the appellant to cross-examine the surveyor, and to inquire whether the amount had been actually expended in the works. *Bayley* v. *Wilkinson* upon this matter only decides that they cannot inquire into the reasonableness of the actual expenditure. [BLACKBURN, J.—It would be monstrously inconvenient if any one person were allowed to insist upon having the whole matter investigated. LUSH, J.—Might not the appellant, as a person aggrieved, address the Secretary of State under 11 & 12 Vict. c. 63, s. 120, and 21 & 22 Vict. c. 98, s. 65? His Lordship referred to *Wallington* (apps.) v. *Willes* (resp.) (10 L. T. Rep. N. S. 785; 16 C. B., N. S., 797.)] That would not preclude our contention. The question is, what have the justices jurisdiction to do? Their jurisdiction is limited to ordering us to pay expenses that have been incurred. It turns upon the construction to be put upon the words of the Act "expenses incurred." As to the third objection, the deposit of the plans and sections is made a condition precedent to the power of the board to do the works. *Reg.* v. *The Justices of Surrey* (L. Rep. 5 Q. B. 466), upon the construction of 5 & 6 Will. 4, c. 50, s. 85. [BLACKBURN, J.—In that case the putting up the notice was clearly made a condition precedent. The words used in that section are much more stringent than those upon which you have to rely.] He then urged the fourth and fifth objections. [COCKBURN, C. J.—These are all matters for addressing the the Secretary of State under the sections already alluded to.] He then put the other objections, but the court intimating their opinion that these were clearly untenable, he abandoned them.

Bosanquet (*Notcutt* with him) was not called upon.

COCKBURN, C. J.—We are of opinion that the decision of the magistrates was right, and that we cannot set their order aside. [After referring to the facts of the case and the Acts of Parliament, his Lordship proceeded:] The question put to us in the first instance to decide is, whether it was competent to the magistrates, or incumbent on the magistrates, to go into the question whether the amount charged by the local board as having been expended generally was in point of fact expended. It is my opinion that in going into that question they would have gone beyond the limits of their jurisdiction. By 21 & 22 Vict. c. 98, sect. 64, they are placed in the position of arbitrators. It is quite clear that *quâ* arbitrators they could not have gone into any such question; their jurisdiction is limited to inquiring whether the expenses amounting to a given sum, the amount charged to a particular owner is his fair and just proportion. I think, therefore, that the justices could not have gone into the other inquiry. Then Mr. Bulwer contends that they exercised, or took upon themselves to exercise—whether rightly or wrongly is another matter — the double functions of arbitrators under that section, and of magistrates exercising summary jurisdiction to enforce the decision of the arbitrators, that is, of themselves *quâ* arbitrators as to the amount which the appellant should be forced to pay. The question is not raised before us whether it was competent to them to act in that double capacity, and at once to proceed to make an order for payment without allowing any interval after having in the exercise of their functions as arbitrators decided the amount the appellant was called upon to pay, and we cannot go into it now. But assuming that the necessary interval has been allowed, or taking the case where an arbitrator has fixed the amount, and then

the magistrates are called upon in the exercise of their summary jurisdiction to make an order to enforce payment of the amount, the question presents itself, whether in the exercise of that summary jurisdiction they could go into any question except that of whether the proportion assessed upon the particular individual is the right proportion or not? I do not think that it is competent for them under this Act of Parliament to enter into any such question, and that they are simply exercising what may be called a ministerial office in that sense; though, of course, they must see that the individual against whom the order is made is the right person, and that there has been some assessment, and that the proportion that he is to pay has been fixed by the proper authority. I think that, although in that respect their functions may be said to be judicial, in all other respects they are simply ministerial, and that as soon as the amount apportioned which the man is to pay is ascertained, they are bound to make an order without looking into the facts of the case. The case seems to me to be quite analogous to those of rates, and matters of that kind, in which we have held again and again that it is not for the magistrates to inquire into the validity of the rate or order on which he is asked to exercise his summary jurisdiction. I think, therefore, that if this had been an application to the magistrates on the decision of an arbitrator, as to what the amount should be, it would not have been competent to them to go into the matters to which Mr. Bulwer refers. We find that the Legislature has not left the party in the hopeless condition which it is contended must result if the magistrates were not competent to go into this inquiry; because, by the 120th section of Public Health Act 1848, provision is made for an appeal of the parties aggrieved to the General Board of Health, and now by 21 & 22 Vict. c. 98, s. 65, to the Secretary of State. And if a person complained that he had been made to pay his proportion of a sum which had not been expended, and that there had been gross impropriety of conduct, no doubt the Secretary of State would exercise the power with which the Legislature has invested him, and inquire into such a matter. That, therefore, is the course which a person must adopt if he feels that he has been aggrieved by a proceeding of this kind. It would be the greatest possible inconvenience if on every occasion when the justices are called upon to enforce an order of this sort, it should be a question how far the statute has been complied with by the board, how the money has been expended, or at all events the propriety of executing the works. As to the other points taken by Mr. Bulwer, I think that they were disposed of in the course of the argument. It may be that the preliminaries required by the statute have not been strictly complied with; but I do not see that the appellant has sustained any grievance therefrom, and I agree with what was thrown out by my brother Blackburn, that these matters are not conditions precedent, and that their non-observance would not vitiate the orders. It may be, a very serious question, though it is not raised before us now, whether the magistrates in at once making a summary order for payment have not exceeded their powers, and whether it would not be a wise thing that, as two of the justices have determined, in the exercise of their province and duty as arbitrators, what the amount is which the appellant is called upon to pay, application should now be made to other magistrates to make the second order enforcing payment. I merely throw it out as a matter for consideration, with a view of preventing further litigation upon the subject.

BLACKBURN, J.—I am of the same opinion entirely. I concur in what my Lord has last said, that before attempting to levy the distress warrant which the magistrates have ordered, those who advise the local board had better consider whether it is safe so to do, and whether it would not be amended by applying to another couple of justices to enforce the payment, the proportion having been fixed by the justices when sitting in lieu of arbitrators. However, it is not a question before us, but is simply a question that the local board had better consider before they act upon it in order to be safe. As to all the other objections, I agree entirely with my Lord, and I will say nothing on any one of them except the only one which seemed to me to be of any substance, and that was the last. The appellant wanted to investigate the matter before the justices. It is obvious that where there is a large sum expended in this way, and sought to be enforced in what I may call dribblets before a separate magistrate summarily, it would be in the highest degree inconvenient, if each time the local board were forced to prove to the satisfaction of the magistrate before whom the matter went that these expenses were properly incurred in respect to what was done. And it would also be extremely inconvenient if that question was to be decided summarily by the justices, without any appeal, as far as I can possibly conceive. Any justice might be presuming to decide against the local board in a matter where the local board would have no appeal from him; and this small matter of 19*l.* might involve the question whether they could recover the whole 250*l.* In many other cases the question might be raised on a few shillings where an obstinate litigant refused to pay. That would be most inconvenient. Nevertheless, if the Legislature had given a jurisdiction to the magistrate, you could not help it; but it is a very strong ground for thinking that the Legislature did not intend to give it to the magistrates. The 69th section, after saying that the board are to give notice to the owners of what they require to be done, and that, if the owners do not do it, the board may do it themselves, then says, "and the expenses incurred by them in so doing shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration." So that here it is laid down that the expenses incurred by the local board of health during the works shall be paid by the owners in the proportion to be settled in the manner described. Then it goes on to say, "and such expenses may be recovered from the last mentioned owners in a summary manner." In the case in the Common Pleas, of *Bayley* v. *Wilkinson*, the contention was that, when the parties came before the arbitrator to apportion the expenses, he was not merely to consider in what proportion the sum was to be divided amongst them, but it was urged strongly that the arbitrators must also inquire as to how the money had been expended; that they are not merely to say how much they are to divide among the owners, but that they must look to see if the expense has been incurred. But then the Court of Common Pleas decided

very distinctly that the Legislature did not intend that at all—that, as it was explained by Erle, C. J., the Legislature, knowing that the local board of health were a public body, might trust them *primâ facie*, and that the arbitrator was simply to see to the apportionment. Willes, J. cities very many sections of the Act pointing out that though as against the party assessed, the local board is to be supposed to be right, nevertheless that that does not apply when the magistrate is asked to enforce payment in a summary manner. Again, it is urged that, though the arbitrator might possibly not review what the local board had done in apportioning the expenses, nevertheless the justices may in a summary manner decide it. I must say that when once it is granted that the decision of the Common Pleas is a right decision, in saying that the arbitrator cannot do it, *a multo fortiori*, the two justices enforcing in a summary manner the sum to be recovered cannot do it. Then Mr. Bulwer's argument endeavoured to make out this distinction. In the case of *Bayley* v. *Wilkinson* the contention seems to have been that the local board of health did the works in a wasteful manner, and expended much more than was necessary. The contention that seems to be made here is, that the local board of health have improperly charged in this account some expenses really incurred somewhere else. I cannot conceive the distinction between them: if the one would be a matter for a magistrate to inquire into, the other would be also; but I cannot see the distinction which would make the one inquirable and the other not, unless the Common Pleas are wrong. You could not make that distinction on which Mr. Bulwer mainly rested his argument. Then comes what would be the strength of his argument upon the matter, contrary to the decision of the Common Pleas no doubt, which is binding upon us. The strength of his argument, as it seemed to me, was this: It is a possible thing, no doubt, that the local board of health may either charge an utterly wasteful and erroneous and large sum, or they may have, in mistake, charged sums which they ought not to charge in estimating expenses which they say that they have incurred; and in that case it would be very hard, if there is not some remedy provided for the man who may be charged too much, and who is obliged to pay down his proportion of a sum which he ought not to have been charged. But then, as I find, comes sect. 120, which seems to me expressly to provide that, when the local board have done anything, where they are empowered to recover any expenses incurred in a summary manner, any person who shall deem himself to be aggrieved by the decision of the local board thereupon, may within seven days after the notice, address a memorial to the general board, for which is now substituted the Secretary of State, and get such relief as shall be necessary. If the fact were, whether the time has now elapsed or not, I do not know; if the fact were, that the local board had charged 1000*l.* when in truth and in fact they ought only to have charged 800*l.*, I cannot doubt that the person memorialising the Home Secretary and stating that fact, would obtain the relief he might require, and that the Home Secretary would direct the board not to charge 1000*l.* but only 800*l.* That, I think, is a sufficient remedy, without making the very inconvenient regulation that every person who chooses to dispute the matter may require this very difficult inquiry to be gone into before the magistrate, who is asked to enforce it summarily; in truth, it seems to me that the magistrate, in enforcing this demand for an apportionment of the expenses, is very much like the one who was called upon to issue a distress warrant to enforce a rate. A rate is good unless it is appealed against to the quarter sessions, and the magistrate cannot inquire into it. The expenses are to be enforced by the magistrates summarily, unless they are appealed against to the Home Secretary, and the magistrates cannot enter into the facts.

MELLOR and LUSH, JJ. concurred.

Order confirmed with costs.

Attorney for the appellant, *Crowdy*, for *Aldous* and *Pearce*, Ipswich.

Attorney for the respondents, *Bromley*, for *Notcutt* and *Son*, Ipswich.

Saturday, April 29, 1871.

THE NORTH OF ENGLAND RAILWAY COMPANY (apps.) *v.* LANGBAURGH (resp.)

Railway road constructed by railway company over their railway—Liability to repair road of the bridge and the approaches—8 *Vict. c.* 20, *s.* 46.

A railway company having carried a road over the railway by a bridge, is bound to keep both bridge and road, and all the approaches thereto in repair, and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both.

THIS was an appeal under the statute 20 & 21 Vict. c. 43, from the determination of us, the undersigned, Thomas Chaloner, Esq., and George Jeffery Morehead, clerk in Holy Orders, two of Her Majesty's justices of the peace in and for the North Riding of the county of York in petty sessions assembled at Gisborough in the said riding on the 1st Nov. 1870.

By the North Yorkshire and Cleveland Railway Act 1854, and the North Yorkshire and Cleveland Railway Act 1855, the North Yorkshire and Cleveland Railway Company were empowered to construct certain railways, and to cross certain public highways by means of bridges over such highways. The Railway Clauses Consolidation Act 1845 is incorporated with both those Acts. By the North-Eastern Railway (Bedale and Leyburn and Rosedale Railways Amalgamation) Act 1859, the North Yorkshire and Cleveland Railway Company was dissolved, and the undertaking of that company was vested in the appellants' company.

The North Yorkshire and Cleveland Railway Company erected the bridges hereinafter referred to, and constructed the embankments which formed the approaches, together with the fences on each side thereof, and properly formed and put the roads over the same bridges and slopes into a proper state and condition. The appellants have maintained the roadways over two of the bridges hereinafter referred to, and the slopes thereof in a proper state of repair up to the early part of the present year, since which time no repairs whatever have been made by the appellants to the roads over those two bridges, or the slopes thereof. There was no evidence before us in respect of any repairs having been done to the roadways across the other two bridges hereinafter referred to and the slopes thereof.

The appellants have maintained, and still con-

tinue to maintain, the structures of the four bridges, and the earthwork and embankments forming the approaches thereto, as also the fences on either side thereof, respectively.

On the 18th Oct. 1870, the respondents served upon the appellants a notice in writing, under sect. 65 of the Railway Clauses Consolidation Act 1845, that an application would be made to us for an order upon the appellants to repair the four several bridges therein specified, and the roads over such bridges, with the immediate approaches and fences connected therewith, which were in such notice alleged to be out of repair. Upon the hearing of this application it was admitted on behalf of the respondents that the structures of all the said four bridges, and the earthworks and embankments forming the approaches thereof and the fences, were in a proper state of repair.

It was proved to our satisfaction that the roadway across and over two of the four several bridges and approaches had been repaired by the appellants up to the early part of the present year, and that the roadways over all the said four bridges and the approaches thereof, are now in a bad state of repair. The four bridges are detached from each other, and situate in four different townships, each of which townships separately maintains its own highways.

The aggregate extent of the roadways over all the said bridges, and the approaches thereof, is 1254 yards.

It was contended before us on behalf of the respondents, that under sect. 46 of the Railway Clauses Consolidaton Act 1845, and under the decisions of this court in the cases of *North Staffordshire Railway Company* v. *Dale* (8 E & B. 836); and *Leach* v. *North Staffordshire Railway Company* (29 L. J. 151, M. C.), the appellants were bound to keep in repair not only the structures of the bridges and the earthworks and embankments, but also the roadways over the bridges and the approaches thereto, including therein the metalling of such roadways and approaches.

On behalf of the appellants the cases of *The Waterford and Limerick Railway Company* v. *Kearney* (12 Ir. Com. Law Rep. 224); *Foxberry* v. *Waterford and Limerick Railway Company* (13 Ir. Com. Law Rep. 494; and *London and North-Western Railway Company* v. *Surveyor of Highways of the Township of Skerton* (33 L. J. 158, M. C.), were cited, and it was contended that sects. 46 and 65 of the Railway Clauses Consolidation Act 1845 were equally applicable to cases where the railway is carried over a highway by means of a bridge, and where the highway is carried over the railway by the same means, and that, therefore, the appellants were not liable to keep in repair the metalling of the roadways.

We felt bound by the authority of the cases of the *Staffordshire Railway Company* v. *Dale*, and *Leach* v. *North Staffordshire Railway Company*, and decided that the appellants were liable to keep in repair, not only the bridges, but the roadways over the bridges, and over the approaches thereto, including the metalling of the roads on the bridges and approaches. And we ordered that the appellants should, before the 1st Jan. next, put the roadways over all the said bridges, and the approaches thereto into complete repair. A copy of *our order is hereunto annexed, and to be taken as part of this case.*

The appellants being dissatisfied with our determination as being erroneous in point of law, have applied to us to state a case setting forth the facts and grounds of our determination for the opinion of this court.

The question for the opinion of the court is, whether the appellants are liable to keep in repair not only the structures of the bridges, but the roadways over the same and the approaches thereto, including therein the metalling of such roadways. If so, the order of us, the said justices, is to stand; if not it is to be quashed.

THOMAS CHALONER.
G. J. MORRHEAD.

By sect. 46 of the 8 Vict. c. 20 (Railway Clauses Consolidation Act 1845), it is enacted that—

If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act), either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge, of the height and width, and with the ascent or descent, by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith shall be executed, and at all times thereafter maintained, at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions as after mentioned, it shall be lawful for the company to carry the railway across any highway other than a public carriage road on the level.

Pollock, Q. C. appeared for the appellants.—The question is, whether, when a public road goes over a railway, the railway is liable to repair not only the bridge, but the road itself? [COCKBURN, C. J.—Were they bound to keep the structure in repair?] Yes. [COCKBURN, C. J.—And were they bound to make the road?] They were. [COCKBURN, C. J.—Then why are they not bound to keep such road in repair equally with the structure?] The highway board should keep the road itself in repair, since it is for the use of the inhabitants. The company are not liable to keep the road in repair when it passes under the railway. In *The Waterford and Limerick Railway Company* (appls.) v. *Kearney* (resp.) (12 Ir. Com. L. Rep. 224), it appeared that a railway company carried their railway over a county presentment road by means of a bridge, and in the course of the construction of their works, in order to give sufficient head room under the bridge, sloped away the road on each side of the bridge, but on the completion of their works placed the road in a state of permanent repair, and it was held that the road was not an "immediate approach" or a "necessary work connected" with the bridge within the meaning of the Railway Clauses Consolidation Act 1845, and, consequently, that the company having put the road into a state of permanent repair, was not bound to keep it in repair. The same was held in *Foxberry* v. *The Waterford and Limerick Railway Company* (13 Irish Com. L. Rep. 494). In the English case of *The London and North Western Railway Company* (appls.) v. *The Surveyor of the Highway of Skerton* (resps.) (33 L. J. 158, M. C.), there it was held that where a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the company by reason of any of the provisions in the Railway Clauses Consolidation Act 1845, even though the company have lowered the level of the old highway in making those approaches. [COCKBURN, C.J.—Those were all decided in cases where the railway went over the road.] The principle in the same,

one clause governs both kinds of road. [LUSH, J. —The company are bound to execute and maintain. You admit that they must execute, why should they not also maintain?] There is no reason why, having executed the building of the bridge, they should also maintain the road. The principle is the same, whether the road goes over or under the railway. The 46th section makes no distinction.

Quain, Q.C., for the respondent, was not called upon.

COCKBURN, C.J.—You are asking us to reverse our former decisions upon this very point. In *The North Staffordshire Railway Company* (apps.) v. *Dale and others* (resps.) this court held that a railway company having carried a road over the railway by a bridge is bound to keep both bridge and road and all the approaches thereto in repair, and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. The same argument was used in that case which you are now using. The same question was afterwards decided in *Leach* (app.) v. *The North Staffordshire Railway Company* (resps.) (20 L. J. 150, M. C..) If you wish to question these authorities you must do so in the Exchequer Chamber. They are at present binding on us.

Judgment for the respondent.

Attorney for the respondents, *F. H. Wilcox*, Stokesley.

Attorneys for the appellants, *Williamson, Hill, and Co.*

Tuesday, May 9, 1871.

ATKINS (app.) v. DUTTON (resp.)

Vaccination Act 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Child—Parent summoned, refusing to produce—Order for vaccination.*

The Vaccination Act 1867 (30 & 31 *Vict. c.* 84), *s.* 31, *provides that upon an information to a justice of the peace, by the appointed officer, that any child under the age of fourteen years has not been successfully vaccinated, and that notice given to the parent or person having the custody of such child to procure its being vaccinated has been disregarded, "the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance if the justice shall find after such examination as he shall deem necessary that the child has not been vaccinated, nor has already had the small pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time," and a penalty is imposed for disobedience of the order.*

The respondent was summoned under the above section to appear with his child before a magistrate. He appeared, but refused to produce the child. The magistrate was satisfied on the evidence given before him that the child was a year and eleven months old, and had not been vaccinated, nor had had the small pox, but he thought that he had no jurisdiction, upon the appearance of the defendant without the child, to make an order for vaccination:

Held, that the production of the child before the magistrate was not a condition precedent to the making of the order, and that upon the facts stated, such order should have been made.

CASE stated under 20 & 21 Vict. c. 43, by the Stipendiary Justice for Wolverhampton.

1. The defendant was summoned to appear with his child before me on the 18th Jan. 1871, to show cause why an order should not be made directing his child to be vaccinated.

2. The summons was taken out under the Vaccination Act 1867, and was as follows (omitting the formal parts):

Whereas information in writing has been laid by John Dutton, an officer appointed by the Board of Guardians of the Wolverhampton Union, to prosecute persons charged with offences against the Vaccination Act 1867, that he has reason to believe that one Lydia Louisa Jane Atkins, a child under the age of fourteen years being within the said union has not been successfully vaccinated and that he has given notice to you, being the father of such child, to procure its being vaccinated, and that this notice has been disregarded, these are therefore to command you to be and appear with the said child before me on Wednesday the 18th day of Jan. instant at twelve o'clock at noon at the Police Court, Wolverhampton, to answer to the said information, and to show cause why an order should not be made directing the said child to be vaccinated.

3. By the Vaccination Act 1867, it is enacted and provided as follows:

30 & 31 Vict. c. 84, s. 31. If any registrar or any officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has good reason to believe that any child under the age of fourteen years being within the union or parish for which the informant acts has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find after such examination as he shall deem necessary that the child has not been vaccinated, nor has already had the small pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if, at the expiration of such time, the child shall not have been vaccinated, or shall not be shown to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such an order shall have been made, shall be proceeded against summarily, and unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings. . . .

The statute of the 11 & 12 Vict. c. 43 (except sect. 11), shall apply to all proceedings under this Act.(a)

4. The defendant, who had been previously convicted by me under sects. 16 and 29 of the Vaccination Act, appeared to the summons on the 18th Jan. 1871, and refused to produce his child unless compelled by law to do so.

5. There were several adjournments of the case, which was heard by me on the 22nd Feb. 1871, in the presence of the defendant, who appeared without his child.

6. I was satisfied on the evidence given before me, and I find that the child was about a year and eleven months old, and had not been vaccinated nor had the small pox.

7. For the defendant it was contended that under sect. 31 of the Vaccination Act 1867 I had no jurisdiction to make an order for the vaccination of the child unless she was present. That I had no power to compel the production of the child, or to enforce the appearance of a child of her age or to proceed under the 11 & 12 Vict. c. 43, s. 2, ex

(a) Sect. 33.

parte to the hearing of the complaint against the defendant as though he was a party failing to appear to his summons, as in fact he had appeared.

8. I had doubt on the matter, but I was of opinion that sect, 31 of the Vaccination Act 1867 could not be construed as merely directory, but that the section in providing specially for the appearance of the child gives jurisdiction to the justice to make an order only upon the appearance of the parent or person having the custody of the child with the child before him, and after such examination as he (upon the appearance) shall deem necessary, and that I had no jurisdiction upon the appearance of the defendant without the child, and in the absence of the child, to make the order for her vaccination.

9. I was of opinion that I had no power to compel the defendant to produce the child, or to enforce the appearance of a child so young, and that it was very doubtful (even if the construction put by me on the principal Act is wrong) if I could proceed *ex parte* to the hearing of the complaint, as the words of the stat. 11 & 12 Vict. c. 43, s. 2, which gives power to the justices to proceed *ex parte*, seems to give that power only in cases where the defendant does not personally appear.

10. I therefore declined to make an order.

11. At the request of the complainant I granted a case, and the question for the opinion of the court is "Whether I was right in point of law in declining to make the order asked for."

12. If the court be of opinion that I was wrong in point of law, I respectfully request the court to remit the matter to me, with the opinion of the court thereon.

J. SPOONER.

6th March, 1871.

J. O. Griffits, for the appellant.—The question is whether the parent, when summoned, could avoid the effect of sect. 31 by not producing the child. The provisions of Jervis's Act (11 & 12 Vict. c. 43) are, with the exception of sect 3, incorporated with the Vaccination Act. Sect. 1 of Jervis's Act enables justices to issue a summons, and sect. 2 provides that on the non-appearance of the party summoned a warrant may be issued, or if where a summons shall be so issued as aforesaid, and upon the day and at the place appointed on and by the said summons for the appearance of the party so summoned, such party shall fail to appear accordingly in obedience to such summons, then and in every such case, if it be proved upon oath or affirmation to the justice or justices then present, that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance as aforesaid, it shall be lawful for such justice or justices of the peace to proceed *ex parte* to the hearing of such information or complaint, and to adjudicate thereon as fully and effectually to all intents and purposes as if such party had personally appeared before him or them in obedience to the said summons." Here, however, the party summoned certainly did appear, so it is at least doubtful whether Jervis's Act is of any avail. [BLACKBURN, J.—The penalty in the Vaccination Act seems to be imposed for disobeying the order, not for frustrating the making of the order. MELLOR, J.—The magistrate seems to have read the section thus: "if the parent chooses to produce the child I can go on; if he does not, my summons *is brutum fulmen*, and I cannot proceed." But I *think that the* word "examination" means, not examination of the child, but of the evidence, and the magistrate had made "such an examination as he thought fit," although the child was not before him.] The enactment would be rendered quite useless if it might be defeated in every case by the parent not producing his child.

No counsel appeared for the respondent.

BLACKBURN, J.—The meaning of the Act of Parliament must be that the parent may be summoned before the magistrate, and he may be directed to bring the child, but his doing so is not made a condition precedent to the making of the order, and if the magistrate, after examining the child or not, is convinced on the circumstances, that the child has not been successfully vaccinated and that the notices to vaccinate have been disregarded, he may convict the parent. It would be very absurd if the Legislature had said that the appearance of the child should be a condition precedent. I think therefore the magistrate should have made the order which he has not made.

MELLOR, J.—I am of the same opinion. It may be very advisable that the child should be brought but if the parent will not bring it his contumacy cannot be supposed to interfere with the magistrate proceeding, and to obstruct the operation of the Act of Parliament. It cannot be said there is not a colour for the difficulty, as the magistrate supposed that he only had power to make the order on the appearance of the party with the child. He desires that the case may be remitted if we think he ought to proceed, and I presume that if we do so he will then make the order.

Case remitted.

Attorneys for the appellant, *Neale* and *Philpot*.

April 26, *and May* 23, 1871.

TOLLET AND ANOTHER (apps.) *v.* THOMAS (resp.).

Gaming—Instrument of, upon a game of chance —31 & 32 Vict. c. 52, *s.* 3.

The appellants were convicted under sect. 3 *of the* 31 *&* 32 *Vict., c.* 52 (*The Vagrant Act Amendment Act* 1868), *for having at a public place unlawfully gamed with a certain instrument of gaming at a game of chance. The instrument in question was a machine having on it numbers, beside each of which were three holes, and behind those again were figures which, by a mechanical contrivance, were made to shift by the turning of a key, so that any number from* 1 *to* 999 *could be exhibited behind these holes. On the top of the machine was the word "total," and beside it were holes in which could be exhibited in a similar manner figures shifting on the turn of the key. The appellants took this machine to a race-course, and there appropriated each of the numbers to designate the particular horse to run in a race, and any person who wished to bet on a particular horse deposited with them half-a-crown, and received a ticket with the number appropriated to the horse selected by the better; and the appellants, by a turn of the key, altered the figures, increasing the sum indicated alongside of that number by one, and, as the machine was contrived, by the same turn of the key increasing the sum indicated by the figures beside the total by one. Thus, if at the beginning when the holes were filled up by cyphers the first half-a-crown was deposited in exchange for a ticket bearing the number one, the twist of the key would change the figures exhibited beside number*

one from 0 0 0 *to* 0 0 1, *and at the same time change the figures exhibited beside the total so as there also to show one. When the race was run, the holders of the tickets which had then the number appropriated to the winning horse, were entitled to divide among them the amount of the total, less* 10 *per cent. discount, which was to be deducted by the appellants, the proprietors of the machine: Held, that this was a wagering with an instrument of gaming on a game of chance within the meaning of sect.* 3 *of the* 31 & 32 *Vict. c.* 52.

THIS was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by two justices of Wolverhampton of the appellants, under sect. 3 of the 31 & 32 Vict. c. 52 (The Vagrant Act Amendment Act 1868) for gaming in a public place with an instrument of gaming at a game of chance.

The case stated as follows:

1. At a petty sessions held at Wolverhampton, before Henry Walker and John Ford, Esqrs., two of the justices for the borough, on the 11th Aug. 1870, Charles Tollet the younger, and John Lyshon (hereinafter called the appellants), then being in custody of the borough police, were charged, at the instance of James Thomas, inspector of police for the said borough (hereinafter called the respondent), under sect. 3 of the statute 31 & 32 Vict. c. 52, for that they, the said appellants, on the 10th Aug. then instant, at the said borough, did in a certain open and public place there situate to which the public has access, (to wit), the Wolverhampton racecourse, unlawfully game with a certain article used as an instrument or means of wagering on gaming at a game of chance, contrary to the statute in that case made and provided. And upon the hearing of such charge the appellants were convicted and adjudged to be rogues and vagabonds within the intent and meaning of the 5 Geo. 4, c. 83, and were sentenced to seven days imprisonment with hard labour.

2. The following facts were either proved before us or admitted by both parties: That the respondent, James Thomas, an inspector of police for the said borough, was on duty on the said racecourse on the 10th Aug. last, and saw the appellants about one hundred yards from the grand stand; they were standing on stools, the machine which he seized and produced in court, called the "Pari Mutuel," was between them; they were both shouting, "Now, gentlemen, what will you back; what will you lay your money on?" He saw them receive money and give tickets similar to those he produced; that he saw that going on during two races; that the public had access to the racecourse; that he had seen similar machines the day before on the racecourse, and that he did not previously caution the appellants; that he saw no money paid over; that when a person paid half-a-crown he had a ticket given him, and that the machine was used as a means of registering the gross total of money received, and exhibiting such total to those persons who had been induced to bet on the race. Edward Evans, a sergeant of police for the said borough, also deposed that he was on duty on the racecourse on the 10th Aug. inst., and saw the appellants there; that they were standing on stools, and had hold of the machine produced; that they were inviting the public to lay out their money, and he saw the appellants receive money and give tickets; that the contingency for the deposit was the result of each race. It was also admitted by the appellants that they deducted a commission of 10 per cent. from the gross total of money received.

3. On the part of the appellants it was contended that there had been no offence committed within the intent and meaning of the 3rd section of the 31 & 32 Vict. c. 52, inasmuch as the appellants had not been using an instrument of gaming as contemplated by the said section. That the instrument must be one upon the action of which the whole issue of the bet entirely depended, and that there was no evidence to show that the instrument used by the appellants was an instrument of that kind, inasmuch as the event to be determined did not in any way depend upon the instrument. That it was simply a betting-book upon a large scale upon which were recorded the amounts staked upon each horse. It was further contended that no offence had been committed within the intent and meaning of the said statute, inasmuch as that section only applies to playing or betting by way of wagering on gaming by the person using the instrument, and that there was no evidence to show that the appellants were playing or betting by way of wagering on gaming and further that the facts adduced did not support the charge.

4. On the part of the respondent it was contended that the evidence would fully justify a conviction, and that the appellants, by inviting the public to lay out their money, and by their receiving money to be disposed of by them according to the result of the races, and the instrument being used as a means of registering the amount of money received, and also as an advertisement of the process of betting, was essentially playing with an instrument of gaming within the intent and meaning of the said section.

5. The justices were of opinion that the machine was an advertisement to facilitate gaming, and was a means of wagering on gaming within the intent and meaning of the 3rd section of the 31 & 32 Vict. c. 52, and gave the determination against the appellants in the manner before stated.

6. The questions for the opinion of the court, therefore, are, whether the appellants, using the instrument called the Pari Mutuel, on the Wolverhampton racecourse, which the justices held to be a public place within the meaning of the Act, in the manner stated in this case, was a means of playing or wagering on gaming at a game of chance and a commission of an offence against the 3rd section of the 31 & 32 Vict. c. 52, which section is as follows:

> Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any place to which the public have, or are permitted to have access, at or with any table or instrument of gaming, or any card, coin, or token or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond, and punished under the provisions of 5 Geo. 4. c. 83.

If the court should be of opinion that the said conviction was legally and properly made, and the appellants were in reality committing an offence within the meaning of the said statute (the Vagrant Act Amendment Act 1868), the said conviction is to stand.

But if the court should be of opinion otherwise, then the said charge against the appellants is to be dismissed; in the meantime the appellants are bound over in recognisances to appear and abide the decision of the court on the present case.

A copy of the conviction of the said appellants is annexed to the case.

Given under our hands this 27th Sept. 1870, at the borough aforesaid. HENRY WALKER.
JOHN FORD.

By the 31 & 32 Vict. c. 52, s. 3 (The Vagrant Act Amendment Act 1868), it is enacted that—

Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering on gaming at any game or pretended game of chance shall be deemed a rogue and vagabond within the true intent and meaning of the recited Act (5 Geo. 4, c. 83), and as such may be convicted and punished under the provisions of that Act

Harris appeared for the appellants. — This conviction cannot be supported. It is necessary to prove six things: First, that the appellants were playing or betting—playing under this section means gaming for money. There was no proof of this. [BLACKBURN, J.—You say that if the party himself does not play, though he allows others to play, he is not liable.] Not quite so, as in that case there would be a setting up a game. But in this case there was no evidence of any playing or betting in the proper understanding of those terms. Secondly, the betting must be by way of wagering or gaming. There was no evidence that the appellants wagered or gamed. Thirdly, the place must be a public place, and I must admit that this was such a place. Fourthly, it must be with an instrument of gaming. Both the old Vagrant Act and the present one were directed to tables and things of that sort, which were instruments of gaming, and which themselves had a particular action. The using of the instrument alone is not sufficient unless the party himself plays or bets. [BLACKBURN, J.—I take it that if he produces the instrument for others to play with, he would be using it within the meaning of the Act]. Fifthly, it must be shown that this is an instrument of gaming. This is simply an instrument for registering bets; it is in effect nothing more than a betting book, and what it does might be equally well done upon a sheet of paper. If this is an instrument of gaming, so would be anything which records a bet. Sixthly, it must be "at any game or pretended game of chance." This was a horse race, which cannot be said to be a game of chance. In *Hirst* v. *Molesbury* (L. Rep. 6 Q. B. 130; 23 L. T. Rep. N. S. 555) it was held that a dog race was not a game of chance. [LUSH, J.—You say it must be an instrument which in some way itself decides the game.] Yes, and the party must either bet or play. This is an instrument the object of which is merely to supply the defect of memory, and to register the bets of persons.

James, Q. C. for the respondent.—This is an instrument of gaming. It is more than a record of betting. A betting book would be merely memoranda to refresh the memory; this is of a different nature and for a different purpose. Persons bet by means of this machine. A mere record of bets would not enable a person to bet as this machine does, for no one would know who the others are who have bet upon horses. He would judge of how to bet by seeing how others have bet. [COCKBURN, C. J.—The difficulty is, that the instrument must be used with reference to a game of chance. A horse race is certainly not a game of chance.] It is a chance to the party who bets, as he takes the money of those who have betted on the horses that do not win. He runs a chance quite apart from the winning of a particular horse. The betting cannot be worked without the table.

Harris in reply.

Cur. adv. vult.

May 23. — COCKBURN, C. J.— This is a case stated for the opinion of the court by two justices who had convicted the appellants under 31 & 32 Vict. c. 52, which enacts, "that any person playing or betting in a public place at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering 'on' gaming at any game or pretended game of chance, may be convicted and punished as a rogue and vagabond." There seems no doubt that the word "on" in this statute is, by a clerical error, substituted for "or," and that the statute is to be read as if the word was "or." The article which was actually used on this occasion is not sufficiently described in the case; but it was produced in court, and we had the opportunity of personal inspection. It was a machine having on it numbers, beside each of which were three holes, and behind those again there were figures, which, by a mechanical contrivance, were made to shift by turning a key, so that any number from 1 to 999 could be exhibited behind these holes. On the top of the machine was the word "Total," and beside it were holes which could be exhibited in a similar manner figures shifting on the turn of the key. The appellants took this machine to the racecourse, and there appropriated each of the numbers to designate the particular horse to run in a race, and any person who wished to bet on a particular horse deposited with them half a crown, and received the ticket with the number appropriated to the horse selected by the bettor; and the appellants by a turn of the key altered the figures increasing the sum indicated alongside of that number by one, and as the machine was contrived by the same turn of the key, increasing the sum indicated by the figures beside the total by one. Thus, if at the beginning, when all the holes were filled up by cyphers, the first half a crown was deposited in exchange for a ticket bearing the No. 1, the twist of the key would change the figures exhibited beside No. 1 from 0 0 0 to 0 0 1, and at the same time change the figures exhibited beside the total, so as there also to show 1. When the race was run the holders of tickets which had then the number appropriated to the winning horse were entitled to divide among them the amount of the total, less 10 per cent. discount, which was to be detained by the appellants, the proprietors of the machine. Thus, with ingenuity worthy to be employed in a better cause, it was contrived that each person who was induced to bet might see at a glance what was the amount of the odds offered him if he bet on any particular horse, but (and this is material to be observed) the state of the odds was liable to be changed before the race was run. To illustrate what is meant, let us suppose that at some particular time the figures opposite total indicated that ninety-nine half-crowns had been deposited, and those opposite No. 1 showed that for some reason or other no ticket had been taken out for that horse, anyone seeing and understanding this would know that if he deposited his half-crown and took a ticket for No. 1, thus

swelling the total to a hundred, he would, if things remained unaltered till the race was run, and the horse designated by No. 1 won the race, as holder of this ticket, receive ninety half-crowns, but he would also know that the odds were liable to be altered. For example, if a hundred persons subsequently deposited half-crowns so as to swell the total to 200, and none took tickets for No. 1, he would in the event of his winning receive 180 half-crowns; but if nineteen of those new depositors took tickets for No. 1, he would, in the event of winning, only receive nine half-crowns, for the total would have to be divided between the holders of No. 1 ticket and the other nineteen. The person, therefore, who by means of this machine is induced to part with his half-crown does so on a speculation, the chance of remuneration depending upon two events, one, viz., whether his horse wins determining whether he shall get back anything; the other event, viz., how many gamblers shall deposit their half-crowns, and upon what tickets determining how much he shall receive in the event of his winning. Over neither event could he by any scheme or effort of his exercise any control. There is no doubt that the bet was made in a public place. The question for our consideration is whether the machine referred to in the case is an instrument or means of wagering or gaming at a game of chance within the meaning of the Act (31 & 32 Vict. c. 52, s. 3). This again resolves itself into two questions—first, is the machine an instrument of wagering or gaming? secondly, is the game on which wagering took place under the circumstances stated a game of chance? On the first question it was urged that the instrument was not an instrument of wagering, inasmuch as the wagering took place quite independently of it, the using of the machine being confined to the registering of the bets made, and that a book or large sheet of paper might, though, no doubt, less distinctly, have been made available for the same purpose. This argument, though at first a specious one, will not, in our opinion, hold. The machine in question is a mechanical contrivance for enabling persons willing to bet on the event of a race to ascertain the state of bets already made on the different horses about to run, and to calculate the chance of success according as they may bet upon any particular horse. There can be no doubt that it materially assists the parties resorting to it in the operation of betting, and we cannot doubt, therefore, that it is used as an instrument or means of betting. Whether some other contrivance might be resorted to which would not be an instrument or means of wagering within the statute, is a question we may have to decide hereafter, and with which we need not trouble ourselves now. It is enough to say that the instrument in question is intended to assist persons in wagering, and undoubtedly has that effect, this being enough to bring it within the words, as it certainly is within the meaning of the statute. The second question is whether the wagering thus carried on is wagering on a game of chance. It was urged upon us in the argument that the betting here being on the event of a horse race, it could not be considered as wagering on a game of chance, a horse race not properly coming within such a definition. It is unnecessary to determine whether if this instrument had been used simply for registering bets on the event of a horse race the case would have been within the statute. Whether a horse race be in itself a game of chance or not, we can entertain no doubt that if some additional element of chance be introduced the wagering on a horse race may be converted into a game of chance. Thus, to use a familiar illustration, a lottery in which each individual draws a particular horse, and on the success of which the winning the stakes depends, would, we cannot doubt, constitute—that is between the parties to such a lottery—a game of chance. In the present instance, an element of chance is introduced, which, though not having any reference to the main event, namely, the result of the race in the winning of a particular horse, is yet essential to making the wagering laid upon the winning horse profitable to the better. The winning of the horse betted upon is, of course, the primary condition of the wager being won. But whether the winning of the wager shall be productive of any profit to the winner, and more especially what the amount of that profit shall be, depends upon the state of the bet with reference to the number of bets laid on or against the winning horse, a state of things fluctuating from one minute to another throughout the duration of the betting. Now this being something wholly independent of the issue of the race, as well as of the will and judgment of the winner, depending as it does upon the will and caprice of the other persons betting, is a matter obviously of uncertainty and chance to the individual better, more especially in the earlier period. This being so, and as there can be no doubt that the racecourse on which this betting was carried on was a public place within the meaning of the statute, we are of opinion that the conviction was right, and must be affirmed.

Conviction affirmed.(a)

Attorneys for appellants, *Austin, De Gex,* and *Harding,* for *Cheston,* Birmingham.

Attorney for respondent, *C. W. Cattell,* for *Crowder,* Wolverhampton.

Tuesday, May 23, 1871.

Ex parte DAVIS.

Assault and battery—Information for—Dismissal of information—Certificate—Requiring a recognisance to keep the peace.

An information was laid against A. B. for an assault and battery, and a summons issued against him for that offence. At the hearing, the justices dismissed the information and gave him a certificate, but they ordered him in respect of the said charge to enter into his own recognisance in 50l. to keep the peace for six months:

Held, that notwithstanding the justices dismissed the information, they were legally justified in requiring a recognisance to keep the peace.

THIS was an application for *a certiorari* to remove a recognisance to keep the peace into this court for the purpose of being quashed.

The application was made upon an affidavit of Mr. David Davis, of Newtown, Montgomeryshire, wine and spirit merchant, which stated that on the 14th March last John Hale laid an information against him, the said David Davis, before one John

(a) This case had been previously argued in Hilary Term, in the Bail Court, before Mellor and Lush, JJ., who took time to consider their judgment, but who ultimately directed that the case should be re-argued before the full court.

Price Drew, Esq., a justice for the said county, for that he did, on the said 14th of March, unlawfully assault and beat the said John Hale; that on the 15th of the said month he was served with a summons for assaulting and beating the said John Hale; that he duly appeared at the time and place mentioned in the said summons, before the said John Price Drew, T. W. Hare, and J. C. Bayard, Esqrs., three justices, when the said summons came on for hearing; that the said justices after having heard the evidence adduced in support of the said charge, adjudicated that he was not guilty of the said charge and dismissed the said information, and thereupon they granted him a certificate of such dismissal, which said certificate was in the words and figures following: (The certificate was set out), that the only charge made against him before the said justices was the aforesaid charge of assault, and that no evidence was given against him except in support of the said charge which was dismissed. Yet the said justices upon the hearing of the said information ordered and directed him in respect of the said charge of assault, so dismissed as aforesaid, to enter into his own recognisances in the sum of 50*l.* to keep the peace for six months.

Morgan Lloyd, for the applicant.—The only charge against Mr. Davis was for an assault, which the justices dismissed, giving him a certificate which is a bar to further proceedings for the same assault. [COCKBURN, C. J.—The dismissal of the charge of assault may be said to have been *sub modo*. The justices may well have thought that there was no actual assault, but that there were threats which called for protection.] There was no information calling upon him to enter into any recognisance to keep the peace. [BLACKBURN, J.—I am not aware that any such information is necessary when the party is before the justices.] No threats were proved to have been uttered by the defendant. [COCKBURN, C. J.—It often occurs that the justices say no assault has been proved, but there has been such violent conduct shown that we shall require a recognisance to keep the peace. MELLOR, J.—The conduct of the party may have fallen short of an actual assault, but it may nevertheless have been sufficient to justify his being bound over to keep the peace. He may have used violent words, which though not an assault may have shown an intention to commit one.] There were two courses open to the complainant: he may have charged the defendant with the using of threats if those only had been used, and so have had him bound over; or if an actual assault had been committed, he may have laid his information for it. [COCKBURN, C. J.—There was an information of an actual assault; but in the opinion of the justices no actual assault was committed, but they may have thought that there was an intention to commit one.] By the 24 & 25 Vict. c. 96, s. 44, the justices are required to give a certificate upon the dismissal of a charge of assault, which they gave in this case; and by the 45th section such certificate releases him from all further or other proceedings, civil or criminal, for the same cause; and it has been held that the effect of such certificate is a bar to all other proceedings founded upon the same cause, though in a different shape. If the justices had convicted of the assault, they may undoubtedly have required him to have entered into his recognisance to keep the peace. [COCKBURN, C.J.—There must have been something more in the case than the bare assault.] The affidavit negatives all other causes. There was no evidence of threats. [COCKBURN, C. J.—Threats need not be by words; they may consist of gestures. The justices may well have said it has not come to an actual assault, or, the assault was of too trivial a nature, and, therefore, we will not convict of that offence, but there is enough shown to warrant us in binding over the party to keep the peace.] The certi cate would in such case be a bar. [BLACKBURN, J.—As to an action or proceeding, by way of punishment. But this is only a precautionary proceeding to prevent a breach of the peace.]

COCKBURN, C. J.—We think the magistrates were justified in the course they adopted, and we ought not to grant the rule.

Rule refused.

Attorney for the applicant, *Beecham*, Newtown.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR and H. H. HOCKING, Esqrs., Barristers-at-Law.

Wednesday, June 7, 1871.

JONES *v.* OWEN.

Negligence—Coupled greyhounds—High road.

Upon a reference of all matters in difference without pleadings, the arbitrator found that the defendant had been guilty of negligence in that his two greyhounds, coupled together, rushed against the plaintiff on a high road, knocked him down, and broke his leg.

Held, that this finding was good in law, although there was no evidence of scienter.

THIS was a special case stated by an arbitrator, to whom all matters in difference between the parties had been referred, without pleadings.

The plaintiff complained of the negligence of the defendant in the conduct and management of two greyhounds belonging to the defendant, whereby the plaintiff alleged that he received injury, and the arbitrator found that the following were the facts attending the occurrence.—

The plaintiff, who was a farm bailiff, and about forty-five years of age, was, in the month of Aug. 1868, about 9 o'clock in the evening, walking on a highway about fifty yards outside the town of Carnarvon. He heard the bark of a dog, and two greyhounds suddenly met him, and were in the act of passing by, one on each side of him, when he was thrown violently down in consequence of a chain or piece of rope with which the dogs were coupled together coming in contact with his legs.

The plaintiff first saw the dogs when they were about three or four yards from him; they were then running towards him as fast as they could: he had not time to avoid them, and owing to its being nearly dark he did not see the coupling-chain or rope until he found that he was laying upon it, the dogs being detained from that cause. The defendant to whom the greyhounds belonged, and who was on the occasion in question exercising them, as well as a setter dog, which also belonged to him, came up in a minute or two after the plaintiff fell, and while he was still laying on the ground. The plaintiff and defendant had not before then seen each other. It was ascertained that the plaintiff's thigh was broken, and he was incapable of moving without assistance. He is still suffering from the effect of these injuries. The

plaintiff was sober, and did not in any way contribute to the accident.

Under these circumstances the arbitrator directed the judgment to be entered for the plaintiff, with 175*l.* damages, but if the Court of Common Pleas should be of opinion that upon the facts above stated there was not in point of law such negligence on the part of the defendant as to make him answerable to the plaintiff in damages, then he directed that judgment be entered for the defendant.

Cole, Q.C. (with him *Morgan Lloyd*) for the plaintiffs.—The arbitrator has found that the defendant was here guilty of negligence; if, therefore, any principle of law can be suggested upon which to support this finding, the judgment of the court must be for the plaintiff.

McIntyre for the defendant.—To make the defendant liable, the declaration, if there had been pleadings, must have alleged a *scienter*. There is nothing in the evidence to show knowledge on the defendant's part that these greyhounds had ever done such a thing as this before, nor that it was the usual tendency of such dogs to occasion such injury. Greyhounds are not naturally vicious, and the evidence merely proves that these greyhounds of the defendant did something which was unusual, and which could not render their owner legally liable: (*Cox* v. *Burbidge*, 32 L. J. 89, C. P.) Their being fastened together probably restrained their speed, and was on that account evidence of unnecessary care.

Cole, in reply, was stopped.

WILLES, J.—We cannot reverse this award. The arbitrator has found judgment for the plaintiff, and has reserved for us to enter it for the defendant, if we are of opinion that there is not, as a matter of law, upon the facts stated, evidence of negligence. We cannot come to that conclusion, unless we are prepared to lay down as law that a person is not guilty of negligence who allows his greyhounds to run about coupled together on a high road near a town without protection or restraint. I agree with Mr. McIntyre that they are animals of an ordinarily quiet nature, and a person is not bound to exercise as much care with regard to them as he would be if he possessed others of a nature known to be vicious. The law certainly is, as has been stated by a Scotch judge, that every dog may bite a person once without rendering his master liable for the injury he occasions. This, however, is not a case in which we have to deal with the acts of dogs by themselves. Here the cause of the accident was partly an act of their master as well as of these dogs. We are dealing too with a state of things, in consequence of which the dogs might injure themselves, and therefore, for their safety, they ought when in such a condition to be led. The arbitrator, having the common knowledge of the tendency of coupled greyhounds to rush, may well say they ought to be allowed on a high road only with some one to lead them, on account of the probability of injury, not only to themselves, but also the people lawfully using the high road. We have to deal here with dogs *plus* coupling chains, and I am not prepared to say that this was a proceeding on the defendant's part, which was not in point of law negligence. Judgment will be for the plaintiff on this special case.

KEATING, J.—I am of the same opinion. The negligence alleged is not in allowing dogs to be on the highway without restraint, but in the fact that these greyhounds coupled together were there without being led or guided. I think the arbitrator might well find as he has done.

Judgment for plaintiff.

Attorney for plaintiff, *S. C. Frankish.*

Attorney for defendant, *Edmund Byrne.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 22, 1871.

(Before BOVILL, C.J., MARTIN, and BRAMWELL, BB., BYLES, and BLACKBURN, JJ.)

REG. *v.* JOHN CHILD.

*Setting fire to goods in a house—House catching fire therefrom—Malicious intent—*24 *&* 25 *Vict. c.* 97, *s.* 7.

A person maliciously set fire to goods in a house with intent to injure the owner of the goods, but he had no malicious intention to burn the house or to injure the owner of it. The house did not take fire: Held, that if the house had thereby caught fire, the setting fire to it would not have been within sect. 7 *of the* 24 *&* 25 *Vict. c.* 97, *as under the circumstances it would not have amounted to felony.*

CASE reserved for the opinion of this court by Blackburn, J.

The prisoner was tried before me at the Norfolk Spring Circuit.

The indictment contained two counts, the first, "that the prisoner unlawfully, maliciously, and feloniously did set fire to divers goods and chattels, the property of Fanny Goldsmith then and there being in a building, to wit, a dwelling house, with intent thereby to injure."

The second count alleged that it was "under such circumstances, that if the building had been thereby set fire to, the offence would have amounted to felony."

The evidence was that the prisoner from ill will and malice against the prosecutrix broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners so as to make a bonfire of them. The building would almost certainly have been burned in consequence, had not the police who were sent for succeeded in extinguishing the bonfire which the prisoner had kindled before the house was actually ignited.

The prisoner was not defended by counsel.

The only enactment that was cited, or that I was aware of bearing on the case, was the 24 & 25 Vict. c. 97, s. 7.

I thought that the true construction of that enactment was not such as to make it felony maliciously to set fire to goods in a dwelling house *per se*, and consequently that the first count, though it was proved, was not good in law; and on the second count I thought that if the dwelling house in which the goods were had caught fire from the burning goods, the question whether the offence would have amounted to felony depended upon a further question, viz., whether such a setting fire to the dwelling house would have been malicious and with intent to injure, so as to bring the case within 24 & 25 Vict. c. 97, s. 3. As to this, I explained to the jury that though the prisoner's object was only to destroy the furniture and injure the owner of it, and not to destroy the house or injure the landlord; yet, if the jury thought that he was aware that what he was

doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the building had caught fire from the setting fire to the goods, the offence would have been felony, otherwise not.

The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious.

As it seemed to me apparent from the note in Mr. Greaves' Criminal Law Consolidation and Amendment Acts, p. 213, that the framers of the 24 & 25 Vict. c. 97, s. 7, meant to include all cases in which if the fire had been set to the building with the same intent as it was set to the things in the building, the offence would have been felony, I reserved the case for the Court of Criminal Appeal.

The question for the court is whether on the evidence and finding of the jury the prisoner is properly convicted upon either count.

The prisoner not having been able to obtain bail remains in custody.

COLIN BLACKBURN.

No counsel appeared on either side.

The judges retired to consider the case, and on their return into court the following judgments were delivered:

BOVILL, C. J.—When the prisoner was convicted at the trial, a question was reserved by my brother Blackburn as to the effect of sect. 7 of 24 & 25 Vict. c. 97, which enacts that, "whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony." The prisoner had maliciously, and with intent to injure the owner of certain goods in a dwelling-house, set fire to them, and, although the house was not set on fire, it almost certainly would have been if the fire which the prisoner had kindled had not been discovered and extinguished. My brother Blackburn left it to the jury to say whether the prisoner had acted maliciously with respect to the house, and directed them that, though the prisoner's object was only to destroy the furniture and injure the owner of it, and not to destroy the house or injure the landlord, yet, if the prisoner knew that what he was doing would probably set the house on fire, and so injure the owner, and was reckless whether it did so or not, they ought to find that if the building caught fire from the setting fire to the goods the offence would have been felony. In answer to this direction of the judge, the jury negatived any malicious intention in the sense explained to them by the learned judge, but found the prisoner guilty, adding that he did not intend to injure the owner of the house nor maliciously intend to set fire to the house itself. Under these circumstances, the only fact that can be taken to have been found is that the prisoner maliciously set fire to goods in a dwelling house with intent to injure the owner of the goods. There is no clause in the Act which makes the unlawfully and maliciously setting fire to goods in a dwelling-house a felony. An offence of that kind would come within sect. 51 of the Act. If we were to hold that this case came within sect. 7 we should be rejecting the words "under such circumstances that if the building were thereby set fire to, the offence would amount to felony." We have no authority to reject those words, for it is clear that it is meant that there must be such a setting fire to the house as would amount to felony within the meaning of some of the preceding sections. If any of those sections could apply to the present case it would be sect. 3, which declares it to be a felony "unlawfully and maliciously to set fire to any house, &c., with intent thereby to injure any person;" but the jury have negatived any malicious intention to injure the house or the owner of the house, and found that there was simply an intent to injure the goods. I am clearly of opinion that that is not a felony within sect. 3, and that the conviction must therefore be quashed.

MARTIN, B.—I am of the same opinion. I think that the first count is bad in law, and does not disclose any offence. As to the second count, the jury have negatived an essential element—malicious intention towards the house or its owner.

BRAMWELL, B.—I think that, even if the house had been in fact set fire to, the prisoner would be entitled to an acquittal upon this finding, for I interpret it to express an opinion not only that the prisoner did not intend to burn the house, but that they were of opinion that he thought that the house would not catch fire.

BYLES, J.—I also think that, according to the finding of the jury, the prisoner neither acted maliciously nor recklessly as regards setting fire to the house or injuring the owner of it.

BLACKBURN, J.—I am of the same opinion. At the trial I thought that the conviction could not be supported. It seemed to me quite clear that the framer of the statute meant to include a case of this kind, and it is unfortunate that the words which have been used do not carry out that intention. The terms of the former statute (14 & 15 Vict. c. 19, s. 8), "if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, he shall be guilty of felony," would clearly have included this case, for the prisoner did maliciously set fire to goods in a building the burning of which would have been felony. It happens unfortunately that the 24 & 25 Vict. c. 97, repealed that enactment, and sect. 7 has the words, "under such circumstances that if the building were thereby set fire to, the offence would amount to felony," in lieu of "the burning of which would amount to felony." Mr. Greaves in his Criminal Law Consolidation Acts adds a note to this section, to the effect that these words were advisedly substituted, in consequence of *Reg.* v. *Lyons*, 1 Bell C. C. 28; 8 Cox Crim. Cas. 84, and in order to include cases where an intent to injure was necessary as well as those where it was not; and he further states that the committee of the House of Lords thought they would include every case which could arise. The object was plainly to include cases like this; but I cannot agree with his reasoning in 1 Russ. on Crimes, 742 (note), that if the setting fire to the one is malicious, the setting fire to the other would be malicious also. I think, and so directed the jury, that to make the act malicious with respect to the owner of the house, the burning of the house must not only be the natural result of the setting fire to the goods, but the prisoner must at least be reckless whether he thereby set the house on fire or not. Finding that this view was opposed

to what was the intention of the Legislature as stated by Mr. Greaves, I reserved the case, but I am of opinion that the words used in sect. 7 have restricted instead of extending the liability which existed under 14 and 15 Vict. c. 10, s. 8.

Conviction quashed.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

March 18 *and* 20, 1871.

Re THE QUEEN'S BENEFIT BUILDING SOCIETY.

Building society—Winding-up—Petition by investing member—Creditor—Notice of withdrawal—Rules.

By the rules of a benefit building society it was provided that persons intending to become shareholders should be at liberty to pay in small sums, and should become shareholders when they had thus paid up the full amount of a share or shares, and that any person thus depositing his money should be at liberty, at any time before becoming a shareholder, to withdraw the amount so paid in by him.

On a petition for the winding-up of the society by a person who had made certain deposits on account of shares, and had given notice of withdrawal before the shares were issued to him:

Held, that the petitioner, being under the rules of the society entitled to repayment of his deposits, was a creditor, and as such entitled to a winding-up order.

THIS was a petition for the winding-up of the Queen's Benefit Building Society by an investing member, who had given notice of withdrawal of his deposits.

By the rules of the society, which had been duly certified, it was provided that persons intending to become shareholders should be furnished with pass-books, and should be at liberty to pay in small sums, and should become shareholders when they had thus paid up the full amount of a share or shares, and should receive scrip representing their share or shares. The rules further provided that persons thus depositing their money should be at liberty at any time before becoming shareholders to withdraw the amounts so paid in by them upon giving notice of their intention to do so.

The rules did not confer upon the society any express power to borrow money.

Mr. Gamble, the manager of the society, had paid in various sums on account of shares, but had not become a shareholder. He had given notice of his desire to withdraw the amount paid in by him, and the money not being repaid to him, he presented the present petition for the winding-up of the society under the Companies Act 1862. In the petition Mr. Gamble was described merely as a creditor of the society.

Swanston, Q. C. and *Graham Hastings*, in support of the petition, submitted that he was a creditor of the society, as he had deposited money with the society with the view of becoming a shareholder, but, before actually becoming a shareholder, he had given notice of withdrawal, as he was entitled to do by the rules of the society; and that as a creditor he was entitled to an order for the winding-up of the society. They referred to

Re National Permanent Benefit Building Society, ex parte Williamson, 23 L. T. Rep. N. S. 234; L. Rep. 5 Ch. 309.

The society, though not registered under the companies Act 1862, could be wound-up under that Act: (*Re London Indiarubber Company*, 14 L. T. Rep. N. S. 316; L. Rep. 1, Ch. 329.)

Waller for the society, and

W. F. Robinson, for certain creditors, supported the petition.

Sir *Richard Baggallay*, Q. C., and *J. Napier Higgins*, for certain shareholders, opposed the petition. This society had no power to borrow money, and it had been decided that a benefit building society could not borrow money in the absence of an express power. The petitioner's debt was, therefore, invalid, and he was not entitled to the order asked for.

Re Victoria Benefit Permanent Building Investment and Freehold Land Society, Hill's and Jones' cases, 23 L. T. Rep. N. S. 777, L. Rep. 9 Eq. 605;

Re Spence's Patent Non-conducting Composition and Cement Company, 21 L. T. Rep. N. S. 413; L. Rep. 9 Eq. 9.

As the petition was presented as a creditor's petition, they contended that it could not now be treated as a shareholder's petition, and an order could not be given to the petitioner as a shareholder.

Chitty, for some investing members, and

Stirling, for the official liquidator of the Durham County Benefit Building Society, which was a creditor to the amount of 5000*l.*, also opposed the petition.

March 20.—Lord ROMILLY said that he was of opinion that the petitioner was entitled to the order for which he asked. It was no doubt true that a society of this kind had no power to borrow money in the absence of an express power to do so. But this society was bound by its rules to repay money deposited on account of shares, and the rules having been certified and sanctioned in the manner appointed by the statute had in fact become law. The petitioner, being therefore by the rules of the society entitled to repayment of his deposits, was a creditor, and, as such entitled to a winding-up order. One set of costs would be allowed to the respondents.

Solicitors: *Harper, Broad*, and *Battock*; *Lewis, Munns, Nunn*, and *Longdon*; *C. H. Murr*.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SEDGWICK, Esqrs., Barristers-at-Law.

April 25 *and May* 26, 1871.

MUSGRAVE *v.* FOSTER AND OTHERS.

The Inclosure Acts (8 *& 9 Vict. c.* 118, *s.* 27; 11 *& 12 Vict. c.* 99, *s.* 1; 16 *& 17 Vict. c.* 120)—*Provisional order—Condition—Right in allotted lands—Reservation to lords of manor of right of sporting.*

By a provisional order for the inclosure of Knaresdale Common, the Inclosure Commissioners declared the following to be the terms and conditions on which the inclosure should be made, viz., that one-sixteenth part in value of the lands be allotted to the lords of the manor in lieu of their right and interest in the soil, exclusive of their right and interest in the game.

Acting under this order, the valuer appointed by the commissioners awarded to the lords of the manor certain specified lands, equal in value to one-sixteenth part of the residue of the lands to be inclosed, in full compensation for their right and interest in the soil thereof, exclusively of their right and interest in the game; and he further reserved and set out to the lords all game . . . . on the lands to be inclosed, with full power to hunt and take it.

Held, that the commissioners were empowered by the Inclosure Acts (8 & 9 Vict. c. 118 s. 27; 11 & 12 Vict. c. 99, s. 1) to make it a condition of inclosure that the right of sporting over the inclosed lands should be reserved to the lords of the manor, whilst the soil might be allotted to others; that the intention to reserve such right was sufficiently expressed in the provisional order, and that therefore the lords were entitled to the exclusive right of killing game upon and throughout the said lands.

Declaration: For that at the time of the committing by the defendants of the grievances hereinafter mentioned, the plaintiffs were lords of the manor of Knaresdale, in the county of Northumberland, and entitled to the exclusive right and liberty of shooting and killing game by themselves, and their servants in, upon, and throughout certain lands in the county aforesaid which formerly constituted, and were certain moors and waste lands of the said manor, called or known by the name of Knaresdale Common, and the defendants disturbed the plaintiff's right and liberty aforesaid by shooting and killing game on the said lands, and the plaintiffs also sue the defendants for that the defendants converted to their own use, or wrongfully deprived the plaintiffs of the use and possession of the goods of the plaintiffs (that is to say) dead grouse.

Pleas: First, not guilty; secondly, and for a further plea to the first count that the plaintiffs were not entitled as alleged; thirdly, and for a further plea to the said first count, that at the time of the committing of the acts complained of in that count, the said land were the lands, soil, and freehold of George Thomas Mowbray, and that the defendants committed the said acts as his servants, and by his command in that behalf; fourthly, and as to the last count of the declaration, that the said goods were not the plaintiffs as alleged.

Replication: First, joinder of issue upon each of the pleas; secondly, and for a second replication to the defendant's third plea, the plaintiffs say that the said land, before the said became the lands, soil, and freehold of the said George Thomas Mowbray, and before and up to the time of the inclosure, hereinafter mentioned, were part of the moors and waste lands of the manor of Knaresdale, called or known by the name of Knaresdale Common, and such moors and waste lands were, at the time of the inclosure thereof, as hereinafter mentioned, subject to be inclosed under and by virtue of The Acts for the Inclosure, Exchange, and Improvement of Land; and that before and up to the time of the said inclosure certain persons were lords of the said manor, and as such lords were seised in their demesne as of fee of and in the said moors and waste lands, and that after the passing of The Second Annual Inclosure Act 1853 the said moors and waste lands were duly inclosed, under and by virtue of and according to the provisions of the last-mentioned Act, and of The Acts for the Inclosure, Exchange, and Improvement of Land; and under such inclosure there was duly reserved to the said lords, according to the provisions of the said Acts, the exclusive right and liberty of shooting and killing game in, upon, and throughout the lands so inclosed as aforesaid, being the right and liberty in the declaration mentioned; and the defendants say that all things happened and existed necessary to reserve the said lords the right and liberty aforesaid, and that at, before, and at the same time, when, &c., the plaintiffs were the lords of the said manor, and, as such lords, entitled to the right and liberty aforesaid.

Rejoinder and demurrer.

Issue upon the plaintiff's second replication to the defendants' third plea.

Demurrer to the second replication to the third plea.(a)

Joinder in demurrer.

By consent of the parties the following special case, of which the above pleadings were to be considered part, was stated pursuant to a master's order and to the provisions of the Common Law Procedure Act 1852.

CASE.

1. At the time of the making of the provisional order, and of the inclosure thereunder as hereinafter mentioned, Sir David Miles, Lambert Monck, Baronet, Sir George Musgrave, Baronet, Edward William Hasell, Esq., and William Nanson, gentleman (trustees under the will of the Right Hon. Lord Wallace, then deceased), were lords of the manor of Knaresdale, and as such lords were entitled to the soil of certain lands within the said manor called Knaresdale Common, such lands then being lands subject to be inclosed under the provisions of the Acts for the Inclosure, Exchange, and Improvement of Land.

2. On the 25th Aug. 1852, a provisional order(b) was made and issued by and under the seal of the Inclosure Commissioners for England and Wales for and concerning the inclosure of the said lands under the provisions of the said Acts.

3. By an Act passed on the 20th Aug. 1853

(a) The matter of law intended to be argued was stated to be that the replication did not show a sufficient right and title as against the freeholder to the exclusive right to shoot over his lands.

(b) A copy of the provisional order formed part of the case. The material part thereof was as follows: "Now, therefore, in pursuance of the power given to us by the said Act, we, the Inclosure Commissioners for England and Wales do by this provisional order under our seal declare the following to be the terms and conditions on which we are of opinion that the said proposed inclosure should be made, viz., that one sixteenth part in value of the said lands be allotted under the provisions of the said Act to the said lords of the said manor, in lieu of their right and interest in the soil of the said lands exclusively of their right and interest in the game, and in all mines, minerals, stone, and other substrata under the said lands.

And I further declare that I do, on the request in writing of the said lord of the manor, reserve and set out to the said lord all game, mines, minerals, stone, and other substrata under the lands to be inclosed, with full power and authority for him, his heirs, lessees, and assigns, and his and their agents, miners, and servants, at all times hereafter to enter upon all or any part of the said land, to hunt and take all game, and to search for, work, and carry away all mines, minerals, stone, and other substrata under the said lands, and to do all necessary or reasonable acts for the convenient exercise of this power and authority, he and they paying reasonable and adequate compensation to the persons entitled to the surface of such land for damage done to such surface in the exercise of the rights and easements, and adequate compensation to the persons entitled to the surface of such land for damage done to such surface in the exercise of the rights and easements intended to be hereby reserved. This power so set out and reserved to the lord of the said manor is to be subject to the power which the owner for the time being of every allotment is to have of taking and winning from such allotment any freestone, limestone, or crow coal, for his own use upon any of his allotments, or upon any of his ancient lands and tenements within the said manor, but not otherwise, nor for sale.

(16 & 17 Vict. c. 120), after reciting that the said Inclosure Commissioners had, in pursuance of the said Acts, issued their said provisional order for and concerning the inclosure of Knaresdale Common thereby proposed, and that such proposed inclosure was expedient, it was enacted that the said proposed inclosure should be proceeded with.

4. The inclosure of the said lands called Knaresdale Common was accordingly proceeded with, and an award in the matter of the said inclosure was, under the direction of the said commissioners, drawn up and engrossed on parchment, and signed by the valuer duly appointed and acting in that behalf, and was afterwards, on the 26th May 1859, confirmed by and under the hands and seals of the said commissioners, according to the provisions of the said Acts.

5. By the said award the valuer set out, allotted, and awarded unto the lords of the said manor certain lands therein specified, and then proceeded thus: "Which I adjudge and declare to be equal in value to one-sixteenth part of the residue of the lands to be inclosed, and to be in lieu and in full compensation for the right and interest of the said lords of the manor in the soil of the said lands, exclusively of their right and interest in the game, and in all mines, minerals, stone, and other substrata under the same." And after setting out and allotting and awarding the residue of the lands to be inclosed as aforesaid, the valuer, by his said award, proceeded to award and declare as follows:

6. Amongst other lands thereby set out, allotted, and awarded, the valuer by his said award set out, allotted, and awarded certain portions of the land to be inclosed unto one Thomas Mowbray, deceased, such allotment being made to him in respect of land held by him in fee simple. The said Thomas Mowbray was not one of the consenting parties mentioned in the said provisional order, and never executed the said award or assented to it except by taking possession of the said allotments.

7. On the 12th Aug. 1868 the defendants, by the authority of George Thomas Mowbray, came upon the allotments so made to the said Thomas Mowbray, deceased, and then and there shot and carried away a grouse.

8. At the time when the defendants shot and carried away a grouse as aforesaid, the said George Thomas Mowbray was the owner and in possession of the said allotments so made to the said Thomas Mowbray, deceased, and the plaintiffs were the lords of the said manor.

9. Neither the said Thomas Mowbray, deceased, nor the said George Thomas Mowbray, nor any owner of the said allotments, has in any way assented to the said award, or done anything to ratify the same except as herein appears.

10. The said award may be referred to and taken as part of this case.

The question for the opinion of the court was whether the defendants, as lords of the said manor, were entitled to recover in this action.

If the court was of opinion in the affirmative, then judgment to be entered for the plaintiffs.

If the court was of opinion in the negative, then judgment of *nolle prosequi* to be entered up for the defendants.

Manisty, Q.C. (with him *Kemplay*), for the plaintiff.—The action is maintainable. The commissioners had the power of granting the game to the plaintiffs. Sect. 1 of 11 & 12 Vict. c. 99, enacts that "it shall be lawful for the commissioners, in their provisional order in the matter of any inclosure, to set forth any special agreement or matter concerning or affecting the lands to be inclosed, and to make the same a condition of such inclosure." And by this section the lord has a veto and may object to the inclosure. Cooke on Inclosures (4th edit., p. 359), in a note to the above section, remarks, "Under this provision it is now very common to reserve the lord's right of sporting." Surely that is a matter affecting the land. The lord assents to the inclosure on condition that the game is reserved to him, and accepts the allotment: (*Graham* v. *Ewart*, 7 H. of L. Cas. 331). Sect. 27 of the original Act (8 & 9 Vict. c. 118) (*a*) directs that the conditions of any proposed inclosure may be embodied in the provisional order, and that the commissioners shall specify the share of the land to be allotted to the lord in respect of his right and interest in the soil, either exclusively or inclusively, of his right to mines, pasturage, "or any other right or interest of such lord in the land to be inclosed." [LUSH, J.—Can you call the right of taking game a "right or interest in the land to be inclosed?"] Yes; it is like a right of pasture. [COCKBURN, C.J.—The game is *res nullius*, but they give instead of it the absolute ownership of a piece of land.] The right of sporting is highly valued, and the Lords here wished to retain it. The piece of land was allotted to them in lieu of their right and interest in the soil only.

Field, Q.C. (with him *Crompton*) contra.—This reservation was one beyond the power of the commissioners to make. [BLACKBURN, J.—The question is whether the commissioners had the power they assumed, or whether their act was *ultra vires*.] The whole aim of the statute is to give the owners of allotment the land in severance absolutely. Yet if such a right as this could exist in the lord they could not build or plant, or even make gardens. [BLACKBURN, J.—Do you think the existence of a right of sporting over an allotment in the lord would prevent the allottee building a house?] In the case of *Lord Leconfield* v. *Dixon and others* (16 L. T. Rep. N. S. 18; L. Rep. 2 Ex. 202), a right of sporting had been reserved by a special clause in a Private Inclosure Act, and it was held that the lord did not take an exclusive right of sporting over the allotments. The court saying (p. 205): "In considering the statute on which the question turns, it is not to be treated as one which is for the benefit of the commoners only, nor as one which takes from the lord only. . . . But it should be remembered that the

(*a*) By sect 27 of 8 & 9 Vict. c. 118, the commissioners are to embody the conditions of any proposed inclosure or a provisional order, and take consents of parties interested, and it is enacted that, in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, shall specify the share or proportion of the residue of the land, which, after provision for expenses, and after deducting allotments for public purposes should be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be inclosed, as the case appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed.

right now claimed by the plaintiff is inconsistent with the useful design of the statute. . ." The right claimed here is of the same class as that of hunting with horses and hounds; could that be exercised over allotments? The scheme of the statute is contradictory. First, the commissioners have not made it a condition that the lord shall have the right to the game exclusively; secondly, supposing they had done so, the condition would be void. The scope of sect. 27 and the object of the provisional order is to specify the share or proportion of the residue of the land which the lord is to have, either inclusively or exclusively, of certain things. [BLACKBURN, J.—No; it is the land that is to be given to him for giving up his right to the soil of the waste.] There must be an allotment made to the lord in respect of other rights than rights to mines. The words of sect. 27 do not justify the exclusion of the game at all. But nevertheless let it be assumed that they do, then the right is analogous to a right of pasturage. There are three kinds of interests specified, viz., "mines and minerals," "rights of pasturage," and "other rights and interests." All that can be done under the provisional order is to give the lord the one-sixteenth, or whatever the proportions may be, and to say what it is for, then the other rights are to be valued by the valuer. [LUSH, J.—And when he comes to value he looks at the provisional order, and on seeing the rights are excluded he makes his allotment in proportion.] The mistake here has been to try to reserve in the allotted lands this right of sporting which is inconsistent with inclosure. If sect. 1 of 11 & 12 Vict. c. 99, was framed for the purpose suggested by Mr. Wingrove Cooke in his note, it was for a most delusive purpose. The interest which the statute provides for must be some interest respecting the soil. But the lord had a mere right to kill a bird, &c., which only became his property when killed. [COCKBURN, C.J., referred to *Blades* v. *Higgs* (12 L. T. Rep. N. S. 615; 10 C. B., N. S., 713; 11 H. of L. Cas. 621.] In all the private Acts on the subject were clauses either reserving to the lord the rights to the game or compensating him for them, and when a statute is found to contain no such clause there is a fair presumption that the Legislature did not wish to preserve those rights. In *Townley* v. *Gibson* (2 Term. R. 701), Kenyon, C. J., says, "The defendant's counsel has supposed that mines are a distinct right from the right to the soil; but I do not think so, where they are under the land of the lord of the manor. In cases of copyholds a lord may have a right under the soil of the copyholder, but when the soil is in the lord all is resolvable into the ownership of the soil; and a grant of the soil will pass everything under it." And see also the judgment of Buller, J., therein.

Manisty, Q. C., in reply.

Cur. adv. vult.

May 26. BLACKBURN, J., read the judgment of the Court (Cockburn, C. J., Blackburn and Lush, JJ.) In this case the question raised is whether the plaintiffs, as lords of the manor of Knaresdale, are entitled to the exclusive right of shooting over lands formerly a portion of the waste of that manor but inclosed and allotted to the defendants under the award made in pursuance of a provisional order of the Inclosure Commissioners dated 25th Aug. 1852, and directed to be proceeded with by the Second Annual Inclosure Act 1853 (16 & 17 Vict c. 120). The lords of the manor were before inclosure owners of the soil (subject to the rights of common), and as such they had the right to take the game, not as a special or seignorial right, but as an ordinary incident of property. But the owner of the fee can sever the right to take the game from the owner of the soil and grant it as a separate tenement to another in fee: *Wickham* v. *Hawker* (7 M. & W. 63.) The questions involved in the present case are, first, whether the Inclosure Commissioners, under the Inclosure Acts, are authorised to make it a condition of the inclosure that the right of sporting should thus be severed from the right in the soil, and the tenement thus created remain with the lord whilst the soil is allotted to others; or whether such a condition is *ultra vires* and void. And secondly, whether, supposing the commissioners have such a power, they have in the present case sufficiently expressed their intention to exercise it in favour of the present plaintiffs. The first question is one of general importance. The answer to it depends on the construction of the General Inclosure Act of 1845 (8 & 9 Vict. c. 118), as extended by stat. 11 & 12 Vict. c. 99, s. 1. The General Inclosure Act of 1845, by sect. 25, provides that on an application made to the commissioners for that purpose by those who appear to him to represent at least one-third in value of the interests in the lands proposed to be inclosed, the commissioners, if on the statements made to them they think the inclosure may be found expedient, shall refer the application to an assistant commissioner who is to go down to the spot and make inquiries and hold a meeting "to hear any objections" which may be made to the proposed inclosure, and any information or evidence which may be offered in relation thereto, so that great care is taken that the terms of the proposed inclosure shall be thoroughly known and discussed in the locality. The assistant commissioner is then directed by the 26th section to report to the commissioners; and in case he thinks such inclosure expedient, "he may specify any terms or conditions which may appear to him to be proper for the protection of any public interest, and of any mineral property or peculiar rights in relation to the land proposed to be inclosed." The right of the owner of the soil to take the game is certainly not aptly described by the words "peculiar right in relation to the land." Then comes sect. 27, which is the important one. The commissioners, on the report or after any further inquiries they shall think necessary, are to determine whether in their opinion the proposed inclosure would be expedient; and, if they so think, they, by provisional order under their seal, shall set forth the terms and conditions on which they shall be of opinion that the inclosure should be made, and especially "the allotments to be made for recreation," &c., and, "in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, shall specify "the proportion of the land that shall be allotted to him" in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, &c., or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenant, or any other right or interest of such lord in the land to be inclosed as the case may appear to the commissioners to require, or as the

parties interested, with the approbation of the commissioners may have agreed; and in case there shall be any mineral property or rights in relation thereto not vested in the lord of the manor or other rights which shall appear to the commissioners proper to be specially provided for upon such inclosure or to be excepted from the operation thereof, shall specify the provisions or exceptions in that behalf." The section then goes on to provide that this provisional order shall be thoroughly known in the locality, and then if two-thirds in value of the parties interested assent, the commissioners are again to give notice of the intention to include the provisional order in their annual report, and then if no successful objection is made in Parliament, the inclosure on those terms and conditions is to be proceeded with. It seems from this that the general effect of this scheme was to give the commissioners a wide discretion to consider whether the inclosure on the terms proposed was expedient or not. If they think it is not expedient, they have an absolute power to refuse their assent. If they think it might be expedient, subject to terms and conditions, they may impose such terms and conditions, and then if two-thirds of those interested adopted the scheme subject to such terms and conditions, and the Legislature sanctioned it, it was to become law. The lord of the manor has, by sect. 29, an absolute veto on the inclosure of his waste. He may refuse his consent unless the parties interested agree that the right to take the game be severed from the right to the soil in the land proposed to be inclosed, and the tenement thus created reserved to the lord, the soil only being allotted. He is not bound to assent at all, and has a perfect right to make a stipulation to this effect. It might be a matter of doubt whether under the general Inclosure Act as it was originally framed, the commissioner would have power to impose such condition. The difficulty in construing the Act is, that the right of the owner of the soil to take game is a general incident to the property in the soil, a mode of enjoying that property, and is not therefore aptly described as a "peculiar right" which is the phrase in sect. 26, nor as "another right or interest in the land," which is the phrase in sect. 27, though it is in the power of the lord to sever it from the soil, and so create in another a peculiar right of this kind, and it might be said that the power of the commissioners to impose terms and conditions under the first Act is limited to imposing powers and conditions relating to rights already existing, and not to those to be created by the inclosure itself. But this difficulty seems to be completely removed by the 1st section of stat. 11 & 12 Vict. c. 99, which enacts that it shall be lawful for the commissioners in their provisional order "to set forth any special agreement or matter concerning or affecting the lands to be inclosed, and to make the same a condition of such inclosure." Those who framed this enactment seem to have discovered that the words of the former Act might be construed as restricting the power of the commissioners to impose conditions of a particular kind only, and therefore enacted that their power should be in that respect unrestricted. At all events if the lord of the manor made it a condition to his assent that the right to take the game should be severed from the right to the soil, and the persons interested agreed to this condition, and an inclosure was proposed on these terms, and the commissioners by their provisional order sanctioned the inclosure on the conditions that this was done, they would be making that a condition which was both a "special agreement," and "a matter affecting the lands, and so would be acting not only within the meaning of the Act, but within the most literal construction of the words used. The second question, whether the commissioners have so framed this particular provisional order as to make it a condition of the inclosure that the right to take the game should be severed from the right to the soil, so as to become a separate tenement, and that the lord should have the tenement so created, is one depending on the construction of the provisional order. There might easily have been words found far more apt to describe this than those actually used, but it is impossible to avoid seeing that it was meant that this should be done, and I think that we ought to proceed upon the principle laid down in *Ewart* v. *Graham* (1 H. & N. 563.) There the language of a Private Inclosure Act left no doubt that it was intended that the lord of the manor should enjoy over the land after it was inclosed, as a separate right, the same power of taking the game which he had *de facto* before the Inclosure, as a mode of enjoying his property in the land whilst it was his own. And the majority of the Exchequer Chamber and the House of Lords held that, though the words used were not such as would be used by a lawyer to express an intention to create a fresh right, yet they were sufficient to effect that purpose, the intention being clear. Coleridge, J., in delivering the judgment of the majority in the Exchequer Chamber, says, "When it is clear from the context of an instrument, in what sense words are used in that instrument, the sound rule of construction is to attribute to them that meaning, even though the words be technical and have technically a different meaning, for it is so only that you can effectuate the intention." This is applicable to the present case. The judgment, therefore, should be in favour of the plaintiffs.

Judgment for the plaintiffs.

Attorneys for the plaintiffs, *Williams* and *Jones*.

Attorneys for the defendant, *Bell*, *Brodrick*, and *Gray*.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR and H. H. HOCKING, Esqrs., Barristers-at-Law.

May 31 *and June* 1, 1871.

BURIAL BOARD OF ST. MARGARET'S, ROCHESTER *v.* THOMPSON.

Burial Acts (15 *&* 16 *Vict. c.* 85, *ss.* 15, 19, 30, 32, *and* 38; 16 *&* 17 *Vict. c.* 134, *s.* 7)—*Right of sexton of parish to dig graves and toll the bell in cemetery, formed under Burial Acts—Right of burial board to interfere—Right of sexton to appoint a deputy.*

Where a parish has, under 15 *&* 16 *Vict. c.* 85 *or* 16 *&* 17 *Vict. c.* 134, *provided a burial ground and appointed a burial board, the sexton of the parish has a right, under sect.* 32 *of the former Act, to enter such ground at a reasonable time and in a reasonable manner, when the body of a parishioner requires burial, to dig a grave for such parishioner, and to select a proper spot in the cemetery for such grave, unless, in the latter instance, the burial board has itself appointed a*

particular spot for the purpose, and the burial board has no right to appoint servants of its own to dig such grave, or to exclude the sexton when he comes to the burial ground at the above-mentioned time and manner, and for the above-mentioned purpose; nor will trespass lie against the sexton if he enter the cemetery, as aforesaid, contrary to the orders of the burial board. The sexton has also the right, if a chapel with a bell or bells has been provided in the cemetery under 15 & 16 *Vict. c.* 85, *s.* 30, *for the performance of the burial service according to the rites of the Church of England, to toll the bell at the funeral of a parishioner, at the time, and in the manner, at and in which he had the right to toll the bell of the parish church when the parish churchyard was used as a burial ground; and trespass will not lie against him for entering the chapel and tolling the bell as aforesaid, contrary to the orders of the burial board. The sexton has also the right to appoint a fit and proper person to do either of these acts for him; and trespass will not lie against such person if he enter the burial ground or chapel, for the purpose of doing such acts, any more than against the sexton himself.*

Semble (*per Keating, J.*), *it is doubtful whether the board would be justified in throwing upon the rates the expense of providing persons to do the above-mentioned work in lieu of the clerk and sexton.*

THE question in this case arose upon cross-demurrers to pleas and a replication.

The declaration stated that the defendant broke and entered a certain bell tower, and also certain lands of the plaintiffs, situate and being in the parish of St. Margaret, Rochester, and which said lands were called the cemetery, and there made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for divers long spaces of time, and then dug and excavated the earth and soil of the said land, and then made divers holes, excavations, and graves in the same, whereby and by reason of the premises, the plaintiffs were greatly annoyed and disturbed in the quiet and peaceable possession and use of the bell tower and lands, &c.

To this the defendant pleaded, first, excepting as to so much of the declaration as is hereinafter pleaded to in the last plea, not guilty; secondly, a denial that the bell tower and lands mentioned in the declaration were the bell tower or lands of the plaintiffs; thirdly, as to the alleged trespasses on the lands in the declaration mentioned (other than those to which the fourth and last pleas herein are pleaded), that the said lands are situate in the parish of St. Margaret, in the city of Rochester, and within the diocese of the Bishop of Rochester, and before the time of the said alleged trespasses on such lands the said Bishop had in due form of law consecrated such lands for the purpose of interments therein in accordance with the sacred rites and customs of the Church of England, and the said Bishop had appointed in due form of law a certain time (which before the said alleged trespasses to which this plea is pleaded had elapsed), when such consecrated portion of the said lands should be deemed to be and become, and at the time of the said alleged trespasses (in this plea pleaded to) such lands had become, the consecrated burial ground for the said parish for which the same had been *provided. And the* defendant says that the said parish of St. Margaret is an ancient parish, of which one Alfred Kingsford was before and at the time of the said alleged trespasses to which this plea is pleaded the clerk and sexton, and, by reason of the premises, of right at the time of such alleged trespasses was entitled as such clerk and sexton to perform and exercise all the duties and functions of right belonging to the said office of clerk and sexton in respect of the burial of the remains of the parishioners and inhabitants of the said parish in such consecrated burial ground, the same being the burial ground of the said parish as aforesaid, as he had previously performed and exercised the like functions and duties. And the defendant, as the servant and by the command of the said A. Kingsford, as such clerk and sexton as aforesaid, dug and excavated the earth and soil of the said consecrated burial ground, and made holes and excavations and graves therein for the burial therein of the remains of the parishioners and inhabitants of the said parish, and thereby performed and exercised the lawful duties and functions in respect of such burials of the remains of the parishioners and inhabitants of the said parish to be performed and executed in the said consecrated burial ground by the said clerk and sexton of the said parish, and appertaining to the office of the said Alfred Kingsford, as such clerk and sexton as aforesaid of the said parish, and the lawful duties of the defendant, as his servant, and which are the alleged trespasses in the said declaration mentioned, and to which this plea is pleaded; fourthly, and for a further plea the defendant says as to the alleged trespasses in the bell tower in the declaration mentioned, that at the time the said land in the last plea mentioned was, as therein stated, consecrated by the said Bishop of Rochester, in whose diocese the said land is situate and the same thereby became and was the consecrated burial ground of the parish of St. Margaret, for which the same was provided (as in such plea is stated) there was before and at the time of such consecration, and at the time when the same became and was the burial ground of the said parish, upon such land and forming part and parcel thereof, a certain chapel, with a bell tower attached thereto, and which is the bell tower mentioned in the said declaration and at the time of such consecration of the said land so consecrated as the burial ground of the said parish, the said Bishop did then and there, also, at the same time consecrate as part and parcel of such burial ground, the said chapel, with the said bell tower attached thereto, for the performance of the sacred services of the Church of England, and the several duties and functions to be performed therein by the said clerk and sexton of the said parish in and about the performance of the rites and ceremonies to be performed by the said clerk and sexton in the said chapel and bell tower, in respect of the interment of the dead in the said burial ground in accordance with the rights and ceremonies of the Church of England and the said chapel, with the said bell tower thereto belonging, did then become and was at the time of the alleged trespasses to which this plea is pleaded a consecrated part and parcel of the said burial ground to be used therewith, and as part thereof, and the defendant says that the said parish of St. Margaret is an ancient parish of which the said Alfred Kingsford was before and at the time of the

alleged trespasses to which this plea is pleaded the clerk and sexton, and by reason of the premises in this plea stated of right at the time of the trespasses to which this plea is pleaded was entitled as such clerk and sexton to perform and exercise all the duties and functions appertaining to his said office of clerk and sexton of the said parish in the burial of the remains of the parishioners and inhabitants of the said parish in such consecrated burial ground, and the said chapel and bell tower, part of such burial ground as aforesaid, of the said parish in accordance with the rites and ceremonies of the Church of England, and the defendant, as the servant, and by the command of the said Alfred Kingsford, as such clerk and sexton as aforesaid, entered the said bell tower and remained therein for a reasonable time for the purpose of tolling the sacred bell therein, and during such time did then and there toll the said bell in the part performance and exercise of the lawful duties and functions to be performed therein and exercised as of right by the said A. Kingsford, as such clerk and sexton as aforesaid in the lawful and accustomed performance of the sacred rights and ceremonies appertaining to the burial of the of the remains of the parishioners and inhabitants of the said parish in the said consecrated burial ground of the said parish as he had previously performed and exercised the like duties and functions in accordance with the accustomed rights and ceremonies of the Church of England, and which are the alleged trespasses in the said declaration mentioned to which this plea is pleaded; fifthly, that, as to the other alleged trespasses in the declaration mentioned other than those to which the third and fourth pleas are pleaded, to wit, such trespasses as are alleged to have been committed on the unconsecrated portion of the said lands, in the declaration mentioned the defendant brings into court the sum of 1*s.*, and says that that sum is sufficient to cover all the damage thereby sustained.

The plaintiffs took and joined issue upon defendant's first, second, third, and fourth pleas respectively, and as to the defendant's fifth plea the plaintiffs accepted the said sum so brought into court by the defendant, in full satisfaction and discharge of the claim of the plaintiffs in respect of the matter to which that plea was pleaded.

And for a second replication to the defendant's third plea the plaintiffs say that the said lands in which, &c., were consecrated by the said bishop in the said plea mentioned, and after the making and passing and coming into force, and under and by virtue of 20 & 21 Vict. c. 81, and other the statutes in and by the said first-mentioned Act recited and referred to and not otherwise, and that the said lands in which, &c., became and at the time when, &c., were such burial ground as in that plea mentioned under and by virtue of the enactments and provisions in the said statutes contained and not otherwise, and the general management, regulation, and control thereof were then vested in the plaintiffs as such burial board as aforesaid under and by virtue of and in accordance with the said provisions of the said statutes; and the plaintiffs further say that the defendant committed the said trespasses to which that plea is pleaded without the leave, licence, or consent of the plaintiffs to him given or granted, and in defiance of and contrary to their express command, notice, and requirement in that behalf, of all which premises the defendant at the time of the committing of the said trespasses had notice.

And for a second replication to the defendant's fourth plea, the plaintiffs repeat the several allegations, statements, and averments in their said second replication to the defendant's third plea, substituting for the words "third plea" in that replication the words "fourth plea" in this replication, and for the words "land" in that replication, the words "bell tower" in this replication.

The plaintiffs also demurred to the third and fourth pleas.

Joinder in demurrer.

The defendants demurred to the third and fourth replications.

Joinder in demurrer.

Sir *J. Karslake*, Q.C. (*Barrow* with him) for the plaintiff.—The question in this case turns on the construction of certain sections of the Burial Act (15 & 16 Vict. c. 85), which applied only to the metropolis, the provisions of which were extended to places beyond the metropolitan area by 16 & 17 Vict. c. 134. By sect. 38 of the former Act, the general management, regulation and control of the cemetery was vested in the burial board, which, under sect. 15 had power to appoint such officers and servants for the purposes of the burial ground as might be necessary. In the present case the board had provided servants of its own to dig the graves and toll the bell. The 32nd section indeed gives the clerk and sexton the right to perform their duties (when necessary), just as in the old parish churchyard, but these words "when necessary," introduce an important qualification, and it lies on the sexton to justify his acts by showing the necessity. Here there was no necessity for the sexton to interfere, as the board had provided servants to do the work which the sexton claimed a right to do. Moreover, it is to be observed that the 32nd section, though it imposes on the clerk and sexton the obligation to perform certain functions when necessary, does not give them the right to insist on performing these functions. In speaking of the parson, the section says, not only that he shall perform the duties, but also, that he shall have the same rights and authorities as heretofore. In place of these last words, the section, when speaking of the clerk and sexton, only says, "when necessary." Moreover, even if the sexton has the rights asserted for him, he has not the right to perform his functions by deputy, as there is a discretion to be exercised. Again, if he or his deputy has the right, his proper remedy is to assert it in the ecclesiastical courts, not by breaking and entering the cemetery. Then, as to tolling the bell, he cannot have the right, for the burial board lies under no obligation to provide a chapel, much less a bell, and it being optional with the board to provide a bell or not, the sexton can have no right to toll it if the board voluntarily set one up. He referred to Glen's Burial Acts, pp. 67 and 68, and the authorities there cited.

Prideaux, Q. C. (*F. J. Smith* with him) for the defendant.—Sect. 38 vests in the board the management, &c., of the burial ground, subject to the provisions of the Act, subject therefore to the 32nd section. The words "when necessary" have no such meaning as is attributed to them by the plaintiffs, they only mean "when the occasion for performing their functions arises." It was the object of the Act to leave the clerk and sexton in the same position as they respectively occupied

before the Act, only transferring the sphere of their duty from the parish church and churchyard to the cemetery and the chapel built there. It was not intended to deprive the sexton of his emoluments, and his right to them depends on his doing his work: (*Burdeaux* v. *Lancaster*, 1 Salk. 332.) He could not demand the fee, unless he had done the work. If the sexton had the right, the defendant was justified, for every ministerial officer may appoint a deputy.

Walsh v. *Southwood*, 6 Ex. 150; and
R. v. *Kingsclerc*, 2 Lev. 18.

He cited also:

Ashby v. *Harris*, L. Rep. 3 C. P. 523; and
Nichols v. *Davis*, L. Rep. 5 C. P. 80.

Sir *J. Karslake*, Q. C., in reply.

WILLES, J.—It is unnecessary in delivering judgment in this case to refer to the pleadings, because I take it that this is a case in which a parishioner was lying dead and requiring burial, and such being the case it was necessary that somebody should dig a grave and prepare for the burial of the parishioner according to the usages of the Church, and thereupon the sexton appointed a man to prepare a grave and ring the bell, and the person so appointed was absolutely forbidden by the burial board to do these acts on the ground that it thought proper to do the acts itself, and did not intend that the sexton should do them. The defendant being the person sent by the sexton insisted on doing these acts by order of the sexton at a reasonable time and place, and under circumstances under which the sexton had the right to do the particular acts complained of if the burial had being going to take place in the old parish burial ground, in which case the rector of the parish would have had no reason for forbidding the sexton to do the acts in question; so that, in the ordinary course of things, but for the Burial Acts, which have substituted the cemetery for the churchyard, the sexton would unquestionably have been the man to dig the grave and toll the bell. The questions raised therefore are these: first, whether the board has a right to do these acts itself, and forbid the sexton to do them; and, secondly, assuming that question to be answered in the negative, whether the sexton has a right to appoint a deputy to do the work for him. For the purposes of the case, I assume that the sexton does not claim to be entitled to come at an unreasonable time, and I think it is no doubt competent to the board to fix reasonable hours for the sexton to do his work. We are not now dealing with a case analogous to one in which the sexton selects a place for the grave which the rector thinks unreasonable, but I assume that here the place chosen for the grave was one in which a person would ordinarily be buried, and either that the board had pointed it out as the proper place, or else that the board had absolutely refused to point out any place so as to leave it to the sexton to select a reasonable place. Nor do I enter on the supposition that the sexton selected some grossly improper person to do the work; such a thing is unlikely to occur, and if it did the board might interfere to prevent it. I now come to consider what I have spoken of as the first question raised, *viz.*, whether the board has a right to do these acts itself, and forbid the sexton to do them. At the time of the passing of 16 & 17 Vict. c. 134, extending the provisions of 15 & 16 Vict. c. 85 to places beyond the limits of the metropolis, the law appears to have been clear enough. In respect of parishioners lying dead, there was a right in them, or their representatives, or the public, to have the body disposed of; whether in respect of a private right or out of consideration for public decency, or in respect of the usages of religion, the law provided that the dead body should be buried, and, in the case of the deceased having been a Christian, the burial ought to take place in the churchyard, and the ordinary burial service ought to be performed. There were several officers to conduct those proceedings. There was the clergyman, whose duty it was to perform the service. He had also the freehold of the churchyard, and, as the freeholder, might exercise a control over the selection of the place for the grave. He had also the appointment of the sexton and the right to discharge him upon proper grounds. It was the duty of the sexton to dig the grave, and he was not ordinarily interfered with by the rector in doing so, but was allowed to exercise his functions in respect of the performance of which he was entitled to receive fees. Whilst matters stood thus, no difficulty could ordinarily arise. The sexton had thus a clear right, recognised by the rector, to perform the duties in respect of which he received payment. Cases arose from time to time in which the rector interfered with the sexton's performance of his duties; but the sexton had his remedy, and the courts would grant a *mandamus* to compel the rector to allow the sexton to perform his duties. In this state of things 16 & 17 Vict. c. 134 was passed, and the Legislature, in passing that Act, did not intend to deal with the exceptional case of a rector wrongfully interfering with the sexton, but meant only to deal with ordinary cases of rector and sexton. Instead of giving to either compensation in respect of the formation of the cemetery, as was done in the older statutes, the Legislature gave to each the right to perform his duty in the cemetery, and the right to receive his fee in respect of such performance. That is clear from the 32nd section of 15 & 16 Vict. c. 85, made applicable to the present case by sect. 7 of 16 & 17 Vict. c. 134. It first speaks of the incumbent or minister, who is not only entitled to perform the service in the cemetery, but has the duty of doing so imposed upon him. He has to perform the religious service the same as before, and to accompany it by the same ceremonies and usages as in the old parish churchyard. One would expect from that some provision as to the person to dig the grave and do the other ministerial acts requisite to a funeral. We accordingly find that provided for in the next part of the section: "And the clerk and sexton of such parish . . . shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial ground, or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he had previously performed, exercised and received, as if such burial ground were the burial ground of the respective parish of such incumbent or minister, clerk, and sexton respectively." Now, what is the meaning of this provision? I am far from reading the expression "when necessary," introduced in the part of the section relating to the clerk and sexton, as distinguishing him from the incumbent, who, under the earlier part of the section, has the right

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provision applicable to a great many matters
a special provision applicable to one par-
subject matter, the latter must over-ride
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question. There is no express provision to
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is contended that he still has the
toll the bell of the parish church, but
. The question is, whether, reading sect. 30
ction with sect. 32, we ought not to con-
bell put up in a chapel built under the
ection as subject to the same control of the
parochial officer as the bell of the parish
itself. As to the latter bell, no difficulty
s it was laid down in very early times that
shioners were bound to find bells for the
hurch, and many questions have arisen,
the common law and ecclesiastical courts,
use of the bells. It would be a waste of
refer to authorities on this subject; but I
ntion that, as early as 1 Hen. 4 we find a
the Year-books upon the subject, and the
s that, though the rector has a general
over the church, he could not interfere with
s to the disadvantage of the parish. The
stical law, recognised on this point by the
law, is in accordance with the 67th canon,
hows that, "when any is passing out of this
ell shall be tolled, and the minister shall
slack to do his duty. And after the party's
it so fall out, there shall be rung no more
ie short peal, and one other before the
and one after the burial." In 1 Burn's
Law, by Phillimore, 135, there is an *obiter*
of Sir William Wynne, in *Pearce, &c.* v.
of Clapham (3 Hagg. 16), that "a ring of
nnot be provided for without expense, as
s, tuning, &c. Suppose at one time the
ners are willing to take upon themselves
penses and at another time refuse, the
could not compel the parishioners to
ie bells in order, because they are in
eple. *There must be a bell to ring to
and toll at funerals; but that is all.*"
That is high authority to show that the tolling of the bell at a funeral is an ordinary and necessary part of a funeral. That being so in the parish church, what is to be done in a cemetery? The 30th section provides that a chapel is to be built on a plan to be approved of by the bishop. I think it is obvious, reading this section in connection with sect. 32, that, as the incumbent is authorised by the latter section to perform the duties and have the same rights in the cemetery as he had in the old parish church, he has a right to perform the service in the chapel, if a chapel has been built, and it follows that he has a right, and is bound to perform the service according to the rites of the Church, and a chapel erected under sect. 30 was substituted, so far as the performance of the funeral service is concerned, for the old parish church. I am, therefore, unable to draw any distinction between what is necessary for the mere disposing of the body and what is necessary for the proper performance of the prescribed ceremony. Before leaving this part of the case, it is right that I should refer to one argument of Sir J. Karslake's. He said that the right of the sexton was subject to the right of the minister, who might forbid him to toll the bell. The minister might no doubt, under some circumstances (as, for instance, if the church were situate close to the house of a person dangerously ill), forbid the tolling of the bell, though we know the difficulty involved in such a proceeding. The question, however, now arises, whether the burial board is placed in the position of the minister, so as to determine whether canon 62 shall be obeyed or not. I think that, if there is any reservation of power in that respect, it would remain in the minister, and would not be transferred to the burial board. It is said that the minister might forbid the burial, but the Act only purported to deal with matters of ordinary occurrence; and I think that, unless some special circumstance of unreasonableness can be set up by the board, either in respect of the place or time selected or the deputy apppointed, the 32nd section gives the sexton the same right in the cemetery as against the burial board as he had in the churchyard as against the minister, and the sexton would, ordinarily, under the circumstances before us, have the right both to dig the grave and toll the bell. I now come to the only other question raised, viz. whether, assuming the sexton to have the right himself, he was justified in appointing a fit and proper person to do the work for him. It is said that the maxim *delegatus non potest delegare* applies, but I think that, as to matters purely ministerial, such as digging a grave or tolling a bell, a sexton might well appoint a deputy. It is obvious that, in a season of great mortality, it would be impossible for him to do all the work himself, so that to hold that he cannot appoint a deputy, appears highly unreasonable.

KEATING, J.—I am of the same opinion. We must take it on the pleadings that the defendant, as servant of the sexton, went to the cemetery for the purpose of doing the acts complained of under circumstances which, if the old parish churchyard still existed, would have justified and authorised him in digging in the churchyard, because it is stated that he entered at a reasonable time, and in a reasonable place and manner. The question now arises whether the burial board has a right to prevent him from discharging these

functions, on the simple ground that the board is ready to perform them itself. I am clearly of opinion that the board had no such right, and in looking at the purview of the statute, I am surprised that the question could have been raised. The object of the statute was to preserve the old state of things under new circumstances, on the substitution of the consecrated cemetery for the old churchyard, and, looking at the control to be exercised by the bishop and other matters in the Act, I am satisfied that it was intended as much as possible to preserve the old state of things. As to the clerk and sexton, I am at a loss to see how words more distinct could be employed than the words of the 32nd section. It is contended that the words "when necessary" mean when there is no one else to do it. I think, however, that that is a strained interpretation, and that the words simply mean "when the necessity arises," or "when the occasion occurs." The section goes on to say that the clerk and sexton shall "perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish . . . and be entitled to receive the same fees . . . as he had previously performed, exercised, and received." I should be at a loss to suggest words which more completely express the intention of the Legislature as I have stated it. That being so, the argument of the burial board amounts to this: that, the statute having imposed upon the sexton the obligation to dig the graves and given him the right to receive fees upon so doing, nevertheless intended to relieve him of his duties, if the burial board chose to provide servants of its own to do the work. I think that that is a very strange view to take of the intention of the Legislature. For myself, it is only my opinion, I exceedingly doubt how far the board would be justified in throwing upon the rates the expense of providing persons to do work which the Legislature has expressly provided shall be done by the clerk and sexton. It is not necessary to decide this point; but that is my opinion. Under this section there is a clear right and duty in the sexton to perform the functions which he had in the old parish church. That being so, I think these pleas give a good answer to the action. Nor is there any distinction as to tolling the bell. I quite agree with my brother Willes as to the effect of sect. 30. The plan of the chapel to be erected is to be approved by the bishop, who would not consecrate it unless it was a proper building for the purpose for which it was built. The Legislature meant to make provision that the chapel should be on the same footing as the old parish church. As to the sexton having deputed the defendant to do the work for him, I quite agree in thinking he could clearly delegate his authority, the defendant being a fit and proper person to do the work.

M. SMITH, J.—I am of the same opinion. What the burial board is really contending for is, the power to exclude the sexton from the ground and from the performance of his functions there, provided that the board was willing to perform the duties of sexton itself. I think that such an attempt is in violation of the plain intention of the Legislature. The scheme of this legislation, which empowered the burial board to have the ground consecrated as a cemetery, was to substitute the burial-ground for the old churchyard, and to place *the newly-consecrated chapel, as nearly as possible, so far as the performance of religious rites was concerned, in the same position as the old parish church. As to the sexton, he was an officer with important duties to perform; his duty lay in the burial-ground, and it was one in the performance of which the parishioners were interested, and the performance of which gave him a right to receive fees. It is contended on behalf of the burial board, that the sexton had no duties to perform in the cemetery, if the board itself was willing to provide for the performance of the duties which he would have otherwise had to perform. The words "when necessary," which are relied on for this purpose, mean, in my opinion, simply "when the occasion shall arise." Reliance has been placed by the board on the 38th section; but by that clause the management, regulation, and control are vested in the board, only "subject to the provisions of this Act." One of the provisions of the Act preserves to the sexton his old duties and rights. No doubt the board has a general control, and, as already observed by my learned brothers, it was the duty of the sexton to conform to any reasonable rule that might be laid down by the board as to the time at which, and the place where, he was to perform his duties. If the board laid down no rules on these points, but still insisted on excluding the sexton, then the question would arise which arises here, viz., what means the sexton has to enforce his rights. It is said that he has no right to enter without the consent of the board, just as he would not have had the right to enter the churchyard against the order of the rector. It may be that the rector, who is freeholder of the churchyard as well as rector of the parish, might have the power to determine when and where a grave should be dug, and might at certain times exclude the sexton from the churchyard. The rector is limited by the Act to the performance of the religious duties. The sexton is also mentioned in the Act. The parishioners are interested in the performance of his duties. If the board forbade him to bury, it would still be the duty of the sexton to bury, and it would be monstrous if he could not enter for this purpose and were left to take proceedings at law to enforce his right to be admitted, and to do all that was necessary for the purpose of burial. As to the tolling of the bell, I will add nothing to what has fallen from my learned brothers. Tolling the bell was one of the functions of the sexton before the Act, and it is not only proper, but necessary for the burial board to provide a bell for the performance of the Church of England service, and the bell having been provided by the board, I think the sexton has the same right to toll it as he has to dig the grave. Subject to the qualifications pointed out by my brother Willes, I think the sexton has the rights asserted in the pleas, and that those pleas are not answered by the replication, that the defendant did the acts complained of without the consent of the board.

Judgment for the defendant.

Attorney for plaintiffs, *T. Sismey.*

Attorneys for defendants, *Sandys* and *Knott*, for *Hayward*, Rochester.

Nov. 15, *and April* 24.

REGISTRATION APPEALS.

THOMPSON (app.) *v.* WARD (resp.)

ELLIS (app.) *v.* BURCH (resp.)

Parliament—Borough franchise—Dwelling-house—"Part of a house occupied as a separate dwelling and separately rated to the relief of the poor"—Representation of the People Act 1867 (30 & 31 *Vict. c.* 102, *ss.* 3 *and* 61).

In each of these cases, the question was whether what the appellants occupied, was a dwelling house within the meaning of the Representation of the People Act 1867 (30 *&* 31 *Vict. c.* 102), *s.* 3, *as interpreted by sect.* 61.

In the first case, H. occupied one room in a house which consisted of nine rooms, and which, though originally built for one family, was now let out in six several tenements to six tenants. The house had an outer door leading into the street, but this was never closed, and now had no lock or bolt, although there were still two staples through which a bolt used to, and still might, be shot. The landlord did not reside on the premises. The passage, staircase, and conveniences (the latter consisting of a privy and an ash-pit in a yard at the back of the house), were common to all six tenants. H. and each of the other tenants, had the exclusive occupation of his respective room or rooms, all of which opened out on to the passage or staircase above-mentioned. Each tenant had a separate coal house in the yard at the back. The claimant was separately rated to the relief of the poor, his name appearing in the occupiers' column of the rate book, but all the rates were paid by the owner of the house, whose name appeared in the owners' column.

In the other case the facts were the same, except that there was an outer door which was shut by night, but left open all day, but neither tenant had the right to exclude the other from the use of this outer door, the key of which was lost. The claimant in this case had two rooms, each of which opened on to the passage or staircase; the only communication between the two rooms was the staircase.

In each case the revising barrister held that the subject of occupation was not a dwelling house within the meaning of the above Act.

Held (*per Willes and Brett, JJ., dissentientibus Bovill, C. J., and Keating, J.*), *that the decision of the revising barrister was right.*

Semble (*per Bovill, C.J.,*) *that the subjects of occupation were not only "dwelling houses" within the meaning of the 3rd section of the Representation of the People Act* 1867 (30 *&* 31 *Vict. c.* 102), *independently of sect.* 61, *but that they were "houses" within the meaning of sect.* 27 *of the Representation of the People Act* 1832 (2 *Will.* 4, *c.* 45).

THESE two appeals being almost identical as to their facts, were taken and argued together.

THOMPSON *v.* WARD.

This was an appeal from the decision of the revising barrister for the city of Durham.

The name of G. Herbert appeared in the list of claimants, published by the overseers of the township of Elvet.

Nature of the qualification, "house."

2. In support of the claim the following facts were proved:—

The claimant had for above a year, from and up to July 31st last, occupied as a tenant at the rent of 4*l.* 10*s.* a year, one room in a house situate in Chapel-passage, Old Elvet, in the township of Elvet, in the said city.

3. The house consists of nine rooms, and is let out in six several tenements. Of these, three tenants occupy two rooms each, and each of the other three tenants occupy one room.

4. The house was originally built for one family. The passage, and the staircase, and the conveniences, consisting of a privy and ash pit, which are situate in a yard opposite the passage, are common to all the tenants. Each of the tenants has a separate coal house in the yard. There is an outer or street door to the passage, which is never closed, and is without a lock or bolt, although it retains two staples, through which a bolt formerly was and still might be, shot.

5. Each tenant has the exclusive occupation of his or her respective room or rooms, for which they pay the following rents: (here the rents paid were set out, ranging from 5*l.* 10*s.* to 4*l.* 10*s.*)

6. The owner does not reside on the premises. The name of the claimant appears as separately rated in the occupiers' column of the rate book in all rates made between 31st July 1869 and 31st July 1870; but the landlord, whose name appears in the owners' column of the rate book, paid all the rates.

7. The claim was objected to, on the ground that the claimant was not the occupier of the dwelling house within the meaning of 30 & 31 Vict. c. 102, and was consequently not entitled to be registered as an elector.

8. On the other hand, it was contended that the premises occupied by the claimant constituted, under the interpretation clause of the Representation of the People Act 1867, a "dwelling house;" and that by the operation of 32 & 33 Vict. c. 41, ss. 7 and 19, the payment of the rates by the owner should be deemed a payment by the occupier for the purpose of any qualification or franchise, which, as regards rating, depends upon the payment of poor rates, and that the claimant was therefore qualified as an elector.

9. I was of opinion that the premises occupied by the claimant were not a "dwelling house" within the meaning of the Representation of the People Act 1867, and disallowed the claim.

10. If the court shall be of opinion that the premises occupied by the claimant were a "dwelling house" within the said Act, his name is to be inserted in the list of voters.

Littler (*Manisty*, Q. C. with him) for the appellant.

Sir *J. Karslake* (*Pinder* with him) for the respondent.

This was an appeal from the decision of the revising barrister for city of Exeter.

ELLIS *v.* BURCH.

AT a court, &c., Arthur Burch duly objected to the name of the said John Ellis being retained upon the list of persons entitled to vote in the election of members for the said city in respect of his said occupation of a dwelling house in Prospect-place, in the parish of St. Mary Major, within the said city. The facts proved were these: The said John Ellis was, on the 31st July 1870, and had been during the whole of the preceding twelve calendar months, the occupier of two rooms in a seven-roomed house in Prospect-place, of which a Miss Avery was the owner. He occupied these rooms

as tenant to Miss Avery at an annual rent of 6*l.* 10*s.*, and the rooms were separately rated, and he was separately rated in respect of them to all rates which had been made for the relief of the poor during the aforesaid twelve months, and by his agreement with Miss Avery such rates were to be paid by her, and had been duly paid accordingly. All other rates and assessed taxes requisite to be paid in respect of the premises occupied by the said John Ellis were duly paid. The rest of the house — viz., five rooms — was occupied by John Chambers, also as tenant to Miss Avery, at an annual rent of 9*l.* 11*s.* 9*d.*, she paying all rates and taxes, and the part of the house so occupied by him was separately rated to the relief of the poor. Miss Avery did not reside on the premises. The house had a front door, which was generally kept open by day and shut by night, being fastened by an ordinary latch and bolt. The door was fastened, sometimes by Ellis and sometimes by Chambers. Neither had any right to exclude the other from the use of the front door. There was a lock, but the key had for some time been lost. Inside the front door was a passage, on the left side of which was a room occupied by John Ellis, and used by him as a sitting room and for cooking his victuals. On the right side of the passage was a sitting room, occupied by John Chambers, behind which was a kitchen, also occupied by John Chambers, and access to which was gained by a door at the back of the sitting room. At the end of the passage was a staircase, used in common by Ellis and Chambers, leading to the first floor. At the top of the staircase was a landing, on one side of which was a room occupied by J. Ellis, and used by him as his bedroom, and situate immediately over his other room on the ground floor. On the other side of the landing was another room, occupied by John Chambers, and used by him as a bedroom. From this landing there was another flight of stairs, leading to the second story, on which were two rooms in the sole occupation of Chambers. Neither Ellis nor Chambers could get from their rooms on the ground floor to their bedrooms on the first floor without going out into the passage and up the staircase above referred to. There was no privy or water closet in the house, but there was a water-closet at the end of the row of houses, common to the house in question, and three other houses. The question for my decision was whether the two rooms thus occupied by John Ellis did or did not constitute a dwelling house within the meaning of the Representation of the People Act 1867. I held that they did not, and therefore expunged the name of the said J. Ellis; except on this question or ground the appellant was found to be qualified to be registered. If the court shall be of opinion that I was wrong, the name of the said John Ellis is to be inserted in the list.

Kingdon, Q. C., for the appellant.

Lopes, Q. C., for the respondents.

The arguments sufficiently appear in the judgments.

The following cases were cited and considered:

Cook v. *Humber*, 5 L. T. Rep. N. S. 838; 11 C. B, N. S. 33;
Wilson v. *Roberts*, 5 L. T. Rep. N. S. 838; 11 C. B. N. S. 50;
Henrette v. *Booth*, 9 L. T. Rep. N. S. 393; 15 C. B. N. S. 500; 33 L. J. 61, C. P.;
Cuthbertson v. *Butterworth*, 21 L. T. Rep. N. S. 140; *L. Rep. 4 C. P.* 523;
Monk v. *Dykes*, 4 M. & W. 569;
Lee v. *Gansel* 1 Cowp. 1;
Reg. v. *Mayor of Eye*, 9 A. & E. 670, 680;
Cross v. *Alsop*, 23 L. T. Rep. N. S. 589;
Toms v. *Luckett*, 5 C. B. 23;
Fludyer v. *Lambe*, Cas. temp. Hard. 307;
Brewer v. *McGowen*, 21 L. T. Rep. N. S. 462; H. & C. 275; L. Rep. 5 C. P. 239;
Smith v. *Lancaster*, 21 L. T. Rep. N. S. 492; L. Rep. 5 C. P. 246; 39 L. J. 33, C. P.;
Stamper v. *Overseers of Sunderland*, 18 L. T. Rep. N. S. 682; L. Rep. 3 C. P. 388;
Score v. *Huggett*, 5 M. & G. 96;
Dewhurst v. *Fielden*. 1 Lutw. 274; 7 M. & G. 182;
Powell v. *Price*, 4 C. B. 104; 1 Lutw. 586;
Cirencester case, 2 Fraser 452;
Judson v. *Luckett*, 2 C. B. 197; 1 Lutw. 490.

Cur. adv. vult.

April 24.—The judges being equally divided in opinion, the following judgments were given:—

BRETT, J.—In the case of *Thompson* v. *Ward*, George Herbert appeared on the list of claimants for the city of Durham as claiming in respect of "a house." The case found that the claimant had for above a year occupied as tenant at 4*l.* 10*s.* per annum, not a house, but one room in a house. The house, it was stated, consists of nine rooms, and is let out in six several tenements. Of these, three tenants occupy two rooms each, and each of the other three tenants occupies one room each. The house was originally built for one family, the passage and the staircase and the conveniences, consisting of a privy and ashpit, which latter are situated in a yard opposite, are common to all the tenants. Each of the tenants has a separate coal house in the yard; there is an outer or street door to the passage—*i.e.*, as I understand, to the passage of the house, which is never closed, and is without lock or bolt although it retains two staples through which a bolt formerly was, and still might be, shot. Each tenant has the exclusive occupation of his or her room or rooms. The owner does not reside on the premises. The claim was objected to on the ground that the claimant was not an occupier of a dwelling house within the meaning of the statute 30 & 31 Vict. c. 102. The revising barrister was of opinion that the premises occupied by the claimant (he does not, it is to be observed, speak of the room only) were not a "dwelling house" within the meaning of the Act, and disallowed the claim. The question for the opinion of the court was left in these terms: "If the court shall be of opinion that the premises occupied by the claimant were a 'dwelling house' within the meaning of the Act, his name is to be inserted in the list of voters." It was argued on behalf of the appellant that the claimant, according to the case of *Henrette* v. *Booth* (*sup.*), would have been entitled to be registered under the old Act if the premises occupied by him had been of sufficient value, and was therefore entitled under the new Act; or, if he would not have been entitled under the old Act, that the new Act was intended to alter the old Act as interpreted in *Cook* v. *Humber* (*sup.*); that within the meaning of the new Act, every occupier must be either an occupying tenant or a lodger; that the claimant was not a lodger because the landlord did not occupy any part of the house, and was therefore an occupying and resident tenant; that the claimant's case comes within the very words of sect. 61 of the new Act, because his room, which is the tenement occupied by him is part of a house; he alone occupies the room, he therefore occupies it separately, it is therefore occupied as a separate dwelling. It was argued

respondent that the premises occupied by imant, even if of sufficient value, would not iven a qualification under the old Act: that w Act does not, as to the point in dispute, he old Act; that the claimant may be con- l as a lodger, although the landlord does not any part of the premises, or because the d in this case does occupy the passage and se; that the question is not whether the nt is a lodger, but whether he occupies a ig house within the meaning of sects. 3 and he statute; that it is not sufficient to show e claimant occupies separately, for a lodger es separately in the sense in which the was used in argument: that the tenement ed by the claimant was "part of a house," but ccupied as a separate dwelling," because in to use or enjoy as a dwelling, that part of use which is said to be his separate dwelling, essarily used another part of the house in m with other persons. I am of opinion that se of *Henrette* v. *Booth*, in which the cir- nces were very peculiar, and which I ven- think trenched somewhat too closely on much considered case of *Cook* v. *Humber*, ot oblige us to hold that the tenement occu- y the claimant was a "house" within the ig of the old Act. It seems to me to be y inconsistent with the findings in this case that the tenement occupied by the claimant use within the meaning of the old Act. It re seems to me that the case, as stated and , raises the question, What is the true legal etation of sects. 3 and 61 of the Representa- the People Act 1867? Now, in the first in order to arrive at what is the exact point lecided, I think it better to point out what , in my opinion, be taken into consideration. the old Act two separate buildings could joined together to make up the value ed (*Dewhurst* v. *Fielden*, *sup.*; *Powell* v. *sup.*); such separate buildings as the con- ces described in this case could not have oined to the tenement, *i.e.*, the room, or om, passage, and staircase, to make up alue, although the fact of the use of om, being more valuable by reason of the to use the conveniences might have been into account as adding to the value of m, &c. But the thing to be considered as bject matter of the occupation would have ccording to the decisions, the room alone, or om, passage, and staircase under the same so, as it seems to me, a joint occupation of eparated and external buildings as the con- ces in this case, can have no effect upon estion whether the tenement, *i.e.*, the room, ccupied by the claimant is so separately ed by the claimant as to be a dwelling house within the meaning of the 61st section. lly, it does not seem to me to be necessary ermine whether the claimant is or is not a . It may be that a claimant occupying a nt does not occupy such a tenement as s him to be placed on the register as an tant householder, though he may not be a . Thirdly, it does not seem to me neces- consider the cases of tenements which have tructurally separated from the house of they were once a part, or of tenements as originally constructed, never were part ouse. Such tenements were held to be houses within the meaning of the old Act, and are doubtless also houses within the meaning of the third section of the present Act without reference to the interpretation clause. The cases of chambers in the Inns of Court, and probably of the flats in Victoria-street (though with regard to these latter, which have been so often quoted, as if the circumstances relating to them had been the subject of judicial decision I should prefer to reserve an opinion until the facts are ascertained) are, I apprehend, within the latter proposition, that is to say, they are tenements which as originally constructed were not parts of a house. The question as put forward in the present case is in respect of a room which is stated in the case to be a room in a house, which house was originally constructed as one house, which house is still structurally the same house as it always was, and from which the room in question has never been more structurally separated than it was in the beginning. The question, therefore, and the only question is, whether that room is a dwelling house within the new statute. Now the 27th section of the Reform Act 1832 was, after many apparently fluctuating decisions, though they have been explained to be really consistent, finally interpreted in the ruling case of *Cook* v. *Humber*. And in that case it was pointed out that under that section the qualification is made up of four elements, viz., tenement, value, occupation, and estate. There must be for tenement, it is said, a house, warehouse, &c.; there must be for value annually to 10*l.*; there must be occupation, that is, actual exercise of the rights of the owner of a house in possession during the requisite time; there must be an estate in the tenant either in fee or lease. If these four distinct elements are combined in the claimant he is qualified, but otherwise he is not. Now, although it is said they must exist in combination in order to qualify, still in inquiring into the existence of the combination, each element must be separately ascertained. First, is the claimant a tenant? secondly, is he an occupier? thirdly, is the tenement sufficient in value? fourthly, in kind? The 3rd section of the Representation of the People Act 1867 so closely follows the form and structure of the 27th section of the Reform Act 1832, and deals so entirely with a similar subject, that it seems to me impossible to deny that the qualification under it is compounded of elements which must be combined in the claimant in order to qualify him, and that in considering whether he is or is not qualified by such combination each element must be separately ascertained. The elements, then, of qualification under the 3rd section are estate, occupation, and tenement. The element of value is discarded. There must be an estate in the tenant, that is to say, a holding as owner or tenant. There must be occupation. And as to this element it seems to be useful to observe carefully how it is dealt with in the statute. It seems to me that it is completely dealt with in the third section. According to that section, without referring to the interpretation section, there must be an actual exercise of the right of inhabitancy in, and of ownership of, the house for the requisite time, and such actual exercise of rights must, by the proviso, be the separate exercise of it, and must not be a joint exercise of it with another. The question of joint or separate occupation is completely disposed of in the section whilst dealing with the element of occupation. The remaining

element, the nature of which must be separately ascertained, is the tenement or thing occupied. That is described in the section as a "dwelling house." If there had been no other description of it in the statute, I apprehend the court, in accordance with *Cook* v. *Humber* (*supra*), must have held that it must be as much structurally a separate house as the house described in the 27th section of the former Act. I say so because the two statutes deal with a similar subject-matter, and there is an express enactment that they are to be read togegether as one. But then comes the 61st section, which enacts that "the following terms shall in this Act have the meanings hereinafter assigned to them, &c., that is to say, dwelling house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Before attempting to interpret this clause, some things should be observed in it. It may be said to be applicable, not only to the 3rd section, but to several others. I incline, however, to think that whatever may be its interpretation, it can only be applied to the 3rd section. But, as applied to the 3rd section, I think it most material to observe that it is a definition of the tenement—that is, the thing to be occupied—of that element, and not of the element which is called occupation, that is the mode or manner of occupying the thing occupied. Subject to these observations, there arises the real and to me most difficult question what is the proper interpretation of this clause. I must repeat that to me this clause which, assuming to deal with the question of what the tenement occupied is to be, and to define only that element of qualification, is a most difficult and obscure enactment. It has been suggested that it means that the thing occupied may be part of a house, provided the occupier be not a joint occupier with some one else. If so, the words "occupied as a separate dwelling" are futile, because by reason of the proviso in the 3rd section, the same result exactly would have been arrived at if the only words in the 61st section had been "dwelling-house shall include any part of a house." This alone, as it seems to me, makes it contrary to a well-known and firmly-established canon of construction, to give to the section the suggested interpretation. But further, if that interpretation were adopted, it seems to me that the 3rd section read in that sense and applied as is suggested in this case, would describe exactly the position of a lodger. He may in that sense, equally with the present claimant, be said to occupy as tenant separately, that is to say, not jointly with another, a part of a house. That being so, a lodger might be registered under sect. 3, without reference to the element of value required by sect. 4. Such a reading seems to me to make the 3rd section inconsistent with the existence of the 4th. From these considerations I arrive at the conclusion that the suggested interpretation ought not to be accepted. Another interpretation which was suggested on behalf of the respondents was, that the part of a house described in the 61st section must be structurally separated from the rest of the house. This interpretation is open to the objection that it gives no real effect to this 61st section, because the same interpretation would without it, by reason of *Cook* v. *Humber* (*sup.*), have been placed upon the 3rd section itself. This objection is, I think, a valid one, and the clause cannot be so interpreted. The 61st section does, in my opinion, get rid of the necessity of a structural separation. It follows that the correct interpretation is between these two extremes. Considering always that this 61st section is dealing with the thing occupied, and not with the mode of occupying it, I think that the word "occupied" in this section has its popular meaning of "used," and is not dealing with the technical and legal idea of "occupation." The clause should be read thus: "Dwelling house shall include any part of a house used as a separate dwelling." The interpretation to which I feel forced to arrive at is that, although there need not be a structural separation, there must be a practical separation of the thing occupied from the rest of the house. The true construction seems to me to be that the part of the house occupied by the inhabitant of it, who claims to be registered, should be so situated in the house of which it is a part, and should be in such a condition as to be capable of being used, and should be in fact used as a house wholly separated from other houses and used as such by its inhabitants. If, in order to use, or in the using of the part of the house in respect of which he claims, the claimant has stipulated for, or has accepted the right of using, or does in fact use some other part of the house, as a part of a house, then besides using exclusively or separately the part of a house to which he confines his claim, he uses another part jointly with others. And the part of the house for which he claims is not the part of the house which he really uses. It is only a part of that part. The part which he really uses is composed of the part to which he improperly confines his claim, and the part jointly used by him and others. The part of the house which he really uses, is a part not used as a separate dwelling, because a part of it is used by him jointly with others. Under such circumstances, the case, in my opinion, is not within either the 3rd or the 61st section. I have said, "improperly confines his claim," because I feel certain that if the construction of the statute at which I have arrived be correct, a claimant cannot properly be allowed to evade the consequence of that interpretation by claiming in respect of a part only of that which he really uses. If a claimant could reject all the uses he makes of a house, except the use of the one room he is allowed or has a right to occupy exclusively, and could claim in respect of the exclusive use of that room, every inmate of a house, except a servant, must be taken to be the inhabitant occupier of a house within a house, though the owner of the whole house is resident in and has control over all the house but the one room. If a claimant can do this, the description of the qualification in the 3rd section becomes an idle and inapplicable phrase. The present claimant, in my opinion, fails, because the part of the house which he really uses is composed of the room to which he has improperly confined his claim, and the passage and staircase which he uses in common with the other occupiers, and which passage and staircase are by the express findings in this case not parts of a street or way, but parts of the house of which the room is a part. I think it not unworthy of notice that the interpretation of the statute thus arrived at makes the definition of a house and of a householder under the statute consistent with the definition at common law of a house and a householder, enumerated for the purpose of the franchise by the committee in the *Cirencester Case* (*sup.*):—"Neither can a person be deemed to be a house-

holder whose habitation is composed of more apartments than one, unless he also possesses an exclusive right to the use of the staircase, doorway, or other passage that forms the means of communication between the several apartments. The original right to an exclusive use is the point of discrimination between the householder on the one hand and the inmate on the other." I am of opinion that the decision of the revising barrister was right, and ought to be affirmed.

KEATING, J.—In these cases the appellants claimed to vote under the provisions of the 3rd section of the Representation of the People Act 1867, as inhabitant occupiers of "dwelling houses" within the meaning of that Act. The facts were that they resided in parts of houses, the one in two rooms, the other in one room. In each case the residence was exclusive as to the rooms, though not as to the use of the passages or all the out-door conveniences, and there was complete control over the use of the outer door or entrance to the houses. In neither case did the owner reside upon the premises, and in each case there was a separate rating of the claimant in respect of the part of the house occupied by him. The only question in each case was whether the rooms so occupied were "dwelling houses" within the meaning of the Act referred to. Before the passing of the Representation of the People Act of 1867 the borough franchise in respect of the occupation of houses was regulated by the Reform Act of 1832, 2 Will. 4, c. 45, s. 27, which confined it to the occupation of "any house" of the value of 10*l*. Residence in the house was not necessary; it was sufficient if the residence were within seven miles of the borough in which the house was situated. Under this statute questions frequently arose as to what constituted "a house" within the meaning of the section, and it was decided early that the subject of the qualification need not be a house in the popular acceptation of the term, but that rooms in a house, if, as it was termed, "structurally severed" from the rest, might constitute "a house" so as to satisfy the statute. But the difficulty remained as to what amounted to such a "structural severance" as would be sufficient. In *Cook* v. *Humber* an attempt was made by this court to lay down certain rules, by which it was hoped the difficulty might be overcome; but I think that the subsequent case of *Henrette* v. *Booth* renders it at least doubtful how far that hope was realised. The truth seems to be that the question of "structural severance" was and continued to be one of very difficult solution, depending upon the circumstances of each case—the cases oftentimes running very closely together, of which the cases referred to furnish a complete illustration. In this state of things, which must be assumed to have been within the knowledge of the Legislature, they were pleased to create a new franchise, and to enact that an inhabitant occupier as owner or tenant of any "dwelling house," without reference to value, might vote, and, as if to get rid of the difficulty of what should amount to "structural severance," the Act provided that "any part of a house occupied as a separate dwelling and separately rated to the relief of the poor," should constitute a "dwelling house" within the meaning of the Act. Now it appears to me that the claimants here satisfy in terms the requirements of the Act. Each occupies a part of a house as a separate dwelling, and is separately rated in respect of such occupation. But it was argued on behalf of the respondents that the claimant could not be said to occupy the rooms "as a separate dwelling," unless the dwelling constituted "a house" within the meaning of the former Act 2 Will. 4, c. 45, s. 27, in other words, that the later Act made no change whatever in the nature of the subject matter of occupation for the purposes of the franchise, but only in its value, and that when the Legislature said in the one Act "a house," and in the other "any part of a house," they in effect meant one and the same thing. Now whether there was in the present case such a "structural severance" as would constitute "a house" under the former Act, I do not inquire, because I am quite unable to accept the interpretation contended for. Indeed, the only foundation for that I am aware of is the occurrence in the 61st section of the words, "occupied as a separate dwelling," the word "house" being there dropped; but inasmuch as the clear intention was that a joint occupation was not to confer the franchise, unless of sufficient value to qualify under the 27th section of the former Act, there seems to me to be nothing more unnatural in expressing that purpose in the 61st section, although it had been previously provided for in the 3rd section, than in repeating the necessity for separate rating, which had already been expressed in the same previous section. As to the exclusive use being confined to the rooms, and not extending to the passages and other means of access as well as the conveniences, the franchise even under the former Act did not exact that as a qualification, as witness the occupation of chambers, flats, and other cases of a like description; whilst, if the intention of the Legislature really was in conferring the new franchise, not in any way to alter or affect the nature of the subject of occupation, it is inconceivable to my mind why they should not have expressed themselves differently. It was also contended, as the Legislature by the 4th section of the later Act, requires that to entitle a lodger to vote, his lodgings must be of the annual letting value of 10*l*., that to give the franchise to the present claimants would in effect defeat the object of the 4th section by enabling a lodger to vote out of a lodging of less value than 10*l*. But that argument seems to me to beg the question, and to assume the claimants to be lodgers within the meaning of the Act. Now what in point of law constitutes a lodger may not always be easy to ascertain; whether the landlord residing on the premises be a test or not, or what other test may be applied, it is not, as it seems to me, necessary to determine; if at all events, a man is not a lodger who has the exclusive occupation of rooms or a room in a house, where the owner neither resides nor exercises any control whatever over the outer door, and who is separately rated for the subject of his occupation; and in my opinion, whatever the correct definition of a lodger may be, the claimants in the present cases are not in the position of lodgers as contemplated by the 4th section of the Act of Parliament. Upon the whole, therefore, I think the appellants are entitled to the judgment of the court, and that the decision of the revising barrister ought to be reversed.

WILLES, J.—I regret much the difference of opinion which exists in this case, more especially as, agreeing, as I do, with the opinion expressed by my Brother Brett, the result will be that, the

court being equally divided, the decision of the revising barrister must stand against the opinion of two of the judges. We are not entertaining an appeal from that decision upon a question of fact, but upon a question of law—viz., whether a man who occupies two rooms, one downstairs and one upstairs, in a dwelling house occupied by others who have an equal use of the staircase and outer door of the house as himself, such rooms being separately rated to the relief of the poor, is a person who occupies a separate dwelling house, or whether he is a mere lodger who jointly occupies with others. We have no right to assume any material fact beyond those which the revising barrister has found, because by sect. 42 of the Registration Act (6 Vict. c. 18) he is to state in writing "the facts which, according to his judgment, shall have been established by the evidence in the case, and which shall be material to the matter in question." It was for him to decide whether in point of fact the house described in each of these cases is so divided, whether vertically or horizontally, as that the room occupied by the claimant in the city of Durham, in the one case, or the two rooms occupied by the claimant, in the city of Exeter, in the other case, may constitute a separate dwelling house. In each case he has found that the room or rooms so occupied are not separate dwelling houses. The claimant has no outer door of his own. In each case it is found that there is an outer or street door, though in one case negligently kept, and that the rooms are rooms in an ordinary house occupied by persons who to my mind, and according to the decision of this court in *Cook* v. *Humber*, are persons who, for want of control over a separate outer door, are to be dealt with as lodgers, and not as occupiers of separate dwelling houses. We are called upon to find that the room or rooms as described constitute separate dwelling houses, which, according to the ordinary interpretation of the English language, is to find the thing that is not; we are called upon to find that to be a dwelling house which the revising barrister has found not to be a dwelling house. If the matter came before me as one of fact, it is possible, though not likely, that I might arrive at a different conclusion; but, to arrive at such a conclusion as matter of law only would be expanding the facts by a construction of law which at least is doubtful; and I decline to do so. Ordinarily, at common law, and according to the common understanding of mankind, rooms in a house, the occupier of which rooms has no control over a separate outer door, do not constitute "a house." They are not "houses" within the Reform Act, neither are they "dwelling houses" within the Representation of the People Act 1867. The Act which indicates what ought to be the conclusion come to in this case is the Reform Act (2 Will. 4, c. 45). It is a mistake to suppose that the Representation of the People Act 1867 repeals, or was intended to be a substitution for, the Reform Act, except in so far as it extends the franchise, by enabling a person who in respect of the occupation of a dwelling house, would be entitled to a vote under the Reform Act, provided the subject of occupation was of the annual value of 10*l.*, to acquire a vote, even though it be not of that value, subject to certain conditions. The 27th section of the Reform Act gives the right of voting to one who occupies, as owner or tenant, "any house, warehouse, counting-house, shop, or other building," which, of course, includes a dwelling house, though not necessarily so confined. That is the main provision in the Act of Will. 4. Then comes the provision as to joint occupation, which I agree with my Brother Keating, is of the highest importance, when looking at the Representation of the People Act 1867. That is sect. 29, which enacted that, where premises shall be jointly occupied by more persons than one, as owners or tenants, each of such joint occupiers shall, subject to certain conditions, be entitled to vote in respect of the premises so jointly occupied, in case the clear yearly value of such premises shall be of an amount which, when divided by the number of such occupiers, shall give a sum of not less than 10*l.* for each and every such occupier. We have, therefore, under that Act, a general provision, including a special provision as to voting in respect of a house of the yearly value of 10*l.* There is another matter which it is important to look at when we come to construe the Act of 1867. It is that, though, upon the true construction of sect. 27 of the Reform Act, part of a building might constitute a house, if structurally separated from the rest, this court has held that no lodger, whether the landlord himself occupied any part of the premises or not, or whether the lodger had a key of the outer door or not, could acquire the franchise under the Reform Act. We start, therefore, with this, that joint occupiers, but not lodgers, had a right to vote under that Act. I cannot take the view adopted by my brother Keating, and, I believe, by my Lord also, as to lodgers. I cannot help thinking that the position of a lodger has been well defined. It was so in the masterly judgment of Chief Justice Erle, in *Cook* v. *Humber* (*sup.*), every word of which is applicable here. I entirely adopt it, and I think the subsequent case of *Henrette* v. *Booth* (*sup*), is not at all inconsistent with it. I conceive it to be a judgment as conclusive as anything can be which is not demonstrated by mathematical reasoning. In *Cook* v. *Humber* (*sup.*), the appellant occupied rooms in a house which are thus described: "The rooms on the ground floor have doors into the house passage or hall, which is shut off from the street by an outer door, kept closed during night and day. The rooms on the upper floor rented by him are approached by a staircase, used exclusively by him, and there is no communication between such rooms and the rooms on the other side of the passage. The rest of the house is occupied by the landlord, who resides therein with his family. The appellant has a lock and key to each of his rooms, and both he and his landlord have keys of the street door, and they are rated jointly." The question was whether the person who occupied that large portion of a house was a tenant within the meaning of the Reform Act. It was held that he was not, because there was no structural severance of the part so occupied by him from the rest of the house. All the previous decisions were there cited. The Chief Justice says, at p. 44 of 11 C. B., N. S., "We consider that the qualification fails, because the subject of occupation was not a house, but only a part of a house, without any actual severance from the residue." He then goes on to define the elements of a qualification for a borough vote: and at p. 45 of 11 C. B., N. S., he says, "As to the kind of tenement which qualifies, the statute has described two classes of buildings, viz., those used for residential, and those used for commercial purposes—house, for residence; warehouse, counting-house, shop, or

other analogous building, for commerce. When the claim is in respect of a house, we consider that the Legislature did not intend to create a part of a house used for residence, and not for commerce, a tenement sufficient to qualify. A part of a house cannot truly be said to be a house, unless the word 'house' is used in two senses. In *Judson* v. *Luckett* (*sup.*) a part of a house in one sense was in another sense a whole house, by reason of actual severance." Then, after disposing of the argument that the appellant might have been considered to be in the occupation of "another building," and observing that it had always been held that a lodger was not qualified as a householder, he refers to *Fludyer* v. *Lambe* (*sup.*), where the objection to the plaintiff's vote was, that he had let part of his house in lodgings, and so was not the sole occupier; but Lord Hardwicke ruled to the contrary, and said, "A lodger was never considered by anyone as the occupier of a house; it is not the common understanding of the word; neither the house nor any part of it can be properly said to be in the tenure and occupation of the lodger." I might here add a reference to *Brewer* v. *M'Gowen* (*sup.*) in which the same doctrine was laid down in this court since the passing of the Representation of the People Act; and with reference to its construction his Lordship then goes on (11 C. B., N. S., 46): "Since the Reform Act the same opinion is conveyed in the decisions holding that occupation as a lodger did not qualify. The common meaning of "lodgings" is a part of a house used for residence. If the Legislature had intended to make lodgers qualified, we think it would not have been left to obscure conjecture from the words "other building." Every word of that is worth considering, because the Chief Justice is there speaking of a part of a house occupied as a separate dwelling, which is the language used in the 61st section of the Act of 1867; and I entirely agree that it should not be left to obscure conjecture who is to vote in the election of members of Parliament. His Lordship then refers to *Wright* v. *Stockport* (5 M. & G. 33; 1 Lutw. 32), where the occupation of a separate room in a cotton spinning factory was held to qualify, because each separate room was, by reason of actual severance, and the fact of its having a separate outer door, an entire building in one sense, though part of the entire building (the factory) in another sense, and adds: "Assuming this to be the correct construction of the statute, the question here is brought to the point whether the rooms occupied by the appellant are a 'house.' We think that they were correctly decided by the revising barrister not to be a house within the meaning of the statute, because they formed part of a house when they were let, and there was no actual severance of the appellants' part from the other part." Considering the great care which was taken in framing the Act of 1867, I cannot help thinking that that passage was in the minds of its framers when they introduced into sect. 61 the interpretation of "dwelling house;" and though I agree in the main with the judgment of my Brother Brett, I do not see my way to the conclusion that there need not be actual structural severance, but that any practical division will suffice. I do not see how it was possible to select words which, having regard to the former Act, and to the construction which had been put upon it, could be a clearer indication of an intention to go no further as to "dwelling-house" than the Legislature had previously gone as to "house." The Chief Justice goes on (11 C. B., N. S., 47): "No authority earlier than *Score* v. *Huggett* (*sup.*) and *Jones* v. *Luckett* (*sup.*) was cited to show that a part of a house may become a 'house' without any actual severance, by reason of some conventional arrangement in respect of the keys of the outer door, or the pernoctation of the landlord; and the authorities are uniform to show that, by actual severance, a part of a house became changed into a house, and without that severance the change would not be effected." The whole reasoning of that judgment completely dispels all doubt, and shows that the character of the subject of occupation cannot be changed by reason of the circumstance of the landlord residing or not residing upon the premises, or by the fact of the occupier of the rooms having or not having a key of the outer door. He then refers to *Monks* v. *Dykes* (*sup.*), where Parke, B., speaking of the doctrine of Lord Coke, that a chamber may be *domus mansionalis* in law (3 Inst. 65, 66), says that "it refers to a house divided into several chambers, with separate outer doors, and that neither in law nor in common sense can a man be said to be in possession of a dwelling house where he is a mere lodger." And referring to the rule as to burglary, which he says has no analogy with qualification, the Chief Justice concludes (11 C. B., N.S., 48): "The general rule is, that a part of a house, in the common understanding of the word, does not become a house in law, unless there be actual severance. In Leach's Crown Cases, 90, in the notes to *Roger's* case, Lord Holt's opinion is reported thus: "If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally, yet, if they enter into the house at one outer door with the owner, those rooms cannot be said to be the dwelling-houses of the inmates; but the indictment ought to be, for breaking the house of the owner." If the owner does not reside on the premises, the crime of feloniously breaking into the sleeping abode of a lodger in the night is precisely the same as it would be if the landlord slept there; and, in that case, it is held that the abode of the lodger may be called his *domus mansionalis*. This exceptional rule, depending on the reasons above assigned, is no ground whatever for holding lodgings to be a 'house' within the meaning of a statute requiring the claimant of a vote to be the occupier of a house; and yet these exceptional cases were pressed on the court in *Toms* v. *Luckett* (*sup.*) as authorities for holding that lodgings became a 'house,' if the owner did not sleep on the premises." That case of *Cook* v. *Humber* (*sup.*) appears to me to dispose of all the arguments arising out of the landlord not residing or sleeping on the premises, and of the tenants having or not having control over the outer door of the house, and show that, under the Reform Act, and upon the finding of the revising barrister in this case, the rooms in question did not constitute a "house" within the meaning of that Act. It appears to me to have laid down a clear and intelligible rule. It is said, however, that doubts have been thrown upon that decision by the subsequent case of *Henrette* v. *Booth* (*sup.*) But the court in that case professed to adhere to their former decision; and the principle which that case adheres to shows that these rooms do not constitute a house within the Reform Act.

The claimant there occupied the upper floor of a house, consisting of two rooms communicating with each other, one being used as a tailor's shop, and the other as a sitting and bed room, and communicating with the landing on the staircase by one outer door, over which the tenant had exclusive control. In neither of the cases now before us is there any such finding; the claimants had no outer door other than that which was common to all the inmates. In *Henrette* v. *Booth* (*sup.*) it was a question of fact for the revising barrister whether, looking at the nature and character of the premises, the door upon the landing was really an outer door. He came to the conclusion, that in point of fact it was so. The judgment of Erle, C.J. lays down precisely the same principle which he had laid down in *Cook* v. *Humber* (*sup.*), but he comes to the conclusion that, as the claimant had exclusive occupation of his rooms, and exclusive control over the outer door thereof, he was entitled to be registered. My brother Keating says (15 C. B., N. S. 511): "Looking at the facts found by the revising barrister, I have come to the conclusion, though not without difficulty, that the appellant was the occupier of a "house" within the meaning of the 27th section of the Reform Act. The only door which the revising barrister speaks of as an outer door is the door leading from the rooms in the appellant's occupation, and over which he had exclusive control. Practically, there was no other outer door. There is, it is true, at the bottom of the staircase, a thing which is in some sense a door, but which wants all the essential elements of an outer door, 'having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street.' It is as though the outer door were taken off its hinges and left lying at the side of the door posts. I think the revising barrister very properly abstained from calling that the outer door." If the revising barrister there had found the door at the bottom of the staircase to be the outer door of the premises, though neglected and out of repair, the learned judge would evidently have come to the opposite conclusion; and that opposite conclusion I feel bound to adopt in this case. Thus, under the Reform Act, the occupier of a house of the annual value of 10*l.* was entitled to vote. Joint occupiers also, provided the annual value of the house was enough to give each the annual value of 10*l.*, were entitled to vote. Lodgers had no vote. And part of a house might be a "house" within that Act, provided it was structurally severed from the rest of the building of which it formed part. Then came the Representation of the People Act 1867 (30 & 31 Vict. c. 102). That Act did not repeal the former Act, but is to be construed with it. It enlarges the franchise in respect of dwelling houses, but is not therefore to be so construed as to enlarge the species (dwelling house) to such an extent that it could not fall within the original genus (house), without express words to convey such an intention. Sect. 3 deals with two of the points I have referred to. It gives, by sub-sect. 2, the franchise to the occupier whether as owner or tenant, of any dwelling house within the borough irrespective of value; and requires by sub-sect. 3 that he shall have been rated to the relief of the poor in respect of the premises so occupied by him. Then, sub.-sect. 4 contains a proviso that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling house. A lodger does not fall within that section. This is obvious, not only from *Cook* v. *Humber* (*sup.*) but also from sect. 4, sub-sect. 2 of which gives the franchise to one who, "as a lodger has occupied in the same borough, separately and as sole tenant, for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling house, and of a clear yearly value, if let unfurnished, of 10*l.* or upwards." The next section to which reference may be made for the purpose of determining whether "lodger" under this and the former Act is to be differently construed, is sect. 7, sub-sect. 2 of which enacts that, "where the dwelling house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling house or tenement shall be rated in respect thereof to the poor rate." I do not observe upon the *Sunderland case* (*sup.*), though I collect from his judgment that one of the judges had this point in his mind, and that his opinion was the same as that which I entertain. The 7th section has no immediate bearing upon the decision in the case, but it may be usefully referred to for the purpose of showing what was the meaning of the Legislature. It dealt with a lodger where the owner did not dwell in the house in the sense contemplated by the Lord Chief Justice Erle in *Cook* v. *Humber* (*sup.*), and so far adopted his view. I now come to the section which is said to upset all the reasoning, and the conclusion arrived at under the previous sections of the Act, viz., the interpretation clause, sect. 61. This section is one which I find it very difficult to deal with. With great deference to the opinions of my Lord and my brother Keating, I cannot think that the Legislature, by the interpretation they put upon the word "dwelling house," meant to enlarge the franchise given by sect. 3 to such an extent that every man who occupies any portion of a dwelling house—a single room, or a cupboard, of which he is sole tenant—shall have a right to vote as the occupier of a "dwelling house" within that section, although no such franchise existed before, either at common law or under the Reform Act. That does not appear to me to be the proper office of an interpretation clause. It would be to pervert the meaning of what had before been said in plain and unambiguous words. The language is: "Dwelling house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Everyone knows that a "dwelling house" may include several separate dwelling houses, if structurally distinct. It is clear to my mind, that by separate dwelling the Legislature meant a thing which is physically capable of being described as a dwelling house, whether the separation be practical or structural. Taking *Cook* v. *Humber* (*sup.*), as my guide, I adopt the latter expression. It must be something more than a mere room in a dwelling house. Take the case of a common dormitory, where the space to be occupied by each tenant is marked out on the floor: is each space to be called a separate "dwelling house?" Or suppose, instead of a common dormitory, each tenant had a separate sleeping apartment and the use of a common refectory: would they be the occupiers of separate dwelling houses within this Act? These are difficulties which the Legislature may probably think it right to remove. The conclusion I arrive

at is that the claimants in these two cases are mere lodgers, and would have votes only under sect. 4, provided their holdings were of the annual value of 10*l.* and the other conditions of that section were satisfied. I think that the intention of the Legislature was that the separate dwelling house referred to in sect. 61 must be something which could properly be called a "dwelling house," and which is structurally, or at least practically, separated from the rest of the dwelling house of which it forms a part—such a dwelling house as would have been a "house" within the Reform Act, and which answers the description of a house as interpreted by this court in *Cook* v. *Humber*. I cannot conceive it to have been intended that a man should have a vote as the occupier of the "dwelling house" under this Act which would not have been a "house" under the Reform Act. In *Thompson* v. *Ward* the claimant occupied one room of a house which had been built for one family. There were several tenants, all of whom used the passage, staircase, and other conveniences in common. There was an outer door to the passage, though from neglect it was never closed, and was without any available fastening, though it might have been fastened. In *Ellis* v. *Burch* the claimant occupied two rooms under similar circumstances; the only difference between the two cases being, that in the one there was no fastening to the outer door, whereas in the other there was a bolt. In neither case had the claimant exclusive control over the outer door; nor was there in either any structural separation, as there was in *Henrette* v. *Booth* (*sup.*) Notwithstanding that, I feel fully impressed with the notion that these statutes for extending the franchise ought to receive a large and liberal construction to the extent of the fullest meaning. That case is fairly to be attributed to the words, and I am clearly of opinion that we should be going beyond the expressed intention of the Legislature if we held that the claimants in these cases are the occupiers of "dwelling houses" or "separate dwellings" within the true meaning of the 3rd and 61st sections of the Representation of the People Act 1867. For these reasons, I think the decision of the revising barrister should be affirmed.

BOVILL, C.J.—I cannot consider that the question raised upon this appeal is at all concluded by the revising barrister having called a door to the passage which was never closed, and was without lock or bolt, "an outer or street door," or that the decision of the case depends upon the existence of such a door. The point submitted for our judgment is whether the claimant's premises, as described (including the description of the door), constitute a dwelling house within the meaning of "The Representation of the People Act 1867." The 3rd section of that Act gives the franchise, subject to certain qualifications, to an inhabitant occupier as owner or tenant of any dwelling house, and the word "dwelling house," it is declared by the interpretation clause, sect. 61, "shall include any part of a house used as a separate dwelling and separately rated to the relief of the poor." The Legislature not having given any more precise definition of what is to be deemed a dwelling house, this court is called upon to say what is the proper construction to be placed upon that term as used in the statute, and upon the interpretation clause with reference to it. In considering this question, and endeavouring to ascertain the meaning of the Act from the language in which it is framed, it is not unimportant to bear in mind what had been the decisions upon the Reform Act of 1832, and what was considered the state of the law at the time the Act of 1867 was passed. In the Act of 1832, s. 27, the words used with reference to the borough franchise were, "every person who shall occupy as owner or tenant any house, warehouse, counting-house, shop, or other building," of a certain value, &c., and upon that enactment various questions arose as to the nature of the qualifying tenement, and also as to the character of the occupation, and there were numerous decisions upon these points, especially with reference to what was to be deemed "a house or other building," and what was an occupation as tenant, which involved the consideration of what was an occupation by a mere lodger as distinguished from a wholly independent tenant. It would be very difficult to reconcile the whole of these decisions, nor is it very material for the present purpose to attempt to do so. They were carefully considered by this court in *Cook* v. *Humber* (*sup.*), and will be found collected in the report of that case; and in the result, the court came to the conclusion that part of a house could not be considered as coming within the words "other building," and that it could not be considered "a house" unless it was structurally severed from the rest of the building of which it formed a part. It was also considered that the question in most of these cases resolved itself into one, as to the nature of the subject-matter of the occupation rather than of the nature of the occupation of the tenement. It is also to be borne in mind that in buildings used for commerce, part of a house—such as a counting-house or warehouse—is, by the express terms of the Act, declared to be a qualifying tenement, although it was not so with regard to a house used for residence. In *Cook* v. *Humber* (*sup.*), the claimant occupied as tenant one side of a house consisting of rooms on a ground floor, and rooms on the upper floor, with a separate staircase communicating between the rooms, and used exclusively by the tenant of those rooms, the entrance to the rooms being by doors to the rooms on the ground floor from the house passage or hall, which was shut off from the street by an outer door, kept closed during night and day, and the claimant had a key of the street door. There was no communication with the rooms on the other side of the house, and the landlord occupied and resided in the rest of the house, and had a key of the street door. It was decided that the rooms so occupied by the claimant were part of a house only, without any actual severance from the residue, and not a house; that the Legislature did not intend to create part of a house used for residence and not for commerce, a tenement sufficient to qualify a voter, and that the claimaint was therefore not entitled to the franchise as the occupier of a house within the meaning of that statute. The court in that case also laid down (at 11 C. B., N. S., 44) that a house might be divided by the structure into several flats constituting several houses, although there was an outer door to the whole house of which the tenants of the flats had not the key, and which was kept closed and under the sole control of a porter for the security of the tenants, and although the porter resided in one of the flats, and was the

owner of all the others under the same roof. That case was followed by *Wilson* v. *Roberts* (*sup.*) where it was also held that two rooms occupied by the appellant as offices and being the whole of the first floor, the landlord occupying the shop and residing with his family in the rest of the house, and each having a key of the street-door, and the appellant's rooms not being structurally severed from the rest of the house, were a part of a house only, and not a house within the meaning of the Act. In the year 1863 the court had again to consider the question in the case of *Henrette* v. *Booth* (*sup.*) In that case the claimant occupied the whole of the upper floor of a house, consisting of two rooms communicating with each other, one being used as a tailor's shop, and the other as a sitting room and bedroom, and communicating with the landing on the staircase by one outer door, over which the tenant had exclusive control. The other floors were occupied by other tenants. There was a common staircase, and at the entrance from the street was a door, open all day, but generally allowed to swing to at night, but having no lock or fastening of any kind. The previous decisions were again carefully considered, and the court, adhering to their decision in *Cook* v. *Humber* (*sup.*), came to the conclusion and decided that the claimant was the occupier of a house within the meaning of the statute, the floor occupied by him being severed horizontally from the rest of the house as completely as in the case of chambers, in the Inns of Court, where there was sometimes the additional circumstance of an outer door, and sometimes not, Erle, C.J., adding, "the party has exclusive possession of the floor occupied by him and exclusive control over the outer door of the floor," and he repeated what had been previously stated, that the nature of the tenements could not depend on the presence or absence of the landlord, or the possession of a key of the outer door to the street. In this case my Brother Keating was also of opinion that the door to the street could not properly be considered an outer door, and I am of the same opinion as to the door in this case. In these cases the court found it extremely difficult to define in language what was "a house" within the meaning of the Act, or what was such an actual severance within the meaning of their own decisions as would constitute part of a house a house for the purpose of the franchise. When the Representation of the People Act 1867 was passed, the term "dwelling house" was introduced, but the Legislature equally abstained from defining what was a dwelling house except by declaring in the interpretation clause that the term "dwelling house" should include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." The principal difficulty under the former Act was to determine when part of a house was to be considered only part of a house, and when it was to be considered "a house," within the meaning of that Act, and that had to be determined with reference to its structure, and its severance from the other parts of the building. This was a difficulty with respect to the nature of the tenement which was the subject of occupation; and when the last Act was passed, and the Legislature enacted that a "dwelling-house" should include any part of a house, it *would seem to* have been with the express intention of avoiding the difficulties that had arisen as *to when part of a house* was to be considered a house, and with the object, so far as the subject o occupation was concerned, of making it immaterial for the future whether the part of the house was to be considered a "house" or not. The Legislature, however, at the same time, by adding the words "occupied as a separate dwelling," introduced a qualification with respect to the nature of the occupation as distinguished from the subject of occupation, thus making the part of a house a sufficient tenement, and putting it upon the same footing as an entire house, provided it was occupied in the manner and for the purpose specified—viz., as a separate dwelling, and was separately rated. Part of a house, if used as a warehouse, counting-house, or shop was a sufficient tenement for the purpose of the borough franchise under the Act of 1832, and the Act of 1867 seems to me to place part of a house occupied as a separate dwelling upon the same footing. We next have to consider the effect of the words "occupied as a separate dwelling." These words appear to me, as I have already observed, to point to the nature and purpose of the occupation; and an occupation for mere professional purposes is not sufficient: (*Cuthbertson* v. *Butterworth*, *sup.*). They cannot mean that there is to be an absolutely separate dwelling, consisting of what is commonly or legally considered an entire house, because the tenement to which the words refer is described as part of a house used as a separate dwelling, meaning, I apprehend, that the part must be used as a separate dwelling. The words "separate dwelling" again seem to require that the occupation as a dwelling must be separate as distinguished from a joint occupation. There must also, for the purpose of obtaining the franchise under section 2 of the Act of 1867, which in this respect corresponds with sect. 27 of the Act of 1832, be an occupation by the occupier as owner or tenant. Under the former Act a person who occupied as a lodger, though in one sense a tenant, was not considered to occupy as owner or tenant within the meaning of that Act, and the same rule must prevail under the late Act, more especially as the franchise is now by sect. 4, under certain conditions, given to lodgers in respect of their lodgings. In the case submitted to us by the revising barrister, no question is raised as to the room of the claimant being occupied by him as a tenant; and the question really turns on whether such room is to be considered "part of a house occupied as a separate dwelling." Now it is part of a house, and it is occupied by the claimant alone, and not jointly with any other persons, and for the purpose of his residence or dwelling, and as it seems to me of his separate dwelling, and as an independent tenant. It is also found, whether rightly or not we are not at liberty upon this case to inquire, to have been separately rated to the relief of the poor, and I am therefore of opinion that it must be considered a dwelling house within the meaning of the 2nd section of the Act of 1867. In this particular case it also appears to me that it may very well be contended that the room of the claimant was in contemplation of law, a dwelling house of itself, independently of the interpretation clause as well as a house within the meaning of the Act of 1832, and as this point was elaborately argued before us and may arise in other cases, I will state my views upon it. It is quite clear that part of a house, even a single room, may

properly and legally be considered and described as a house or dwelling house. For instance, Lord Coke, in treating of burglary in the 3rd Inst. p. 64-5, says, "A chamber or room, be it upper or lower, wherein any person doth inhabit or dwell is *domus mansionalis* in law," which Parke, B., explains in *Monks* v. *Dykes* (*sup.*), to refer to "a chamber under certain circumstances, viz., when a house is divided into several chambers with separate outer doors." In that case Lord Abinger, C.B., also makes remark that "a room within a house may be a dwelling house or it may not." In *Lee* v. *Gansel* (*sup.*), where the question was as to the rights of bailiffs to break open the door of a room occupied by a lodger within the house, Lord Mansfield after referring to the case of chambers in the inns of court and in colleges, opening upon a common staircase as being clearly several houses, adds: "So if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses as Newcastle House." So in *Reg.* v. *The Mayor of Eye*. In *Re Evans* (9 A. & E. 680) Littledale, J., says: "If there be no landlord residing in a house, half a dozen different persons may be stated to have dwelling houses within it." And the other judges thought the fact of the doors opening upon a common staircase made no difference, Coleridge, J., remarking, "That the passage was no more than part of the street." The following may also be mentioned as familiar instances of parts of houses being considered houses, viz., chambers in the Albany, chambers in the inns of court, rooms in the colleges at the Universities, shops in the Burlington Arcade, flats in Victoria-street, apartments in Hampton Court Palace. The decisions in *Cook* v. *Humber* and *Henrette* v. *Booth*, and the cases there cited are also conclusive to show that a single room may be a house or dwelling house of itself for the purpose of the parliamentary franchise. They also establish that the existence of an outer street door to the house in addition to the outer door of the tenant's chamber, even although the tenant have not the key of it, and the street door is kept locked by a porter who resides on the premises, would not prevent the room being legally a house of itself, provided it be structurally severed from the other parts of the house, and provided the tenant has an outer door of his own to his room, and has the complete control over that door. It seems to me to be very difficult to distinguish this case in principle from many of those which have been referred to. In the present case the room of the claimant is his sole residence and dwelling place. Structurally it is divided from and does not communicate with, the rest of the house. There is, in my opinion, nothing which can properly be considered an outer door except the door to his own room, over which he has complete control; and though he has the use only of the staircase and some other conveniences in common with the other occupiers, if it were necessary to decide the point, I should be disposed to consider that his room was a house of itself within the Act of 1832, and a dwelling house of itself within the Act of 1867, independently of the interpretation clause in the latter Act. It is tolerably clear, however, that when a whole house is let out in apartments, as in the present case, it was not the intention of the Legislature that each of the occupiers of these apartments should *acquire the franchise, because* being rated was a necessary part of the qualification; and under the exception in the 7th section of the Act of 1867, in such cases unless the apartments were separately rated at the time the Act was passed, the landlord, and not the occupiers, was required to be rated. In this case the occupiers are found to have been rated, and no question is submitted to us on that point; but it may well be doubted whether they could properly be so rated unless the apartments were separately rated at the time of the passing of the Act of 1867, and whether the provisions of the Poor-rate Assessment and Collection Act 1869 at all apply to cases where the occupier was not then liable to be rated, and where consequently there could be no rating of the owner instead of the occupier under that Act. If the question of rating had been raised, it is not improbable that this case would have been found to come within our decision in the late case of *Cross* v. *Allsopp* (*sup.*), decided in last Michaelmas Term, so that the claimant would not be entitled to remain on the list of voters. Another question which was argued at great length, and which indirectly arises, though it is not directly raised by the case submitted to us, is whether the claimant is to be considered a mere lodger? Generally speaking, a lodger is a person whose occupation is of part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in, or retains the possession of, or a dominion over, the house generally, or over the outer door; and under such circumstances that the possession of any particular part of the house held by the lodger does not prevent the house generally being in the possession of the landlord. Where a landlord resides in part of a house, and there is an outer door from the street, and he by himself or his servants has the control of this outer door, and undertakes the care or control of rooms let to other persons, and the access to them, and those rooms themselves have not anything in the nature of an outer door, and are not structurally severed from the rest of the house, there could be little hesitation in saying that an occupier of those rooms, being part of the house, is only a lodger. On the other hand, if there be no real outer door to the street, and neither the landlord nor his servants, nor anyone representing him occupies any part of the premises, or exercises any control over any part of them, and the rooms occupied by another person are structurally severed from the rest of the house, and have an outer door to the general landing or staircase, and no one but such tenant has or exercises any care or control over the room, or that outer door, as a general proposition the person so occupying those rooms could not properly be said to be a lodger. It is always important in determining whether a man is a lodger to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself or his servants, and, at the same time, retains the general control and dominion over the whole house, and this he may do, though he do not personally reside on the premises. These views are borne out by the judgment of Maule, J., in *Toms* v. *Luckett* (*sup.*), which was confirmed by my brother Willes in the recent case of *Smith* v. *Lancaster* (*sup.*). They are also in accordance with many authorities where the occupation by a lodger of part of a house or premises has been held not to

deprive the landlord of the general possession of the whole house: (See generally Lord Hardwicke in *Fludyer* v. *Lambe* (*sup.*), per Lord Mansfield in *Lee* v. *Gansel* (*sup.*); also *Reg.* v. *Mayor of Eye* (*sup.*), and the recent cases of *Brewer* v. *McGowen* (*sup.*), and *Smith* v. *Lancaster* (*sup.*) In *Stamper* v. *The Overseers of Sunderland* (*sup.*), the court decided that where a house was wholly let out in apartments as in the present case, and the several occupiers were not separately rated at the time the Act passed, the owner was by the express terms of the 7th section of the Representation of the People Act 1869 the proper party to be rated, and that the occupiers of the several rooms could not properly after the passing of that Act be rated in respect of their separate occupations. I was of opinion in that case as each tenant of a room had the sole and exclusive occupation and control over it, although he had the use of the staircase and some other parts of the house in common with the other tenants, and as neither the owner nor landlord nor any person representing him resided in or occupied any part of the house, that these tenants of the rooms must be considered as occupiers of separate tenements for rating purposes, and that each room must be considered a separate and independent dwelling-house or tenement, and I see no reason to change that opinion. My brothers Byles and Montagu Smith were also of opinion that the tenants would, under the Statute of Elizabeth, have been liable to be rated if no other legislation had intervened. My brother Smith no doubt intimated an opinion that such persons might be lodgers and their rooms lodgings within the meaning of the 7th section of the late Act, and a similar argument was urged before us in this case, but the 4th section, on which the lodger franchise depends was not then under consideration, and the 7th section being only a rating clause, and its language apparently taken from Sturges Bourne's Act (59 Geo. 3, c. 12, s. 19), I think the language of that section has little effect upon the construction to be placed on the franchise clauses of the Act. Some stress was laid upon the words "wholly let out in apartments or lodgings" in the exception to the 7th section, including cases where the landlord did not reside upon the premises; but I do not think this argument is entitled to much weight, because "apartments" is a proper term to apply to rooms in a house constituting separate houses in themselves, as was said by Mr. Justice Maule in the case of *Score* v. *Huggett* (*sup.*), and rooms may also be lodgings where, although the landlord does not reside upon the premises, he retains the general control over the house and the outer door. In this case the landlord has no control or dominion over the house or over the outer door; he is not, I think, in any sense the occupier of the house, nor can the possession of the occupiers of the rooms be deemed his possession or occupation of the house generally. I think it cannot properly be said that there is any occupier of the whole house, no one tenant having any control over the house generally beyond the others, nor can the whole of the tenants in any sense be considered as joint occupiers of the house. And I am of opinion that each tenant is the occupier of his own room only, in the independent position of *a tenant, and that his occupation is not subordinate to that of any other person*, and is not the occupation *of a mere lodger*. As I have already intimated, I think it was not the intention of the Legislature in the Act of 1867, that the persons occupying separate rooms in a house, when the whole was let out in separate apartments, should have votes, because, under that Act, rating was made an essential test of the qualification, and by the same Act such persons could not be rated unless they were separately rated at the time the Act was passed. The general question of the right of such persons to the franchise is not, however, raised by this case, upon which the only question submitted for our determination, and which we have to decide, is whether the premises occupied by the claimant were a dwelling house within the meaning of the Act. Upon that question it seems to me that the Legislature intended to constitute "any part of a house" (as distinguished from a whole house, in the sense in which the term "house" had been previously interpreted by the cases) a sufficient subject of occupation, provided it was occupied for the purpose of a dwelling, and as a separate dwelling, in the sense of the occupation not being a joint occupation with others of that particular part of the house, and provided there was a wholly independent occupation, as distinguished from that of a mere lodger, and the part of the house was separately rated. The room of the claimant was part of a house, and the nature of his occupation in this case seems to me to fulfil the other conditions, and, it being found that he was separately rated, I am of opinion that he must, for the purposes of this appeal, be considered the occupier of a dwelling house, and that his premises will be considered as a dwelling house within the meaning of the Act of Parliament, and that the decision of the revising barrister disallowing the claim ought upon this point to be reversed. The court, however, I regret, is equally divided in opinion as to the proper interpretation of the words "any part of a dwelling house occupied as a separate dwelling" in the interpretation clause, and the result will be that the decision of the revising barrister in this case must stand. It is very unfortunate that there should be this difference of opinion as to what was intended to be a sufficient subject of occupation under the Act; and as we have been unable to determine the meaning of the words in the statute, it may be for Parliament to consider whether it will pass a declaratory Act in order to define more clearly what was intended to be included under the term "dwelling-house," and who is to be considered a "lodger." The difference of opinion that unfortunately exists upon this subject is practically of less importance than it otherwise might have been, in this and other similar cases, as affecting the franchise generally, because, according to the decision in *Stamper* v. *The Overseers of Sunderland*, unless their apartments were separately rated when the Act was passed, these occupiers could not properly under the Act of 1867 be rated to the relief of the poor; and the Act of 1869, which dispenses with the necessity of rating in certain cases would therefore probably be found to have no operation upon their cases according to the decision in *Cross* v. *Alsop*, and if so, then, upon an objection being raised to the votes on the point of rating, the claim of those persons to be upon the register ought to be disallowed.

ELLIS *v.* BURCH.

BOVILL, C.J.—This case differs in its circum-

stances in some respects from that upon which we have just delivered our opinions, and if the decision had depended upon the nature of the tenement occupied and the necessity of there being a structural severance of the part of the house used as a separate dwellings, I should have been of opinion that there was no such structural severance in this case, but in the view which I take of the construction of the present statute that point does not arise. Although these rooms would not, in my opinion, according to the authorities constitute a house of themselves, yet they are, I think, part of a house, and with regard to the nature and purpose of the occupation they are, as it seems to me, used and occupied as a dwelling and a separate dwelling within the interpretation clause of the Act of 1867; and being found to have been separately rated (whether rightly or otherwise is not now in question), they are in my opinion a dwelling house within the meaning of the 2nd section of the Act of 1867. I think, therefore, upon this case, and upon the point submitted to us, that the decision of the revising barrister ought to be reversed. I may add that in this case also it appears to me that the claimant was the occupier of the rooms in question as an independent tenant, that his occupation was not subordinate to that of any other person, and that no other person had the general occupation or control of the house or outer door, or any dominion over him or the rooms which he occupied, or the outer door of those rooms; and that the claimant under these circumstances occupied as a tenant and not as a lodger, and that his rooms were not lodgings within the meaning of the franchise clause of the Act of 1867. As the same difference of opinion, however, exists upon the bench in this case as in the last, the decision of the revising barrister will stand.

(The result, therefore, was, that in accordance with the decision in *Reg.* v. *Millis* (10 Cl. & F. 534, 907), the decision of the revising barrister was in each case affirmed.)

Judgment accordingly.

Attorneys for appellant (Thompson), *Hill* and *Hoyle.*

Attorneys for respondent (Ward), *Sharp* and *Ullithorne.*

Attorneys for appellant (Ellis), *Coode, Kingdon,* and *Cotton.*

Attorneys for respondent (Burch), *Geo. E. Philbrick,* for *Sanders, Burch,* and *Barnes,* Exeter.

Thursday, June 22, 1871.

WOODHOUSE (app.) *v.* ETHERIDGE (resp.)

Fence season for river fish—Eels—Thames bye-laws—27 & 28 Vict. c. 113.

By 27 & 28 Vict. c. 113, *s.* 65, *the Conservators of the Thames may make bye-laws for any of the purposes mentioned; amongst them, for the protecting, preserving, and regulating of the fisheries in the river Thames, and the preservation of the fish therein; and for determining the times during which the taking of any particular or specified kinds of fish shall not be practised. By the* 8*th bye-law made by the conservators, the fence season shall be for pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish (except salmon, salmon trout, and trout), the period between the* 14*th Feb. in each year, and the* 31*st May following, both inclusive. By the* 9*th bye-law, a person taking fish within the fence season for the same is liable to a penalty not exceeding* 5*l.*

The appellant was convicted for taking eels within the fence season for river fish; the justices, however, found as facts that all the fish mentioned by name in the bye-law, spawn, and are out of season, and unfit for human food during the fence period; and that there was no sufficient evidence how eels are propagated, nor when they spawn, nor whether they are at any time unfit for food.

Held, that the conviction was right.

APPEAL from a conviction by justices.

At a petty sessions holden at the Town Hall, New Windsor, in the county of Berks, before two of Her Majesty's justices of the peace, in and for the said county of Berks, on Saturday, 25th June 1870, the matter of a certain information and complaint by Henry Whitbread Etheridge, hereinafter called the respondent, against William Woodhouse, the younger, hereinafter called the appellant, whereby the appellant was charged with having unlawfully, in the upper river of the river Thames, taken and attempted to take, and had in his possession, certain kinds of fish, known as river fish—to wit, eels—within the fence season, to wit, between the 14th Feb. and the 31st May, contrary to Upper Thames Bye Laws of 1869, and contrary to the form of the statute in such case made and provided, came on to be heard and determined in due form of law. Upon the hearing of the said information and complaint, the justices convicted the appellant in a penalty of 1*l.* and costs 19*s.*, and the appellant, being dissatisfied with this determination, as being erroneous in point of law, duly applied to the justices according to the form of the statute 20 & 21 Vict. c. 43, to state and sign a case, setting forth the points and grounds of such determination for the opinion thereon of this honourable court. In compliance with such application, the following case was stated:

1. The appellant claimed under a lease (which was put in evidence) to be the lessee of a several fishery comprising certain eel bucks in the river of the Upper Thames, under a lease from one Cater, dated 15th Sept. 1868, for the term of seven years from 25th March 1868, at the yearly rent of 50*l.* No question as to the appellant's right or title to such several fishery by virtue of the said lease was raised at the hearing before us.

2. The eels comprised in such fishery form a valuable part of the produce thereof.

3. The respondent is the superintendent of the Upper Thames navigation, duly appointed by the Conservators.

4. The 8th of the Upper Thames Bye Laws of 1869, which purport to be made in exercise of the powers conferred by the Thames Conservancy Act 1857 (20 & 21 Vict. c. cxlvii., Loc. and Pers.); the Thames Conservancy Act 1864 (27 & 28 Vict. c. 113), ss. 31, 65; the Thames Navigation Act 1866 (29 & 30 Vict. c. 89), ss. 41, 42; and the Thames Conservancy Act 1867 (30 & 31 Vict. c. 101). s. 12, is as follows:

Fence seasons.—8. The following respective periods shall be deemed to be the fence season in the upper river, that is to say: (*a*) For salmon, salmon trout, and trout, the period between the 10th Sept. in each year and the 31st March following, both inclusive. (*b*) For pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish

(except salmon, salmon trout, and trout), the period between the 14th Feb. in each year and the 31st May following, both inclusive.

5. By the 9th of the said bye-laws it is declared that it shall not be lawful for any person, as regards the upper river (*inter alia*), to fish for or take, or attempt to take, or to have in his possession any fish, within the fence season for the same; and that if any person does anything in contravention of this byelaw, he shall, for every such offence, be liable to a penalty not exceeding 5*l*.

6. It was admitted by the appellant, for the purpose of raising the question for decision in this case, that he had, within the limits of the said several fishery, and between the 14th Feb. and the 31st May in the present year, taken eels by means of traps or engines called grig weels.

7. Such grig weels are wicker baskets sunk in the river by means of weights. They contain a chamber into which there is an entrance narrowing inwards nearly to a point, and formed at the end of converging willow rods. These rods diverge easily upon pressure externally, and so admit the long thin body of the eel into the chambers, when they close again and prevent his regress; these engines are intended only to be used for the catching of eels, but other fish may be caught therein.

8. Salmon and salmon trout and trout spawn between the 10th Sept. and the 31st March, and during that period are out of season and unfit for human food, and the taking of them during that period would be a wanton hindrance to their propagation.

9. All the different species of fish specifically named in paragraph (b) of the said 8th bye law, set out in paragraph 4, except salmon and salmon trout and trout, spawn during the period between 14th Feb. and the 31st May, and during that period are out of season and unfit for human food, and the taking of them during that period would be a wanton hindrance to their propagation.

10. Statements were made and quotations read from different works upon natural history by the advocates of appellant and respondent as to the nature and habits of the eel, but no sufficient evidence was given before us to enable us to find as a fact how eels are propagated, whether they are oviparous or viviparous, or whether they do or do not spawn or propagate their young between the 14th Feb. and the 31st May, or at any other particular time. It was alleged by the appellant but disputed by the respondent that eels are never known to be out of season or unfit for human food at any time when it is possible to take them.

11. Eels can only be taken by the means employed by the appellant or otherwise by use of baits during the period between the beginning of March and the end of October. They are taken in the months of October, November, and December by means of large fixed engines called eel bucks, which interrupt them in their passage down the river towards the sea.

12. Upon these facts it was contended before us, on the part of the appellant, that it had not been proved that eels are fish known as river fish, but that it had been proved that they were not *ejusdem generis* with the several kinds of fish specified by name in sub-sect. (b) of the said 8th bye-law, so as to be included in the description "every kind of fish known as river fish" in the said bye-law mentioned; that they were not within the mischief intended to be provided against by the said bye-law; and that therefore, according to the true and reasonable intent and construction of the said bye-law, the appellant had not committed any offence against the same; but the respondent alleged to the contrary thereof.

13. We, however, being of opinion that the said 8th bye-law included eels in the expression "every other fish known as river fish," considered that we must convict the appellant.

The question for the opinion of the court is, whether, upon the facts above stated, we were bound to convict the appellant of an offence against the above-mentioned 9th bye-law if read together with the exception in the 13th bye-law? If we were so bound, the conviction is to be affirmed, if otherwise, it is to be quashed.

The 13th, which was the last byelaw, was as follows:

Nothing in these byelaws, except the provisions relative to the fence season shall take away or abridge any right of the owner or occupier of a private fishery, or any person having a private right of fishing or having authority in writing in this behalf from any such owner, occupier, or person to fish for, or to take, or attempt to take fish by means of nets, commonly called cast nets and cray fish nets, or by grig or ground weels for eels, or by night lines, or by means of eel bucks or stages, so far as the same can be legally used, or with a special licence from the conservators in writing, under their common seal, but not otherwise, by means of a net commonly called a hoop net, having a mesh of not less than 2 inches from knot to knot when wet, or 8 inches all round, and not being more than 6 yards long, or with the like special licence as aforesaid, but not otherwise, by means of a net commonly called a drag net, having a mesh of not less than 2 inches from knot to knot when wet, or 8 inches all round.

Harington, for appellants.—I do not dispute that eels are a river fish, but the framers of these bye-laws, taking into consideration, as appears by the 13th bye-law, that eels were to be found in the river, must have advisedly omitted them from the list of fish to be protected. The case finds as a fact that this fence season is not necessary for eels, and it would be unreasonable to deprive the appellant of a very valuable part of his private property without doing any benefit to the public, whose food these fishery laws were intended to improve. Eels do not belong to either of the species of fish particularly named, and therefore could not be included in the general words which follow. Moreover, these bye-laws are authorised by 27 & 28 Vict. c. 113, and by the 65th section "the conservators may from time to time make bye-laws for the following purposes or any of them;" *inter alia*, "For the protection, preserving, and regulating of the Fisheries in the river Thames, and the preservation of the fish therein;" and "for determining the times during which the taking of any particular or specified kind of fish shall not be practised." The expression "Every kind of fish known as river fish" cannot therefore come within the authority given by the Act to the conservators to restrain the taking of any particular or specified kinds of fish. And if this be so, the 67th section applies to this case; "This Act or any power conferred by this Act or any bye-law made or other thing done under any such power, except any bye-law made for any of the purposes following [there are excepted those purposes for which the conservators are authorised by the 65th section to make bye-laws] shall not extend to take away,

alter, or abridge any right, claim, privilege franchise, exemption, or immunity, to which any owner or occupier of any private fishery in the river Thames is entitled, or to empower the conservators to interfere with the exercise of the rights of such owner or occupier, but the same shall remain and continue as if this Act had never been made."

Bosanquet for the respondent.—The validity of this bye-law with respect to "river fish" was not questioned before the justices, and therefore cannot be disputed now. This is really a matter of fact, and the justices having found that eels are river fish, the conviction was right.

Harington in reply.—The court will not put such a construction upon this bye-law as to make it illegal, even although this objection was not suggested before the tribunal whose decision is appealed against.

WILLES, J.—This is a question raised apparently by agreement for the purpose of determining whether the 8th of these bye-laws applies to eels. There can be no doubt that taking the expression, "every kind of fish known as river fish" by itself, it would include an eel bred in the river. Lord Coke mentions eels as an example of fish, and cites a passage from Domesday (Co. Litt. 5, b); they have always been considered fish, and that passage is authority for saying they are river fish. It appears also to be a fact that the commissioners who drew up these bye-laws imagined eels to be fish; for they allude to them in the 13th bye-law, and provide that nothing in the other bye-laws shall interfere with the legal use by owners of private rights of grig or ground weels for eels, or eel bucks. The commissioners therefore knew they were dealing with eels. Mr. Harington has argued that we ought not to construe this 8th bye-law to apply to eels, because it is found in the case that there was no sufficient evidence whether eels spawn or propagate their young during this fence season. Without venturing upon a decision concerning the points considered doubtful by the justices, it is enough that the law regards the order of nature, and it may be that eels at some time of the year should be protected, at least in this particular river. There is therefore nothing unreasonable in the commissioners making this particular time the fence season for eels, and at all events, it devolves upon any person, who asserts that this protection is unreasonable, to establish it clearly. Passing over then the argument based upon the reason of this bye-law, we come to the consideration of its words. No doubt eels are fish of importance, and are of more importance for the food of man than most of the fish mentioned by name; and it is a rule of law, as well as of grammar, that when specific and general words are used together, the general words must relate to the species as well as to the genus referred to by the specific words. It is said that we ought to construe "every kind of fish known as river fish," to include only those which are of the species mentioned before. The names are given of fish of various species thrown together, and in no order, and then are added the words, "every kind of fish known as river fish." These are words which, in my opinion, under the circumstances of their position do not come within the rule of grammar. Further, when all the genus is exhausted, we find that no river fish is omitted except flounders, eels, and lampreys, and I cannot help thinking that the words must mean the universal inclusion of all fish, or are limited, if at all, to fish of use for food. Upon the best and closest analysis of this clause, I think it was meant by its framers to include eels. Then with respect to sects. 65 and 67 of the Act (27 & 28 Vict. c. 113) which authorises the bye-laws; it is said that, even if the framers intended to include eels in the expression "river fish," the bye-law does not sufficiently specify them under the 65th section, and that the 67th section expressly protects the appellant and his rights in a case like this, not particularly specified in sect. 65. But this bye-law was certainly made for the purpose first described in sect. 65—viz., for the preservation of the fish in the Thames, and the question clearly is, whether, assuming the expression to include eels, it is sufficient that they should be specified as river fish. I think the Act did not mean to prohibit a bye-law of this kind. It did not intend to impose upon the conservators the necessity of describing the fish more specifically than with ordinary language, and it appears to me that eels are sufficiently described as river fish. If eels had been mentioned in the bye-law, the conservators would certainly have been right in applying this fence season to them, and it is only for us to say whether the language they have used is sufficiently explicit. If the conservators or the Fishery Commissioners did not mean to forbid the taking of eels during this period, they can, under the 65th section, alter the bye-law. I am not, however, myself inclined to believe that we are in error as to their intention. The decision of the justices will be affirmed.

M. SMITH, J.—I am of the same opinion. It is a safe rule to suppose that framers of such regulations as these mean what they say, and I do not see why eels should not be included under the expression "every kind of fish known as river fish." I cannot say from the context that the commissioners who framed the bye-laws did not mean to include eels, and if I am mistaken, and it was not intended to apply the fence season to them, the commissioners can now alter the bye-law. My brother Willes is learned in fish, as he is in law, and I am happy to concur in all that he has said.

Upon application by respondent's counsel, Willes, J. thought the commissioners ought not to ask for costs under the circumstances.

Judgment for respondent, without costs.

Attorney for appellant, *C. T. Phillips.*

Attorneys for respondent, *Vizard* and *Co.*, for *E. H. Barrett*, Slough.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Tuesday, May 9, 1871.

BOTHAMLEY *v.* DANBY.

57 *Geo.* 3, *c. lxix.*; 27 *&* 28 *Vict. c.* 101. *s.* 25 (*Highway Act* 1864)—*Right of pasturage—Sheep on highway.*

By 57 *Geo.* 3, *c. lxix., a certain barrier bank, made for drainage purposes in Lincolnshire, together with a road thereon, is vested in trustees who are, by sect.* 58, *directed and required from time to time to let the herbage of the bank to be grazed with sheep only, at such yearly rent as can be reasonably had for the same.*

The road which runs along the top of the bank is an open public highway.

The 27 & 28 Vict. c. 101 (The Highway Act 1864), s. 25, enacts that "if any . . . sheep . . . is found straying on, or lying about any highway, or across any part thereof, or by the sides thereof (except on such parts of any highway as pass over any common or waste, or uninclosed ground), the owner or owners thereof shall, for every animal so found straying or lying, be liable to a penalty, . . . provided . . . that nothing in this Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway."

Sheep owned by a renter of the herbage, and depastured on the sides of the above-mentioned barrier bank, were found upon the metalled part of the highway, and the owner was convicted and fined under sect. 25 of the Highway Act 1864.

Held, that the conviction was right.

CASE stated by justices under 20 & 21 Vict. c. 43.

Parts of Holland, Lincolnshire, to wit: This was an information and complaint preferred under the statute 27 & 28 Vict. c. 107, s. 25 (*a*) by Thomas Danby, an inspector of police, against Frederick Bothamley, of Long Sutton, in the said parts and county, farmer, for that he the said Frederick Bothamley, on the 25th Nov. 1870, at the parish of Long Sutton in the said parts and county, was then the owner of twelve sheep unlawfully then found straying on a certain highway there situate, called Sutton Gate, the said part of the said highway not being such part thereof as did lead or pass through or over any common or waste or uninclosed ground, and he the said Frederick Bothamley not having any right of pasturage on the sides of the said highway; and after hearing the parties and the evidence adduced by them, we the undersigned, being two of Her Majesty's justices of the peace in and for the said parts of Holland in the said county of Lincoln, did thereupon adjudicate the said Frederick Bothamley to be the owner of four sheep so found straying on the said highway as aforesaid, and did convict him thereof and adjudge him to forfeit and pay for such offence the penalty or sum of 6*d.* per head for each of the same four sheep, and the further sum of 13*s.* 6*d.*, the complainant's costs incurred in that behalf.

And the said Frederick Bothamley, alleging that he is dissatisfied with the said determination, as being erroneous in point of law, did, within three days thereafter, apply to us the said justices, to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of the Court of Queen's Bench at Westminster. Wherefore, in pursuance of the statute in such case made and provided, we hereby state and sign the following case: The defendant having appeared upon summons before us, the undersigned, to answer to the said complaint, it was thereupon proved on the part of the said complainant, and admitted by the defendant's attorney on his behalf, that there was a public highway which has been of late years formed of hard materials, and maintained and kept up in such state by and at the expense of the parish of Long Sutton aforesaid, along the top of an artificial embankment, which forms the defence to one side of a large or main drain, constructed and running through the district for the purposes of carrying away and discharging the water of upwards of 30,000 acres of land, and which also formed the highway in question, and that the defendant was the owner of the twelve sheep so found straying as aforesaid, but that four of them only were straying actually on the land or metalled part of the highway, the other eight sheep being found depasturing or lying on the sides or at the bottom of the aforesaid embankment; and on the part of the defendant it was proved and admitted by the complainant that the embankment in question, and the sides thereof are the property of, and vested by the Act 57 Geo. 3, c. 69, (*a*) in a body of proprietors of land therein specified, and commonly called the South Holland drainage trustees; and it was also admitted and proved that the said highway is not inclosed by any gate or otherwise, but is an open road, and the only public road running from Sutton St. James (which is a hamlet to Long Sutton aforesaid) to such last-mentioned town or place, and that previous to the formation of the said present embankment a highway had existed on the original embankment, referred to in the next following paragraph or statement.

It was also admitted and proved that some fifteen or seventeen years back the South Holland drainage trustees, under the powers conferred upon them by their various Acts of Parliament, considerably widened their main drain, and for that purpose purchased land on the further or inland side of their then embankment, upon which the road then was, cut away a large portion of their then bank, formed an almost entirely new bank on part of the land so purchased, and diverted the road on to such new bank. That a considerable portion of the land (on the further or inland side of the bank) which was so purchased as aforesaid has never been inclosed, and now lies open, and that grass grows on such land and on the sides of a cess or foreshore of the bank next the drain, and that the trustees have from the time their drain was formed been in the habit of cleansing the same, and casting the earth taken out therefrom upon the sides of the said bank, and the land on the further or inland side thereof.

The defendant's attorney, however, contended that such substituted road on the surface or top of the present embankment must be taken to have had only a limited dedication as to the public use thereof, for that not merely the property of and in the bank itself had been vested by the 8th section of the above quoted Act (which accompanies and forms part of this case) in the drainage trustees, but that by the 58th section (*b*) of the same

(*a*) 27 & 28 Vict. c. 101 (The Highway Act 1864) s. 25. The 74th section of the Highway Act 1835 shall be repealed, and instead thereof it is enacted, if any . . . . sheep, &c., is at any time found straying on or lying about any highway or across any part thereof, or by the side thereof (except on such parts of any highway as pass over any common or waste or unenclosed ground), the owner or owners thereof shall, for every animal so found straying or lying, be liable to a penalty not exceeding 5*s.* . . . . Provided that nothing in this Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway.

(*a*) 57 Geo. 3, c. 69: An Act for amending an Act (33 Geo. 3, c. 109) for draining lands in South Holland, and for continuing and amending another Act (35 Geo. 3, c. 166) for maintaining and repairing a certain bank, and the road thereon, from Spalding High Bridge to Brother House, all in the county of Lincoln. (10th July 1817.)

(*b*) Sect. 58 enacts that it shall be lawful for the committee men for the time being, and they are hereby directed and required, from time to time to let or demise from year to year the herbage of the . . . barrier bank and of the forelands thereof, and of the banks of the . . . Lord's drain, and of the . . . main cut or drain, and

Act, the trustees were directed and required from time to time to let or demise from year to year the herbage of, amongst others, the above-mentioned bank to any person or persons, to be grazed with sheep only, at such yearly rent or rents as can be reasonably had for the same, and that the said drainage trustees have ever since let, and still continue to let, all such herbages.

It was further proved to us that the defendant is the hirer or renter from the said trustees for the present year of the herbage of the said bank in question, for the purpose of being grazed with sheep at the point where his sheep were so found as aforesaid, and for some considerable distance on either side thereof, for the sum of 8*s*., but that the surveyor of the trustees had not measured the top of the bank, because he considered it of no value.

It was further contended by the defendant's attorney that the limited dedication was shown from the fact that the class of animals with which the bank was to be grazed was specified, and lastly that defendant could not be convicted, as it was shewn that he had a right of pasturage for sheep on the sides of the highway in question.

We, however, being of opinion that the substituted road was one set out or allowed only in lieu of one previously existing, and that the surveyors of the highways of Long Sutton have immemorially repaired, and do at the present time keep such road in repair, and that it is an open public highway, and used by the public as such without any interruption or hindrance whatsoever, did adjudicate the defendant to be guilty of the offence of allowing four of his sheep (namely the four proved and admitted to have been found on the metalled road itself) to be straying on the highway as alleged in the aforesaid information and complaint, and did further adjudge and order him to pay in respect of such offence a fine or penalty of 6*d*. per head for each of the same four sheep, and the additional sum of 13*s*. 6*d*. for the complainant's costs incurred in such behalf.

If the court shall be of opinion that our said adjudication and conviction is valid and correct in point of law, then the said conviction shall be confirmed, but if the court shall be of a contrary opinion, then the said conviction shall be quashed.

EDWARD LEIGH BENNETT.
J. HURTON BARKER.

Manisty, Q.C. (with him *R. E. Webster*) for the appellant.—The penalty in sect. 25 of The Highway Act 1864 is imposed on the owner of cattle straying on any highway or by the sides thereof, except on such parts of any highway as pass over any common or waste or uninclosed land. Now it is clear that the owner in this case had a right to depasture sheep on the sides of the highway. That right, given to him by virtue of 57 Geo. 3, c. 69, s. 58, is preserved by the proviso at the end of sect. 25 of the first-mentioned statute. Then this highway passes over uninclosed land, within the exception in sect. 25 of the Highway Act 1864. It is found to be an open road. *Golding* v. *Stocking* and *Freestone* v. *Caswell* (20 L. T. Rep. N. S. 479, 918; L. Rep. 4 Q. B. 516, 519) are authorites upon the above section. In the latter case Cockburn, C. J., although affirming the conviction of the owner of a right of a pasturage on the sides of a highway, whose horses strayed on the metalled road, yet says expressly, "This was not a case of a highway passing over uninclosed ground." Nor can it be said that the 57 Geo. 3, c. 69, s. 58 is repealed by the Highway Act 1864. *Thorpe* v. *Adams* (L. Rep. 6 C. P. 125) decides that the general principle to be applied to the construction of Acts of Parliament is, that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless the two Acts are necessarily inconsistent. There is an express statutory direction that the sides of the bank shall be let for grazing purposes. Sheep must be nat rally expected to occasionally go upon the adjoining road, and the Highway Act 1864 must not be construed so as to restrict the right given by the previous legislation, and thereby reduce the rental of the pasturage, which is to aid the rates. The dedication of this highway to the public was a limited one, it was a dedication of the highway subject to sheep straying sometimes upon it. A footpath may be dedicated subject to the right of the owner of the soil to plough across it at certain seasons (*Mercer* v. *Woodgate*, 21 L. T. Rep. N. S. 458; L. Rep. 5 Q. B. 26), which is a right more inconvenient to passengers than the one now in question.

Foot, contra.—The point as to this road passing through uninclosed land was never raised at all before the justices. It was not for the prosecutor to prove that the highway did not pass through uninclosed land, and thereby to negative the exception in sect. 25 of the Highway Act 1864, but for the defendant to prove the affirmative thereof in his defence if he would have advantage of the same: (Jervis's Act, 11 & 12 Vict. c. 43, s. 14.) The findings in the case dispose of the point as to a limited dedication. This was a conviction for trespassing on the highway, not on the sides of it. The proviso at the end of sect. 25 might doubtless save the owner from the penalty imposed in the first part of the section for having sheep straying "by the sides" of the highway, yet he is nevertheless liable if they stray on or lie about the highway.

Manisty, Q.C., in reply.

BLACKBURN, J.—I think the conviction was right, on the points as they come before us. The facts seem to be these, viz., that a road runs along the top of this bank made to protect the drainage of a large tract of land, and is a highway. On this bank there are places covered with grass, which the trustees are directed to let as depasturage for sheep, but for no other animals. It appears that sheep left to graze at the sides are found straying on the highway. Then comes the question whether they are within the provisions of the Highway Act 1864 (27 & 28 Vict. c. 101), s. 25, which impose a penalty on the owner of any horse . . . sheep, &c., "found straying on or lying about any highway or across any part thereof, or by the side thereof (except on such parts of any highway as pass over any common or waste or uninclosed ground), . . . provided . . . that nothing in this Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of

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of any other cut or drain made or to be made as aforesaid, and the forelands thereof respectively, or any other lands or grounds which have been covered by the said commissioners, or may be covered under the authority of this Act, to any person or persons, to be grazed with sheep only, at such yearly rent or rents as can be reasonably had for the same.

By sect. 68 all cattle, except sheep, found on the banks or forelands may be impounded.

Sect. 69 prescribes a penalty for keeping rabbits on the banks.

any highway." Now, in all cases where a highway runs through a common or waste or uninclosed ground, the Legislature seem to have thought that the cattle which were depastured on that open common or uninclosed ground must sometimes naturally come on to the road, and that it would be wrong to impose a penalty on the owner in such cases; but where the road is not one passing over any common or waste or uninclosed ground, although there may be a right of pasturage on the sides, they thought fit to leave the enactment, providing that cattle are not to stray, unqualified. Then how is that consistent with a right of pasturage? It does not take it away, but the effect of the section is, that though the owners of animals may depasture them, they must somehow take precautions for herding them—their right is clogged with that condition, but is not taken away. Mr. Manisty argued that, as the trustees are directed to depasture these banks with sheep only for the benefit of the reduction of the rates, the Act of Parliament clogging the right of pasturage with this condition, and possibly reducing the value of it, is inconsistent with the former legislation. I do not think that is so, but I think that, while the trustees have this right, and have to apply the profits to the reduction of rates, it is difficult to see what there is in that to give them a greater right than the owners of private property. In neither case has the Legislature taken away the right of pasturage. In each the right is to be so far affected as that the animals must be prevented from straying on the highway. Here sheep are found on the highway, and therefore the conviction of the owner of them is correct, unless it were clear that the spot where the animals were straying passes through the uninclosed ground, so as to be within the exception in sect. 25. That is a question of degree. Every road where a right of pasturage is on either side is, in one extreme sense of the word, uninclosed, because of the plot of ground at the sides of the actual roadway; but that is not what is meant. I think where the highway runs through an extent of ground of some magnitude, then it is within the exception; and when it does not, but the quantity of ground is of so small an acreage compared with the highway as to be merely accessory to the road, then it would be otherwise. If that was a point taken before the magistrates, they certainly have not stated it in such a way as to bring it before us. I cannot help suspecting that was not brought before the justices, because it was well known that the extent of ground near the road bore but a small proportion to the road. If the fact was not so the point may perhaps be raised in another case the next time the justices convict an owner of straying sheep. There was only one other point taken below—viz., that it must be considered that this highway was dedicated to the public with the right of depasturing sheep on the sides attached to the right of way, so that the sheep might lawfully stray on to the road, a proposition which seems to me quite untenable. No such limited dedication as that suggested manifestly ever takes place, and the words of the Highway Act 1864 would take away the immunity claimed by the owner of sheep straying on to the road, if such ever existed.

MELLOR, J.—I cannot help thinking there is no foundation for the suggestion as to the limited dedication when we consider the object and purpose of this Act of Parliament, and the power given to the trustees of letting the herbage by sect. 25. All the words in that section point to works done for the purpose of forming banks and protecting the drains. The herbage is let to be grazed with sheep only, at such yearly rent or rents as can be reasonably had for the same. The object evidently was to obtain from the letting of the banks a certain profit. The money so derived was directed by the following section (a) to be applied in reduction of the rates. Now clearly that was the extent of the right which the trustees could let to the appellant in this case. No doubt if the spot where these sheep were straying was a portion of the road going through open and uninclosed ground, then the exception in sect. 25 would apply. Now, when reading the words "uninclosed ground," we must look also at the preceding words, viz., "common or waste," and then it is obvious that by "uninclosed ground" is meant ground of the nature or character of waste, and, of course, the question as to what is such uninclosed ground must be very much one of degree. The extent of the ground must be ascertained. As to that matter I have now satisfied myself, although I thought at first that it might be better to remit the case for a further finding. But I think there is a very high probability that the point was not taken by the defendant before the magistrate, because it could not be made out in fact, and the appellant can raise the question hereafter if the facts should be changed. I think we should confine ourselves to answering the question put to us by the justices, as to whether they were right in convicting. In my opinion they were.

Conviction affirmed.

Attorneys for the appellant, *Wright, Bonner,* and *Wright,* agents for *Bonner* and *Calthrop,* Spalding.

Attorneys for the defendant, *Routh* and *Stacey,* agents for *Maples* and *Son,* Spalding.

June 1 and 10, 1871.

ROBERTS v. THE MAYOR, ALDERMEN, AND BURGESSES OF SHEFFIELD.

Town council—Borough fund—Unlawful application of—Order for payment of costs of legal proceedings—Certiorari.

By sect. 92 of the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), the income of the town council is to be paid into the borough fund, which income is to be applied in payment of various salaries, and the expenses, &c., of borough elections, the prosecution, &c., of offenders, the maintenance of corporate buildings, "and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act;" and the section proceeds to provide that "in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough." In the event of the borough fund not being sufficient for the above purposes, the town council are authorised to levy a borough rate in the nature of a county rate.

In the borough of Sheffield, a water company was established under an Act of Parliament for supplying the town with water, and it was provided

(a) Sect. 26.

that upon a requisition from the town council, such company should afford a constant supply. The town council having made such requisition, the company applied to two justices (as provided for by their Act), for their sanction to certain rules and regulations applicable to such constant supply. The town council believing that these rules and regulations would operate injuriously upon the inhabitants of the borough, they opposed their being sanctioned by the justices with success, and in doing so, incurred a large amount of costs. These costs they ordered should be paid out of the borough fund. The water company then promoted a Bill in Parliament to relieve themselves of the obligation to afford a constant supply of water. The town council opposed this Bill, and it was withdrawn. In this opposition, the town council again incurred a large amount of costs, which they also ordered to be paid out of the borough fund. The town council had no other funds but those they derived from rates:

Held, that as there was no surplus, these costs could not be lawfully paid out of the borough fund, they not coming within any of the instances of expenditure mentioned in the said 92nd section.

Semble, that where an application for a certiorari is not made under the provisions of the 13 Geo. 2, c. 18, s. 5, the parties applying are not limited to six months, but may apply at any more lengthened period, as the court under the circumstances may think reasonable.

THIS was a rule calling upon the mayor, aldermen, and burgesses of the borough of Sheffield to show cause why two orders for the payment of the sums of 1000*l.* and 1526*l.* respectively, made by the town council of Sheffield, to be paid out of the borough fund, should not be removed into this court by *certiorari*, with the view to their being quashed for illegality. It appeared that in Sheffield there is a water company, established under an Act of Parliament, for the purpose of supplying the town with water, and under its provisions the company are bound, upon a requisition from the town council, to provide a constant supply, and bye-laws for regulating such supply are to be made with the sanction of two justices. Such requisition having been received, the company applied to two justices for their sanction to a code of bye-laws and regulations. The town council conceiving many of these bye-laws to be oppressive upon the inhabitants, opposed their being sanctioned by the justices. Each party appeared by several counsel, and many of the intended bye-laws and regulations were disallowed, and several were modified. The inquiry lasted for thirteen days, and the town council incurred costs amounting to the sum of 1526*l.* The water company then promoted a Bill in Parliament, the principal object of which was to relieve themselves of the obligation to give a constant supply of water.

The town council opposed this Bill, and it was withdrawn by the water company. In this opposition the town council incurred costs amounting to the sum of 1000*l.* The town council subsequently made two orders for the payment, out of the borough fund, of these costs respectively, one order being made on the 9th March 1870, and the other order on the 8th June in the same year. The present rule was moved for on the 30th Jan. 1861.

By sect. 92 of the 5 & 6 Will. 4, c. 76 (The Municipal Corporation Act), it is enacted—

That after the election of treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the schedules A and B, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (the application of which has not already been provided for) shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called "The Borough Fund," and such fund, subject to the payment of any lawful debt due from such corporate body . . . shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate, and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint, and also towards the payment of the expenses incurred from time to time in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and in boroughs which a separate court of sessions of the peace as hereinafter provided towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough by the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act, and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough. . . . and in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorised and required from time to time to estimate as correctly as may be what amount in addition to such fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this Act; and, in order to raise the amount so estimated, the said council is hereby authorised and required from time to time to order a borough rate, in the nature of a county rate, to be made within their borough, &c.

The town council have no borough property, and the expenses incurred under the Act are wholly defrayed by a borough rate.

Manisty, Q. C., *Lloyd*, Q. C., *Shield*, and *Barker*, now appeared to show cause, and took a preliminary objection that the application for the writ had not been made within six months of the order being made. [LUSH, J.—This application is not made within the operation of the 13 Geo. 2, c. 18, s. 5, limiting it to within six months, that Act applying only to convictions, judgments, orders, and other proceedings before justices of the peace.] That is so; but by analogy, the practice of this court should be the same in other cases of applications for the writ of *certiorari*. [*Pollock*, Q. C.—There has been a long correspondence upon the subject, and the town council were always aware of this objection. BLACKBURN, J.—Is there any rule of practice in this court upon the subject?] There is none; but it is exceedingly inconvenient to have a rule of this sort after a very long time has elapsed, and the money under the order has been paid.

COCKBURN, C. J.—As there is no fixed rule of practice upon the subject, we must be guided by the particular circumstances of the case, and the rule had better be argued upon the merits.

Pollock, Q. C., *Quain*, Q. C., and *Kemplay* appeared in support of the rule.

The following cases were cited:

The Attorney-General v. *Wigan*, Cave's Rep. [illegible]; 5 De G. M. & G. [illegible];

Reg. v. *The Corporation of Tamworth*, 19 L. T. Rep. N. S. 403;

The Attorney-General v. *The Corporation of Norwich*, 2 M. & C. 406;
Reg. v. *Prest*, 20 L. J. 17, Q. B.;
Reg. v. *The Highway Board of Kingsbridge*, 18 L. T. Rep. N. S. 554;
Reg. v. *Thompson*, 5 Q. B. 477.

The facts and arguments are so very fully referred to in the judgments of the learned judges, that is unnecessary here further to refer to them.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. The question turns entirely upon the effect of the 92nd section of the Municipal Corporation Act. It appears that the expenditure in the present instance to meet which the orders in question were made was of a two-fold character, partly for going to Parliament to oppose a bill of the water company, and partly in respect of expenses incurred in opposing certain rules and regulations, in regard to which the water company —in point of fact, the parties now applying to this court—sought to obtain the approval of two of the local magistrates with the view of regulating the constant supply of water which they were bound to give to the town. With regard to the expenses incurred by the corporation in going to Parliament to oppose the Water Company's Bill, I think it is abundantly clear that it is an expenditure not provided for by the language of the section of the Act of Parliament to which I have referred. It was I think altogether beyond the scope of the Municipal Corporation Act or of anything to be done under that Act for the benefit of the borough, and, therefore, there being no surplus fund which could be made use of by the corporation, the borough fund could not be applied to suit such a purpose. The language of the Act of Parliament is this: certain payments are specified, such as the prosecution, maintenance, and punishment of offenders, the payment of constables, and so on, "and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough." Up to that point, in dealing with the borough fund, independently of any surplus which the corporation might have from its property, they were dealing with matters necessarily incurred in carrying into effect the provisions of the Act. But in going to Parliament to oppose an Act of Parliament, it appears to me that the expenditure could not be said to be anything necessarily incurred in carrying the Act into execution. Then we come to the expenses incurred in the opposition to the water company's rules and regulations. It appears that the water company, according to the Act of Parliament by which they were established, were under an obligation to furnish what was called a "constant supply," the meaning of which term was well understood as distinct from the supply under a different form—upon a requisition by the corporation to substitute this constant supply for the supply which up to that time had been given. In order to carry this constant supply into effect, or the works necessary for its execution, the company applied, as they were entitled to do, to have certain rules and regulations to assist them in affording such constant supply, sanctioned *by two justices. The* question upon this point is, *what powers had the* corporation for coming forward to oppose the rules and regulations, which would entitle them to have their expenses, thereby occasioned, paid out of the borough fund? Looking at the rules and regulations as they are now before the court; looking also at the objections taken by the corporation against them, and to the result in the shape of actual disallowance of some of the proposed regulations, and the important modifications which were introduced into others, it seems to me that the opposition of the corporation was a meritorious one, and one in the real interests of the inhabitants of the borough. It appears that the mode in which the company, by their proposed rules and regulations, desired to give effect to their obligation to afford a constant supply, would have been attended with considerable expense to the inhabitants—with so much expense, indeed, as would frustrate to a considerable extent the very purpose of the obligation to furnish a constant supply. Therefore, in deciding that the rule must be made absolute, and consequently that the expenses incurred in opposing the rules and regulations were not chargeable to the borough fund, it must not be taken that the court intend to blame the corporation for the part they have taken in the opposition. The whole question is: can the 92nd section be got over so as to render applicable the borough fund to such an expenditure as this? I have already referred to the words of the section, from which it is plain that it is only in case of a surplus that such a matter as this can possibly come within the powers of the corporation. The borough fund is applicable to certain purposes mentioned in the Act, and then comes this provision: "And in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants, and the improvement of the borough." But in the present instance there was no surplus, and consequently the corporation could not have the benefit of that provision. Assuming, therefore, for the present purpose, that it was for the public benefit that the water company should be compelled to furnish them with a constant supply, which constant supply they were under an obligation to furnish, and that the rules and regulations would have destroyed, or at all events very materially limited, the advantage to the inhabitants—granted all this, if there had been a surplus, the expenses of the corporation's opposition would have come within that part of the section which I have just quoted; but there being no surplus, of course the corporation could not make an order for payment of those expenses out of the borough fund. The case of *The Attorney General* v. *The Corporation of Wigan*, is one somewhat in point. The corporation of that town had applied a portion of the borough fund to a purpose, which at first appeared not to be within the scope of the section, and an injunction was asked for to restrain them from so applying the fund. It was held, however, by the present Lord Chancellor, then a Vice-Chancellor, not to be a matter for an injunction. Upon looking at the judgment in that case, I find that the ground upon which the Vice-Chancellor refused to grant the injunction was, that inasmuch as the expenditure was for the prevention of what would be a nuisance, or would have led to the creation of a nuisance, that as the corporation had within its powers of local government the duty of preventing

nuisances, what they did came within the scope of those powers, and was therefore a thing done in furtherance of the good government of the town, and in the execution of the powers of the Act. Without making any further observations upon that case, it is enough for me to say that it was decided upon a ground very different from that which exists in the present one. There is nothing in the Municipal Corporation Act which makes it incumbent upon a corporation to interfere in the matter of a supply of water. It, therefore, cannot be said that what the corporation did in opposing the rules and regulations of the water company was anything done within the scope of the Act, or in the execution of the powers of the Act. The words of the statute are too strong to be got over. What the corporation have done was not a matter of government in the sense of the execution of the provisions of the Act; it was not a carrying out of any of the powers vested by the Act in the municipal corporation as a corporate body. Therefore, however much I may regret the conclusion to which the court has come, believing as I do that the corporation were actuated by a laudable desire to protect the true interests of the borough, I cannot strain the words of the Act of Parliament and consider that what the town council has done comes within the term, "carrying into effect the provisions of the Act." The rule must, therefore, be made absolute.

BLACKBURN, J.—I am of the same opinion. One point which we must consider is this: Orders for the payment of money have been made and acted upon by the treasurer, and the charges paid, and it was argued that the court cannot quash the orders after they have been acted upon. But it distinctly appears as to both of the orders, that the one was acted upon before it was drawn up, and that the other was acted upon with the perfect knowledge that it was objected to. It would be baffling the intention of the Legislature if an order made by the town council was not to be reviewed after it had been acted upon. That seemed to have been the argument in the case of *Reg.* v. *Thompson*, and if the court wanted an authority, that case supplies it, for Lord Denman held that although the order had been acted upon it must be quashed. In saying this I desire to guard against being thought to say that if an order has been *bonâ fide* acted upon, and without the least knowledge of its being disputed, it may not be a very proper and important thing for the court to consider whether they would grant a rule to quash it if brought before them. In the present case, we cannot say that this is so. The real question comes to this, were the orders made for a lawful purpose? Had the corporation of Sheffield the power to do what they have done, and to charge the expenses to the borough fund? The town council it seems have no estate or surplus fund, but its funds are produced alone by rates. The question therefore is, can they lawfully charge the expenses they have incurred upon that particular fund? The terms of the Municipal Act are really what we must look to and understand. We must remember why the Act was passed. Before it became law, municipal corporations which were the owners of estates might spend them without control, and great waste and jobbery were the result. One of the chief objects of the Act was to restrain town councils from so doing, and accordingly in the 92nd section it was specially enacted that all corporate property should be brought within the borough fund. The statute then enacts how the money is to be applied. It is first to be applied to the payment of debts which had been contracted before the passing of the Act, then to the payment of the salaries of the borough officials, the cost of prosecutions, the maintenance of the borough gaol, and the payment of constables; and the statute goes on to say, "and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough." Then, if the borough fund was not sufficient, there is to be a borough rate in the nature of a county rate to supply the deficiency. In Sheffield a borough rate was required, inasmuch as there was no surplus to defray the deficiency; and then came the question—could the purposes for which these two orders had been made be said to be "expenses not herein otherwise provided for and necessarily incurred in carrying into effect the provisions of this Act?" To answer that question it was necessary to see what those purposes were. This much is clear: there was a water company in Sheffield which supplied a large portion of the town—not the whole of it—with water. That company, under various Acts of Parliament, had come into this position: that they were bound, at the request of the Town Council, to give a constant supply; and they had obtained a power in one of their Acts by which they were entitled to make reasonable rules and regulations. That was a power very commonly given to water companies, and obviously it was a very reasonable power. In the same Act a stipulation was made to the effect that the regulations were not to come into force until they were approved of by two of the borough justices. That being the state of things, the company wished to pass certain rules and regulations, and for that purpose they went before the justices to have them approved. The town council opposed the regulations. Whether or not the opposition of the town council was conducted so as to be extravagant, I say nothing. But putting it simply that the town council thought that the regulations were such as would be oppressive to the inhabitants, I feel that it is quite impossible to say that they were making an impertinent—in the legal sense of the word—intrusion, or that they were doing a thing which they ought to have nothing whatever to do with. It appears to me that they might very reasonably say, "this is a matter in which the inhabitants of the town are concerned." Then comes the question—could they for the purpose of opposing the regulations, do so upon the credit of the borough rate? That is one point. The second point arises out of the Bill promoted by the water company. It seems that whilst the corporation were opposing the regulations, the water company, fearing that the justices might refuse the regulations altogether, promoted a Bill, in which they proposed to have powers to make certain regulations, and also proposed to do certain other things which would have an effect upon the inhabitants of the town. Therefore I would again say that in what the town council had done they could not be looked upon as interlopers and meddlers. But in opposing the Bill, could they

place their expenses to the credit of the borough fund? The council it seemed proposed to promote a Bill of their own, but an injunction was obtained against them, and they never attempted to charge any portion of their expenses under that head to the borough fund. Can we say that these two matters—the opposition to the Bill, and the opposition to the rules and regulations—which very much concerned the interest of the inhabitants, and in which I do not think that the corporation can at all be considered as meddlers—can we say that they were matters coming within the terms of the 92nd section of the Municipal Corporation Act? In other words, that they were "expenses necessarily incurred in carrying into effect the provisions of the Act?" Undoubtedly there are some things not distinctly specified in the Act that are such. The court has more than once decided that if a municipal corporation are the owners of property, and someone attempts to take it away, the expenses incurred by them in litigation in defending their property would become expenses necessarily incurred in the carrying out of the object of the Act. But in the present case there is no pretence for saying that the corporation incurred the expenses to which the two orders relate in protecting and defending their property. It is true that it was alleged that they were the owners of house property, to which the company's water was supplied, and that consequently, in carrying on the opposition, they were protecting their own property, but that wholly failed. In fact it was perfectly obvious that the council acted as they did, on the ground that they were protecting the interests of a large portion of the inhabitants, and that it was within the scope of the Municipal Corporation Act. I have looked into the Act to see if I can find anything which will enable the corporation to do as they have done, but I have been unable to find anything which will justify them. There are several cases in equity which have some reference to the present one, as, for instance, *The Attorney-General* v. *Norwich*, but they were cases where there was a surplus. The only authority in favour of a borough fund being trenched upon is the opinion of the present Lord Chancellor when he was Vice-Chancellor in the case of *The Attorney-General* v. *Wigan*. The corporation of that town had become liable to a considerable sum for the expenses of opposing a Bill by which the corporation of Liverpool endeavoured to take away a river which flowed through Wigan, and which was in the nature of a common sewer. What was done by the Vice-Chancellor and the Lords Justices afterwards was to say that it was not so clear a case as would justify them in granting an injunction, so that what they did was in no way an authority binding upon us; in fact, what the Lords Justices said could not be taken as an opinion one way or the other. I cannot, therefore, but come to the conclusion that, though it might be a legitimate purpose for which the Town Council lent their names and the prestige of their authority—and they would have been right in spending any other money or moneys subscribed for that particular purpose—they could not pledge the credit of the borough rate. That is the question before the court, and, taking that view of it, I think the rule ought to be made absolute.

MELLOR, J.—I have come to the same conclusion. *When the facts of the case are clearly understood the question lies in a very narrow compass.* It is whether or not the opposition to a Bill in Parliament, and the opposition to certain regulations, are matters which could be charged to the borough fund? I think that the words of the section upon which the question turns contemplate two different things. When a borough rate must necessarily be made in order to pay the expenses of a borough, the payments must be limited to kindred expenses to those which are specifically named; and for fear that some such kindred expenses should be omitted, the Legislature added the words, "and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." It appears to me that these words must have a limit, and I think they are limited by the character of the words which precede them, and which show what were the objects which were necessary to be dealt with in carrying into effect the provisions of the Act. I quite concur that where there is a surplus it is necessary to make some appropriation of it, and where that exists it is to be appropriated under the direction of the council, "for the public benefit of the inhabitants and improvement of the borough." Whether that was limited to the public benefit of the inhabitants, in the sense in which a recreation ground or some object of that sort, or matters which went strictly to the improvement of the borough, it is not necessary now to decide, because, in the present case there is no surplus, and I am not required to give a construction to words until a case shall arise. *Primâ facie* it does not appear to me that under that section these expenses could well have been paid; but as there was no surplus we are confined to the words of the section. I think that we are not warranted in saying that these expenses were properly chargeable to a borough rate. I am far from saying that the interference of the council was an officious interference. On the contrary, in all probability, and certainly with regard to some of the opposition, it was properly done—morally properly, I mean; but at the same time it does not come within the section, and therefore the court cannot say that the orders for the payment of the money were properly made. Under these circumstances, the rule must be made absolute.

LUSH, J.—I am of the same opinion, and I concur in the regret expressed by my Lord in being constrained to come to the conclusion that the two orders cannot be maintained. If the Sheffield corporation had been possessed of a surplus sufficient to bear that outlay—a surplus arising from property which might belong to them, or from fines and penalties, or other sources of income apart from the borough rate—I should rule that the way in which they had spent the money was a proper application of it as being for the public benefit of the inhabitants and improvement of the borough. I cannot help thinking that the corporation have acted with perfect *bonâ fides* in opposing the water company's bill, and also in opposing the rules of the water company, having a genuine belief that they were thus acting for the benefit of the inhabitants; and the result showed that they were so acting. Therefore, if they had any funds properly applicable to such a purpose, I should hold that it was a very proper application of them. But I have no doubt at all in a case like this, where a corporation has no property, and no surplus, and where they have to make a borough rate in order to levy funds necessary to carry into

effect the provisions of the Act, that they could not incur such expenses. The items of expenses which a corporation is justified in incurring, have been already sufficiently referred to, and I need not, therefore, go into a list of them. The section uses the words "and all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." Whatever the expenses might be, they must correspond to the general purposes of the Act, namely, maintaining the good rule and government of the borough. That is what a corporation are justified in incurring expenses for, and of paying them out of the borough rate; but, in the event of there being no surplus, they are not justified in incurring expenses upon what may be considered to be for the public benefit and improvement of the borough. With reference to the case of the *Corporation of Wigan*, it appears to me there is a material distinction between that and the case now before the court. A corporation could expend the borough rate not only in maintaining the good rule and government of their borough, but for the suppression and prevention of all nuisances; and it was upon the clause giving them that power that the present Lord Chancellor has based his decision. The duty of preventing nuisances is imposed upon corporations specifically, and the corporation of Wigan were therefore justified in incurring expenses in putting down what the Lord Chancellor said would be a gigantic nuisance. That case, however, was very different from the present. Nothing could justify the outlay that has been incurred in the absence of a surplus fund; but if the corporation had possesssd a surplus, the money would have been properly applied for the general benefit of the inhabitants and improvement of the borough. Under these circum- I think that both orders are bad.

Rule absolute.

Attorneys: *Blakelock Smith; Yeomans.*

V. C. WICKENS' COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Friday, April 21, 1871.

Re DODD'S ESTATE;

Re THE LANDS CLAUSES CONSOLIDATION ACT 1845; *Re* THE HOLBORN VALLEY IMPROVEMENT ACT 1864.

Lands Clauses Consolidation Act 1845, *s.* 80—*Land taken by a company—Purchase money paid into court—Reinvestment—Costs.*

Land which was devised to trustees upon certain trusts, was taken by a company under their compulsory powers, and the purchase money paid into court and invested in consols. Upon an application by the trustees for permission to reinvest the money in the purchase of property to be settled upon the trusts of the will:

Held, that the company must pay the costs of such reinvestment.

THIS was a petition for the reinvestment of certain purchase money which had been paid into court by the Corporation of London under the following circumstances.

By the will of a testator in a partition suit a freehold messuage situated in Snow-hill, in the City of London, was vested in trustees in trust for Samuel Pedley Dodd, then an infant, subject to an annual rentcharge of 150*l.* in favour of Jane Dodds, also an infant, and her children in remainder. The Corporation of London, in the course of their construction of the Holborn Viaduct, had, under their compulsory powers, taken this messuage and paid the purchase money (3700*l.*) into court, which money had afterwards been invested in a sum of 3951*l.* 18*s.* 9*d.* Reduced Annuities. In March 1870, Samuel Pedley Dodds became absolutely entitled to the purchase money, subject to the charge in favour of Jane Dodds, and in the following year he entered into a contract for the purchase of a house and premises in Norfolk for 1100*l.*

The trustees under the will accordingly presented this petition, praying that the purchase might be approved as a proper investment; that a conveyance of the property in fee, subject to the annuity of 150*l.*, might be made to S. P. Dodds; that the 1100*l.* might be raised out of the 3951*l.* 18*s.* 9*d.* Reduced Annuities; that the dividends accruing due on the residue might be paid to S. P. Dodds, and that the costs of and consequent upon the petition, including all costs, charges, and expenses of the reinvestment of the purchase money might be borne by the corporation, under the 80th section of the Lands Clauses Consolidation Act 1845.

Druce appeared in support of the petition. He cited *Re De Beauvoir*, 2 De G. F. & J. 5; *Re Pick's Settlement* 31 L. J., N. S., 495, Ch.

Alexander Miller, for the corporation, submitted that the question of reinvestment was an optional one. The court had power to order part of the fund to be applied towards purchasing an annuity, and the balance to be paid to the person absolutely entitled. If this course were adopted, the corporation would not have to pay the costs of the reinvestment.

The VICE-CHANCELLOR.—I have no doubt that the petitioners are entitled to an order for the reinvestment of the purchase money. I have no jurisdiction to apply part of the fund in the purchase of an annuity, and then to pay the residue to the person absolutely entitled; but even if I had, the Act gives an option of reinvestment to someone—either to the court, or the persons beneficially entitled. If the option is in the court, I can exercise it in favour of the petitioners; and if it is in the persons beneficially interested, the petitioners are entitled to the order asked. There will therefore be an order for reinvestment according to the prayer of the petition, with costs to be paid by the corporation.

Solicitor for the petitioners, *Pedley.*

Solicitor for the respondents, *Nelson.*

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-law.

Wednesday, June 7, 1871.

TURNBULL (app.) *v.* WELLAND (resp.)

School board election—Corrupt practices—Treating —33 & 34 Vict. c. 75.

An election for a school board was about to take place, and the appellant and a friend attended at a public-house in the district, and there met several inhabitants, many of whom were voters. His friend, after discussing various local matters, suggested the appellant as a fit and proper person to be elected to the school board. The appellant then addressed those present upon the subject of a school board and of his candidature. He was then proposed by one of those

present as a fit and proper person to be elected, and his health and success were drunk. Glasses round for those present were then ordered by four different persons in succession, the appellant having given and paid for one of such orders. The appellant was afterwards a candidate, and went to the poll. An information having been laid against him under sect. 91 of 33 & 34 Vict. c. 75 (Elementary Schools Act 1870) for corrupt practices, and being convicted thereof by the justices:

Held, that the conviction was correct.

AT a petty sessions holden at the police court, in the borough of Tynemouth, on the 6th Feb. 1871, before Geo. Bell and Edward Shotten, Esqrs., two of Her Majesty's Justices of the Peace, an information preferred by James Barker Wheldon (hereinafter called the respondent), against Ralph Turnbull (hereinafter called the appellant), charging him for that he the said appellant on the 10th Jan. 1871, at the township of Cullercoats, in the said borough of Tynemouth, at an election for members of the school board for the said borough, was unlawfully guilty of certain corrupt practices, contrary to the Elementary Education Act 1870, was heard and determined, and the appellant was duly convicted of the said offence, and was adjudged for the said offence to forfeit and pay the sum of 5*s.* to be paid and applied according to law, and also to pay to the said respondent, the sum of 1*l.* 11*s.* 6*d.* for his costs in that behalf, and if the said several sums should not be paid forthwith, was adjudged to be imprisoned in the house of correction at Morpeth, in the county of Northumberland, for the space of seven days, unless the said several sums should be sooner paid.

The appellant wishing to appeal, the following case was stated:

At the hearing of the said information, the respondent was supported by Mr. Duncan, his attorney, and the appellant by Mr. Meynell, barrister-at-law, instructed by Messrs. Finley, Adamson, and Adamson, his attorneys, when the following evidence was given by and on behalf of the respondent:

Robert Pearson:

I am a fisherman and pilot at Cullercoats. On the 10th Jan. 1871 I attended a meeting at Mrs. Bailey's, the Newcastle Arms, at Cullercoats. Defendant and Mr. Scott were there, and between twenty and thirty more. The meeting was about the school board. Mr. Scott first introduced the school board. He said Mr. Turnbull would be a fit and proper man for the place, and he would give Mr. Turnbull his undivided support. He also said that he and Mr. Turnbull had had many a contest, and he always found Mr. Turnbull a man of the right stamp, and he could assure them that they could not put a better man into the school board. I had not known Mr. Turnbull before that night, and Mr. Scott introduced him as a candidate for the school board. When Mr. Scott sat down Mr. Turnbull began to speak about the school board. He sat the first time, and the second time he stood up, and addressed the meeting about the school board and about reading and its benefits, and so on. He said that if they returned him he would do the best he could to keep down the rates and the expense of the new schools. I remained at the meeting about one hour or one hour and a half; when I left, it had been intimated to Mr. Turnbull and Mr. Scott that their cab was waiting. I left about a quarter to ten o'clock, I think. When I went in a Mr. Bailey invited me to have something to drink; I declined. The company were just about drinking their glasses off when I went in. Mr. Scott told them to hold up their hands for *the different kinds of drink they wanted, viz., rum, brandy, whisky, &c.*, so many for the rum, and the same *for whisky, &c.* The glasses were brought in, and Mr. Scott paid for the first round—6*s.* 6*d.* I think was the money. There was a second round ordered in the same way by Mr. Turnbull, and Mr. Turnbull paid for the second round. There was smoking going on also. I did not see any more rounds. Bailey asked me twice or thrice. Mr. Turnbull said to Lisle, "You can have rum or brandy, wine, lemonade, or what you please." This was as soon as I went in. When I left the room, the most of the people were drunk.

Cross-examined:

Lisle asked me to go in. Mr. Scott was talking when I went in about municipal matters and the school board wearing them in. Mr. Scott talked about ten minutes or a quarter of an hour, and during his speech he stated that he had been a candidate and had given up. It was then he said Mr. Turnbull was a fit and proper person. One-half in the room were voters, I think, ten or twelve at least. The non-voters drank also. Mr. Scott spoke a good deal about the fish quay and also the free library. I did not hear anything about a memorial. I have often been at meetings with Mr. Scott before upon municipal matters. William Robinson was there, he said Turnbull was a fit and proper man, and he proposed him, and nobody seconded. There was more drink after this. I was merely told there was a meeting. Mr. Scott used to give drink at all other municipal meetings. I have had drink there myself. Neither Mr. Turnbull or Mr. Scott asked for votes.

Re-examined:

Mr. Turnbull was never at those meetings. The company after Mr. Robinson proposed Mr. Turnbull, drank his health. Both Mr. Scott and Mr. Turnbull's healths were frequently proposed.

William Lisle:

I am a fisherman, and reside at Cullercoats. I am a burgess for the borough of Tynemouth. On the 10th Jan. 1871 I went to a meeting with the last witness at Mrs. Bailey's. It was either Scott or Turnbull's meeting. They were both present. The discussion was principally about local matters, the fish quay, roads, and about the school boards too. I did not know Mr. Turnbull before that night. When Mr. Scott was speaking about the school board, he said Mr Turnbull was the right man in the right place, and he would give him his undivided support. He also said Mr. Turnbull was a good financier, and advocated Mr. Turnbull's claims. There were between twenty and thirty people when I went in. Mr. Bailey, in Mr Turnbull's presence, asked me what I would take, a bottle of pop, or a glass of wine. Mr. Turnbull said I might have brandy if I liked. I declined. The company all had glasses before them, and were drinking. Those who wished rum held up their hands, and the order was taken. There were two rounds when I was present. Mr. Scott ordered and paid for the first round, and Mr. Turnbull ordered and paid for the second. Mr. Scott's came to something between 5*s.* and 6*s.*; and Mr. Turnbull's, 6*s.* 6*d*, I think. A glass was missed, and 3*d.* more was paid by Mr. Turnbull. He put it on the tray, which the waiting girl had in her hand. When I first went in Mr. Turnbull had just concluded speaking about the fish quay. Mr. Scott told them to drink off their ringtails and they would get their glasses replenished. This was the first round I saw. Mr. Scott then got up and addressed the meeting about municipal matters, &c., and about the school board. Mr Turnbull asked them the second time to drink off their glasses. I think he asked them to drink off; at any rate he paid for the glasses. Not one of the men paid for their own drink—smoking as well as drinking. Some of them were nearly drunk. One man beside me fell on the floor drunk. I don't think Mr. Turnbull was much better. Some were voters and some were not. Ten or a dozen were voters.

Cross-examined:

I did not vote for Mr. Turnbull; I was not asked to vote for him at the meeting; I did not hear anybody asked to vote for Mr. Turnbull; I never heard Mr. Scott say I am going to vote for Mr. Turnbull, you can do as you please. It was about a quarter past eight o'clock and I left a little before ten o'clock.

William Storey:

I am a fisherman at Cullercoats. On the 10th Jan. I

was at a meeting at Mr. Bailey's. Mr. Turnbull, I think was there, but I had no previous acquaintance with him. Mr Scott was with him; Mr. Scott said he had resigned as a candidate for the school board, through family affliction. Mr. Scott, I think, said he would give Mr. Turnbull his vote; I did not hear him say anything further about Mr. Turnbull; I think not; I think he said Mr. Turnbull would be a fit and proper person for the situation. Mr. Scott was nearly done when I went into the meeting; I was only there a short time, and those were about his last words. After Mr. Scott was done Mr. Turnbull addressed the meeting about the Fish-quay, and different municipal matters. He also mentioned the school board, and said he was a candidate for the board, and I don't know anything further. There might be about twenty-five people when I went into the meeting; they each had a glass of grog or ale, whatever they were drinking. I had two glasses of rum; I did not pay for them; Mr. Bailey gave me the first glass, the second, I think, I got from Mr Scott. I did not hear anything said about replenishing the glasses, the glasses were only replenished once, and I think by Mr. Scott. The company held up their hands for the different kinds of spirits they wanted; I don't know who asked the company to hold up their hands. I was there about half an hour or over. There was a Francis Storey there. I am not a voter; I think there would be seven voters, I recollect about seven.

Cross-examined:

I heard nobody asked for their votes. I have been at meetings when Mr. Scott was there. He has had a few, and always talked about municipal matters, and gave an account of how he had voted. Generally about the same number of people, and he sometimes gave them glasses round, voters and non-voters. I have had glasses from Mr Scott at those meetings. There were none drunk when I left.

Re-examined:

I used to be a voter about a year and a half ago.

In addition to this evidence Mr. Meynell admitted the proof of all the necessary notices and documents, &c., relating to the formation of the Tynemouth School Board and the election of members thereof, and that the appellant was a candidate at such election which took place on the 16th Jan. 1871, and also on behalf of the appellant, admitted that the appellant had ordered and paid for one round of drink at the public house at Cullercoats, but with no guilty intention of influencing his election, and contended that there was no corrupt practice within the meaning of the Act of Parliament and in support of the defence adduced the following evidence:

James Bailey:

I am overseer of the poor at Cullercoats; on the 10th Jan. I went to the Newcastle Arms, Cullercoats; Mr. Turnbull and Mr. Scott were there; they were talking about ordinary matters. I said to Mr. Scott and Mr. Turnbull, "Go to Mr. Featherstone's meeting;" Mr. Scott said, "That is not what I have come about." He said he wanted to see the fishermen about the fish quay question; some fishermen were sent for; Mr. Turnbull was with him at the time. I have several times seen Mr. Scott and Mr. Turnbull there; several meetings had been held. They often came together; Mr. Turnbull was at one time a guardian for Cullercoats; Mr Scott addressed the company about the fish quay and the free library. A gentleman got up and asked Mr. Scott if he intended to continue to be a candidate for the school board. The school board had not been mentioned before, and I had been there for a hour and a-half. Mr. Scott said he had retired from the candidature owing to family affliction, and any gentleman was left to vote for whom he chosed. He said Mr. Turnbull was a candidate, and he meant to vote for him, and all the electors were at liberty to vote as they liked. Before this, Mr. Turnbull had addressed the company about the fish quay and free library. Mr. Turnbull never said anything about the school board before Mr. Scott was asked the question. A memorial was mentioned about the fish quay; *I think Mr. Scott mentioned this;* Mr. Turnbull got up and addressed the company, and told them what he had done, and it was best to put the best man in the right place; I did not vote. Mr. Turnbull did not in my hearing ask anyone to vote for him, neither did Mr. Scott. I paid the second time round, and I think the last, which I believe is standing to my account. I cannot say whether Mr. Scott or Mr. Turnbull paid anything.

Cross-examined:

My sister-in-law keeps this house. There were four or six in the room when I went in; they had glasses before them; I cannot say whether I paid for the second round; I don't know who ordered the third round; I cannot say who paid for it; from half to three-quarters of an hour might elapse; I would order the fourth round. I was there when the meeting broke up. I was not there when Mr. Turnbull ordered the glasses. I won't say that I did not get a glass at Mr. Turnbull's expense. I remember the second round Mr. Turnbull placed some money on the table to pay for the glasses; that was the second round. I told Mr. Turnbull, "It is not often you come, and I'll pay for them," and did so. Mr. Turnbull took his money back again. I did not see Mr. Turnbull pay for anything. It is about three years since Mr. Turnbull was a guardian. Mr. Turnbull almost regularly came with Mr. Scott. I did not know of the meeting that night. I know two persons of the names of Bolan and Forster at Cullercoats. I did not meet those gentlemen and tell them that Turnbull and Scott were coming out to Cullercoats that night. I cannot remember whether I saw Mr. Bolan that night at Cullercoats. I might have said to Mr Bolan and Forster that I expected Scott and Turnbull coming that night. I don't recollect I got a sort of an inkling that they were coming out. I got a notice that day that they were coming out. It was from half-past seven to eight o'clock. I went to the meeting; I left about ten o'clock; there were four rounds. There was a cab for Mr. Scott and Mr. Turnbull; they came and returned in one.

Re-examined:

After the fishermen came in, and Mr. Featherstone's meeting was broken up, there might be twenty to twenty-five. There might also be four or five voters in the room. I got no notice of any meeting by Mr. Scott.

William Bell:

I am a joiner at Cullercoats. On the 10th Jan. I was at the Newcastle Arms, at Cullercoats. I went about a quarter past seven, and Mr. Crosby came in afterwards. Mr. Scott and Mr. Turnbull were there. Seven when I first went in, and then about ten. Mr. Scott was speaking about the fish quay when I went in, the free library, roads, rating. Mr. Scott was asked by a party in the room if he had retired from the school board on account of a family affliction. The school board election was not mentioned before this. Mr. Scott said Mr. Turnbull was a candidate. I had a glass of ale first, which I paid for. Mr. Scott gave me a glass of whisky. Mr. Turnbull ordered a glass of whisky for me, which was not then paid for by him. I am not a voter. I did not hear anybody asked to vote for Mr. Turnbull. I did not see Mr. Turnbull pay for anything.

Cross-examined:

Mr. Turnbull asked the company what they would partake of—whisky, gin, and rum. The amount, I think, was 5s. 9d. The room was pretty full, but not crammed. I was there from a quarter past seven till eleven o'clock. When Mr. Scott was asked about the school board, Mr. Turnbull addressed them upon the topic of the school board. He spoke about twenty minutes. I got three glasses of whisky, two at Mr. Scott's and one at Mr. Bailey's expense. Mr. Turnbull said on the third round, "Drink off your ringtails. Mr. Scott has mentioned ringtails. Have my ringtails, too." A drunken man came in and was refused drink.

Re-examined:

The twenty minutes was the whole length of his speech.

Francis Crosby:

I am a bellhanger at Newcastle and Cullercoats. On the 10th Jan. 1871 I went to the Newcastle Arms, at half-past seven o'clock. Mr. Scott, Mr. Bailey, Mr. Turnbull, and three other men were there. Mr. Scott was speaking about the fish quay and municipal matters.

After some time, about two hours, Mr. Scott was asked if he had retired, or if it was his intention to retire from his candidature for the school board. He said yes, and gave his reasons. He said nothing about Mr. Turnbull that I heard. The school board was not mentioned by Mr. Scott or Mr. Turnbull. I did not hear Mr. Scott say how he was going to vote. I did not hear Mr. Turnbull canvas for voters. I had a glass of beer, which I paid for, and I had three glasses of rum the whole night. Mr. Scott paid for the first and second, and James Bailey for the third. I did not see Mr. Turnbull pay for any.

Re-examined:

It was half-past seven when I went. I left after ten. I am in the habit of going to this house. I had not seen Mr. Turnbull before. I have been at Cullercoats since last May. I went, as usual, of my own accord. Other parties came in after me; about twenty-two or twenty-three would be the largest number present that night. The room was full. The glasses were replenished by order. Mr. Turnbull asked the company to drink off the ringtails for the purpose of having the glasses replenished. I was there for two hours before the school board was mentioned. I don't remember Mr. Scott mentioning Mr. Turnbull's name. Mr. Turnbull did address the company upon the subject of the school board at the latter part of the meeting. Mr. Turnbull was proposed as a fit and proper person to sit at the school board, and his health and success were drunk. Mr. Scott said nothing whatever how he should vote.

Re-examined:

It was Robinson, the tailor, who proposed Mr. Turnbull as a fit and proper person, and it was ten minutes before we left. I did not see any drunken people.

William Robinson:

I am a tailor, and a voter at Cullercoats. I gave Mr. Turnbull four votes. On the 10th Jan. I was at the Newcastle Arms, I went into the room, Mr. Scott and Mr. Turnbull were there. Mr Bailey came in. I was drinking my own ale. Mr. Bailey and Mr. Scott told me to go out and get some fishermen to see Mr. Scott. Some men came in and Mr. Scott addressed them about the fish-quay, &c. I asked Mr. Scott if he had retired from the school board. He said "Yes." Nothing was said about the school board until I asked the question. I was there about two hours, out and in. I did not hear anybody asked for their votes for Mr. Turnbull. There might be five or six voters. When I came back a glass of whisky was standing on the table. Mr. Bailey gave me another. I did not see Mr. Turnbull pay for any whisky.

Cross-examined:

Mr. Scott and Mr. Turnbull were the only two in the room when I went in. I did not hear anything said about ringtails.

By the Bench:

It was well on the evening when Mr. Scott was asked the question. I think it would be about nine o'clock.

After hearing the case we were of opinion that the case did come within the meaning of the Act of Parliament, and we therefore convicted the appellant as before stated.

Whereupon the opinion of the Court of Queen's Bench is asked whether or not we, the said justices, were correct in point of law in our determination as aforesaid upon the circumstances disclosed in the foregoing case.

Given under our hands this 31st March, 1871, at the police court in the said borough of Tynemouth.

GEORGE BELL.
EDW. SHOTTEN.

By the 91st section of the 33 & 34 Vict. c. 75 (The Elementary Schools Act 1870), it is enacted that "any person who at the election of any member of a school board, or any officer appointed for the purpose of such election, is guilty of corrupt practices, shall, on conviction for each offence, be *liable to a penalty* not exceeding 2*l.*, and be *disqualified for the term* of six years after such election, *from exercising* any franchise at any election under this Act, or at any municipal or parliamentary election. The term corrupt practices in this section includes all bribery, treating, and undue influence, which, under any Act relating to a parliamentary election, renders such election void."(*a*)

Quain, Q.C. (*Herschell* with him) appeared for the appellant.—This statute must be construed very strictly, for the penalty is most severe, the party not only being liable to a fine, but to a disability from exercising any municipal or Parliamentary franchise for six years. [COCKBURN, C. J.—The object of the Legislature was to produce the desired effect through the medium of a severe penalty.] The evidence does not show the existence of any corrupt motive, only one of the voters voted for him. This was nothing more than a mere jollification. [COCKBURN, C. J.—The sooner they are put an end to on such occasions the better.] The object must be a corrupt one. The occasion should be looked to. Here there was a proposition for glasses round, and Mr. Turnbull only took his turn. [MELLOR, J.—His success was proposed.] But that was not the object of the meeting. The having a glass with a voter is certainly not treating. [COCKBURN, C. J.—If that was done to influence the voters, it was corruptly done.] There was evidently no intention to influence the voters; it was a mere act of jollity, each party paid for the glasses round in turn. We must look at the common usages of society in such a matter. [MELLOR, J.—The people were strangers to him. COCKBURN, C. J.—The man who treats others in a public house is no doubt deemed by them to be the right man in the right place.] But there was nothing corrupt about it.

Holker, Q. C. (*Edge* with him) for the respondent, was not called upon.

COCKBURN, C. J.—It is not in accordance with the usages of society for a gentleman in the position of Mr. Turnbull to go into a public house and treat others in this way. I think that the justices were quite right in the conclusion to which they came.

MELLOR, J.—I am of the same opinion. There was evidence certainly upon which the justices could act. Mr. Turnbull was proposed as a candidate for the school board, and his health was drunk.

LUSH, J.—If this had arisen before me upon a Parliamentary petition, I should certainly have had no doubt, and I agree that the Act should be strictly carried out.

Judgment for the respondent.

Attorneys for the appellant, *Finley, Adamson* and *Adamson*, North Shields.

Attorneys for the respondent, *Duncan* and *Duncan*, South Shields.

(*a*) By the 17 and 18 Vict. c. 102, s. 4, it is enacted as to treating, that "Every candidate at an election who shall corruptly by himself, or by or with any person, or by any other ways or means on his behalf, at any time, either before, during, or after any election, directly or indirectly, give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision, to or for any person in order to be elected, or for being elected, or for the purpose of corruptly influencing such person, or any other person, to give or refrain from giving his vote at such election, or on account of such person having voted, or refrained from voting, or being about to vote, or refrain from voting at such election, shall be deemed guilty of the offence of treating, &c.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR and H. H. HOCKING, Esqrs., Barristers-at-Law.

Tuesday, June 6, 1871.

VIGAR *v.* DUDMAN.

Land converted into tillage—Tithe—Modus—Replevin.

Before the Tithe Commutation Act 1836, *an award was made under certain Inclosure Acts, by which the tithes of the parish in which the plaintiff was a landowner, and defendant the rector, were commuted; by this award a yearly modus payable for hay and agistment tithe payments, and also larger sums to be paid for the same lands when converted into tillage were fixed by the commissioner.*

A house had since been built upon a portion of a field of the plaintiff mentioned in the award, and a further portion, to the extent of 22 *perches, was converted into garden ground; the remaining portion of the field had been made into an orchard.*

The defendant put in a distress for the larger sum fixed by the award to be paid for this field, on the ground that part of it had been converted into tillage:

Held, in an action of replevin to try defendant's right, that the garden ground was accessory to the house, and that no part of the field was converted into tillage.

Upon the hearing of a special case stated in replevin, the plaintiff has the right to begin.

THIS was an action of replevin brought by the plaintiff, who is a farmer and landowner, residing at Pitney, in the county of Somerset, against the defendant, who is the rector of the parish of Pitney, to recover damages for a distress levied on the goods of the plaintiff for the sum of 3*l.* 16*s.* 3*d.*, being six years' arrears of a corn rentcharge, alleged to be due to the defendant as for a broken modus.

The action was originally brought in the County Court of Somersetshire, holden at Langport, but had been removed by writ of *certiorari* into this court at the instance of the defendant, and by the consent of the parties and by order the following case without pleadings was stated for the opinion of the court.

The tithes of the parish of Pitney, otherwise Pitney Lortie, in the county of Somerset, were commuted before the passing of the Tithe Commutation Act 1836 for a corn rentcharge by an award made under the provisions of the General Enclosure Act (41 Geo. 3, c. 109) and the Pitney Enclosure Act (42 Geo. 3, c. xv.) from which award the following is an extract.

And it was by the said now reciting Act further enacted, That nothing therein contained should extend or be construed to extend to affect any estates, lands, or grounds, within the parish of Pitney then exempted from the payment of tithes in kind by any valid modus or moduses or customary payments in lieu of tithes, but that all such estates, lands, and grounds should thereafter, notwithstanding anything therein contained, remain and continue exempted from the payment of such tithes for which such modus or moduses or customary payments had been paid, and such estates, lands, and grounds should not be charged with the said yearly rents or sums of money in lieu of tithes before mentioned in respect of any of the titheable matters or things in lieu of which such modus or moduses or customary payments had been paid, but that such several modus or moduses or customary payments should continue payable as if the said now reciting Act had not been made.

And in order to ascertain in future what estates, lands, and grounds were so claimed to be exempt from the payment of such tithes, I have caused a schedule of the same to be made, and annex to this my award, entitled "The Pitney modus schedule," wherein I have distinctly ascertained and set forth the said estates, lands, and grounds, with the amount of the moduses or customary payments payable thereout respectively in lieu of such tithes; but as such claims respectively extended only to the said lands when occupied by the owners thereof, or by persons residing within the said parish of Pitney Lortie aforesaid, and such lands were subject to the payment of tithes in kind to the rector of Pitney Lortie when occupied by any person or persons not residing within the said parish of Pitney Lortie, or shall be converted into tillage, I have inserted in the said schedule opposite to such lands the tithe money payment to be hereafter payable thereout respectively in the event of and during the time when the same lands or any part thereof may be occupied by any person or persons not residing within the said parish of Pitney Lortie, or shall be converted into tillage as aforesaid. And it was by the now reciting Act further enacted that, in order to prevent any difficulty to the rector of the said rectory of Pitney and to the owner of the said parsonage of Huish Episcopi for the time being by the division of any estate by sale or otherwise, and to facilitate the future regulating the said yearly rents or sums of money, I the said commissioner should, and I was thereby required to, make three complete schedules or descriptions of each allotment, &c., to be made under the now reciting Act, with the names of the owners thereof, the exact measure, &c., &c., and the rate by the acre by which the said yearly rents or sums of money should be charged.

The following is an extract from the modus schedule referred to in the award:

THE PITNEY MODUS SCHEDULE.

Showing the yearly modus payable for hay and agistment tithe payments, and also the sums to be paid yearly for the same lands when occupied by non-residents, or converted into tillage.

No. on plan	Properties and Premises.	Computed Acres.	Modus payable yearly.	Actual measure of land.	Yearly rents to be paid to the Rector of Pitney Lortie when the modus lands shall be occupied by non-residents.	Payment per acre.	Corn payment at 8s. 7½d. per bushel.			Yearly rent to be paid to the Rector of Pitney Lortie when the modus lands shall be converted into tillage.	Payment per acre.	Corn payment at 8s. 7½d. per bushel.		
		A. R. P.	£. s. d.	A. R. P.	£ s. d.	£ s. d.	Bushels	Gallons	Pints	£ s. d.	£ s. d.	Bushels	Gallons	Pints
488	Matthews, John, sen., Stawey Foot.	1 0 0	0 0 1	1 1 3	0 4 9	0 3 8½	... ...	4	3½	0 12 8½	0 10 0	1	3	6½

No. 422 above mentioned is occupied by the plaintiff, who is also the owner thereof. About forty years ago a house was built upon a portion of the field, and a further portion (to the extent of 22 perches) was converted into garden ground by the then owner thereof, who fenced off the house and garden from the rest of the field, the remaining portion being orchard. Although the house has been built and the garden made for nearly forty years past, no claim has ever been made upon the plaintiff for payment of any other sum than the modus payment of a penny mentioned in the second column of the schedule, which sum he has annually and regularly paid until the last tithe audit in Oct. 1869, when the collection of the tithe having been recently placed in the hands of new agents, they called upon the plaintiff for payment of 3*l.* 16*s.* 3*d.*, being six years arrears of the corn rent (12*s.* 8½*d.*), charged under column 7 of the schedule, on the ground that by reason of the said 22 perches of the field having been converted into garden, the whole sum of 12*s.* 8½*d.* was payable as if the whole field had been converted into tillage, and also that the planting of the ground as an orchard was a breach of the modus. The plaintiff refused to pay the sum claimed, but subsequently tendered to the defendant the sum of 9*s.*, being six years' arrears in respect of the 22 perches actually converted into garden, at the rate of 10*s.* per acre (see column 10).

In order to try the question, it was arranged between the parties that the defendant, the rector, should distrain the arrears claimed by him; and accordingly, on the 12th April 1870 (a day previously settled with the plaintiff's solicitor) the said defendant, the rector, distrained the plaintiff's cattle, goods, and chattels for the said six years' arrears of the corn rent in respect of the land numbered 422 in the said schedule, up to and including the half-year due 29th Sept. 1869. The plaintiff thereupon replevied the said goods, and having deposited in court a sum of money by way of security for costs, commenced this action in the Somersetshire County Court.

It is agreed that the court may draw all necessary inferences of fact.

Copies of the General Inclosure Act (41 Geo. 3, c. 109) and the Pitney Inclosure Act (42 Geo. 3, c. xv.), and of the said award, form part of this case, or of so much of the said award as is material.

The question for the opinion of the court is whether, under the above-mentioned circumstances, the plaintiff is entitled to recover against the defendant damages in respect of the said distraint.

If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff for such sum as the court shall direct, and such costs of the suit as the court shall direct. If the court shall be of opinion that the plaintiff is not entitled so to recover against the defendant, then judgment is to be entered for the defendant for the amount of the defendant's claim, 3*l.* 16*s.* 3*d.*, and costs.

Plaintiff's points: First, that the plaintiff is not, on the facts stated, liable to the defendant for the increased yearly rent claimed; secondly, that neither the planting of the orchard, nor the building of the house, is a breach of the modus; thirdly, *that neither* the planting of the orchard, nor the *building of the house*, is a conversion of the land *into tillage; fourthly*, that the conversion of *twenty-two perches* of land out of the allotment into garden ground, does not render the plaintiff liable to the increased rent upon the whole allotment as if the whole allotment had been converted into tillage.

Defendant's points: First, that the building of a house upon a portion of the modus land, the conversion of other portion of the same land into a garden, and the planting of the fruit trees in the remainder of the land, and converting the same into an orchard, were a conversion into tillage, or in any event a breaking of the modus within the meaning of the award, and entitled the defendant to the yearly rent of 12*s.* 8*d.*, mentioned in column 7; secondly, that the last mentioned Acts by changing the nature of the land out of which the modus was payable operated as a discharge of the modus; thirdly, that by the conversion of any portion of the modus land into tillage, the modus was discharged as to the whole of the land.

The right to be heard first was claimed by both plaintiff's and defendant's counsel.

WILLES, J.—In this court the plaintiff in replevin, as well as in other actions, begins the arguments upon a special case.

Charles for plaintiff.—There was no conversion of any part of this land into tillage. The word, according to Dr. Johnson's Dictionary, means "Husbandry; the act or practice of plowing or culture." It is to be found in some of the early statutes, where it is generally contrasted with pasture:

14 & 15 Hen. 8, c. 1;
27 Hen. 8, c. 22;
5 & 6 Edw. 6, c. 5.

It is always used to express the result of ploughing, or work of that nature:

Mascall v. *Price*, 1 Eagle & Younge's Tithe Cases; 225;
Bedingfield v. *Feak*, Cro. Eliz. 467;
Rolle's Abridgment, 651;
2 Co. Inst. 490.

Philbrick (with him *Edwyn Jones*) for defendant—The question here is as to the meaning of tillage as used by the commissioner in this award:

Com. Dig., tit. "Dismes," E. 30.

Charles, in reply, not heard.

WILLES, J.—In my opinion our judgment ought to be in favour of the plaintiff. The award, as framed by the commissioner, made the plaintiff's land liable to the payment of 1*d.* a year, except when occupied by non-residents, or converted into tillage, in which latter case it would become liable to a payment of 12*s.* 8½*d.* a year. It appears that a house has been built upon it some forty years ago; and I apprehend the building of the house had no effect on the question. At the time the house was built a garden of 22 perches had been made—a very moderate garden if the house was of any extent, and the rest of the plot of land was devoted to an orchard. These were the ordinary accompaniments of a residence in the country; and until a year or two ago the ordinary 1*d.* modus only had been paid by the tenant. The garden and orchard were nothing more than reasonable accessories to the house, and did not fall within the description of agriculture, nor were they like a market garden. As the modus was, *primâ facie*, 1*d.*, the onus would be on the rector to satisfy the court that the garden or the orchard amounted to tillage of the land. In the absence of such proof, it would appear that they were accessory to the house. Making such a garden did not amount to converting the land into tillage, but rather to con-

; the land into residence. If asked what meant, I should take the word as used in nary sense, and especially as used in ancient when the modus came to be expressed in and as used in the award. I should refer, the best authority, to Lord Coke's note to 7 of Littleton on Tenure in Soeage, 85 b., there are some strong and quaint expres-

He begins by stating that agriculture or is of great account in law, and enumerates naine inconveniences by laying of lands tilth to pasture;" and he afterwards pro- "And the common law giveth arable land anciently is called *hyde and gaine*) the pre- ncy and precedency before meadows, pas- woods, mynes, and all other grounds what- " If Lord Coke could again occupy this which he once sat, and he were asked r converting the face of the country into and gardens could be described as tillage, I isfied that he would say "No."

s and KEATING, JJ. concurred.

lgment for plaintiff for 4 guineas and costs.

rneys for plaintiff, *Vizard*, *Crowder*, and

rneys for defendant, *Lowless*, *Nelson*, and

Wednesday, June 7, 1871.

KING (app.) *v.* CHAMBERLAIN (resp.)

imprisonment—Notice of action—Anything e in pursuance of Act—Larceny Act 1861.

action for false imprisonment in a County t, the judge told the jury that, under the 25 Vict. c. 96, s. 103, any person might, out a warrant, apprehend any person found nitting theft, and if acting in the bona fide f that he had authority so to apprehend him, ugh no theft had in fact been committed, was led to notice of action, provided he had rea- ble ground for believing that the person hended was committing a theft. The jury d a verdict for the plaintiff:

upon appeal ,that there must be a new trial, he defendant's right to protection under the te was not subject to the opinion of the jury the reasonableness of his belief.

as an appeal from the County Court of Kent, at Sheerness.

plaintiff is a waterman residing in Bull- Rochester, and the defendant is a second and adjutant in the Royal Artillery, sta- in garrison at Sheerness.

action, which was brought for false im- ment, came on for trial at the Sheerness Court on the 22nd July 1870, before James onsdale, Esq., judge of the said court, and of five persons.

plaintiff stated in his evidence, that on the une 1870, he saw a buoy in the river Med- hich appeared to him to be nearly sunk; and been previously told by the coxswain of the ess garrison boat, that if he found any buoys gets belonging to the War Department he should get salvage for bringing them , he pulled the anchor to which the buoy tached on board his boat, and towed the shore.

defendant stated in his evidence, that look- t of the mess-room through a powerful pe, he saw the plaintiff *in a boat approach* the buoy, and, after being occupied several minutes, remove the buoy and the anchor, which were the property of the War Department, and that in the *bonâ fide* belief that the plaintiff was stealing the same, he gave him into custody the same evening for stealing property of the War Department; also that the coxswain of the garrison boat had no authority to give any such orders as the plaintiff stated he had given with regard to the buoys and targets, or to promise salvage for bringing them ashore, and that the plaintiff must have known this from the length of time he had been a waterman at Sheerness.

On the 22nd June the plaintiff was brought before the stipendiary magistrate at Sheerness, when the defendant stated that he did not wish to prosecute him, but that he hoped the arrest would prevent such things happening in future, as numerous complaints had been made to the defendant of the removal of the buoys belonging to the War Department.

It was contended on behalf of the defendant that he had, in giving the plaintiff into custody, acted under the provisions of the Consolidated Larceny Act (24 & 25 Vict. c. 96), and that he was entitled to notice of action under that statute, and sects. 103 and 113 were especially relied on in support of the above contention.

It was contended on the part of the plaintiff that under the authority of *Downing* v. *Capel* (36 L. J. 97, M. C.), as the plaintiff was not forthwith taken before a neighbouring justice of the peace, but was locked up for three days when there was no necessity for his being so, the defendant was not entitled to any notice of action.

It was further contended on behalf of the defendant that the right of the defendant to notice was a question for the judge and not for the jury, and was not affected by the duration of the imprisonment; and that the question whether there was reasonable and probable cause for the arrest was also a question for the judge and not for the jury, and that there was, in fact, under the circumstances, reasonable and probable cause for the arrest.

The judge told the jury that under the 24 & 25 Vict. c. 96, s. 103, any person might, without a warrant, apprehend any person found committing theft, and, if acting in the *bonâ fide* belief that he had authority so to apprehend him, although no theft had been in fact committed, was entitled to notice of action before the commencement of any action against him for so doing, provided he had reasonable ground for believing that the person apprehended was committing a theft. That the first questions they would have to consider were, whether the defendant acted *bonâ fide*, and whether, from what he saw the plaintiff doing, he might not reasonably suppose the plaintiff was stealing the buoy and anchor. If their conclusions upon these questions were in the affirmative, then the defendant was entitled to notice of action, and the plaintiff must be nonsuited. If, however, they should be of opinion that the defendant did not act *bonâ fide*, or that from what the plaintiff was seen doing he could not be reasonably supposed to be stealing the buoy and anchor, then the plaintiff would be entitled to a verdict for some amount, as the defendant had not complied with the provisions of the 103rd section of the 24 & 25 Vict. c. 96, by taking the plaintiff forthwith before some neighbouring justice of the peace, previously to which enactment

a private person could not justify apprehending a person without warrant upon a mere suspicion of felony, unless it turned out that a felony had been actually committed.

The jury found that the defendant did not act *bonâ fide*, and that from what he saw the plaintiff doing he could not reasonably suppose the plaintiff was stealing the buoy and anchor; and assessed the damages at 15*l*., whereupon a verdict for that amount was entered for the plaintiff.

The question for the opinion of the court is, whether the judge rightly directed the jury?

If the court shall be of opinion that his direction was right, then the verdict for the plaintiff is to stand.

If the court shall be of opinion to the contrary, then either a verdict is to be entered for the defendant, or a new trial or a nonsuit ordered, as the court may direct.

Archibald for defendant, the appellant.—The last case on this subject of false imprisonment is *Lister* v. *Perryman* (23 L. T. Rep. N. S. 269; L. Rep. 4 E. & I. App. 521; 39 L. J. Ex. 177.) [Stopped by the court.]

F. J. Smith, for plaintiff, the respondent.—The authorities upon all the points raised in this case are very conflicting, but the majority of them are in accordance with the judge's direction:

Rudd v. *Scott*, 2 Scott N. R. 631;
Hughes v. *Buckland*, 15 M. & W. 346;
Hazledine v. *Grove*, 3 Q. B. 1007;
Wedge v. *Berkeley*, 6 A. & E. 663;
Leete v. *Hart*, L. Rep. 3 C. P. 322;
Panton v. *Williams*, 2 Q. B. 169;
Turner v. *Ambler*, 10 Q. B. 252.

WILLES, J.—The decision in this case must be set aside, but I think we ought not to enter a nonsuit. There must be a new trial. The County Court judge had considerable difficulties to grapple with, for the cases seem to mix up the grounds upon which notice of action may be required with the question of what was reasonable cause for the prosecution of the offender. Even Mr. Archibald seemed to think, from his reference to the case of *Lister* v. *Perryman* (L. Rep. 4 E. & I. App. 521), that notice of action must depend to some extent upon reasonable and probable cause for an arrest. The cases cited by Mr. Smith show the same confusion; and even in *Hughes* v. *Buckland* (15 M. & W. 346), Lord Wensleydale recognised reasonable belief as a ground for the protection of the statute. There the jury found for the defendants, but it seems that reasonableness for their belief was mixed up with the ground of their finding. Here the judge seemed to think that to entitle the defendant to a verdict, he must have had reasonable ground for thinking that the plaintiff was committing a theft. He laid it down that if the defendant were acting in the *bona fide* belief that he had authority to apprehend the plaintiff, although no theft had in fact been committed, he was entitled to notice of action, but he added subject to the proviso that he had reasonable ground for so believing. The question for us is whether the inference which might have been drawn from this direction is law, viz., whether if a person sees another doing something which he honestly believes to be a felony, and immediately apprehends him, he is to be deprived of the protection of the statute because the jury choose to find *that there was no ground which they thought reasonable for his belief* and for the apprehension. *The jury found that* the defendant could not reasonably suppose that the plaintiff was stealing the buoy and anchor; but that finding is not sufficient to establish that the defendant did not *bonâ fide* believe so. The buoy was fastened by an anchor, and the defendant, looking through a telescope, saw the plaintiff remove it; there were therefore some grounds for believing the plaintiff to be committing a felony, and according to the evidence the defendant seems to have so believed. Sect. 113 of the Larceny Act 1861 gives protection to any person for anything done in pursuance of this Act. In *Herrman* v. *Seneschal* (13 C. B., N. S., 392), it was held that, in order to entitle a party to a notice of action for a thing done in pursuance of the Act with respect to coining offences, it is enough that he honestly and *bonâ fide* believes he is acting in pursuance of the Act, whether there be reasonable ground for such belief or not. That case was acted upon in *Roberts* v. *Orchard* (2 H. & C. 769), which was a bill of exceptions upon this very statute. Williams, J., in delivering the judgment of the Exchequer Chamber, said, where the question is whether a defendant is entitled to notice of action under an Act of Parliament of this nature, the proper way of leaving the question to the jury is this: "Did the defendant honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?" In the case of *Leete* v. *Hart* (L. Rep. 3 C. P. 322), there is a *semble* contained in the headnote which must be taken with the facts of the case; if with those facts it goes further than the two cases to which I have alluded it is wrong. The true question is whether the defendant's evidence is to be believed, for upon what he said he was clearly entitled to notice of action. Mr. Smith contends that there are other points on which our judgment should be in his favour, one being that the protection of the 113th section does not apply to the defendant because he was not doing anything in pursuance of this Act. By sect. 103, "Any person found committing any offence punishable either by indictment or upon summary conviction by virtue of this Act . . . may be immediately apprehended without a warrant;" here he says the removal of the buoy was no larceny; but this is no absolute protection against an action being brought, and it would be sufficient to entitle the defendant to notice if, as he says, he believed the plaintiff was stealing the buoy and anchor. Then Mr. Smith argued upon another footing, and assuming that the other necessary things were complied with, the plaintiff, he said, was not "forthwith taken" before some neighbouring justice of the peace to be dealt with according to law. This contention is open to the answer that it does not appear but that the time taken was reasonable and convenient for doing what was done. The defendant's proper course was to give the plaintiff over to the police; this he seems to have done forthwith, and it was no fault of his if the stipendiary magistrate did not sit in the neighbourhood for three days afterwards. The meaning of the word "forthwith" is discussed in *Thompson* v. *Gibson* (8 M. & W. 281), and in the cases there cited. These collateral points fail, and the real contention between the parties comes round to the direct question whether the defendant's right to protection under the statute is subject to the opinion of the jury as to the reasonableness of his belief. I think his right is not so subject, and on that account there must be a new trial.

Smith, J.—The only question for us is, Did the judge rightly direct the jury? It does not appear that he did, according to the cases of *Hermann* v. *Seneschal*, and *Roberts* v. *Orchard*. It has been said that *Leete* v. *Hart* to some extent qualifies those cases; but I took part in that decision, and I remember, as well as observe from the report, that every judge declined to infringe those cases, and the head note must be read with the facts of the case.

Judgment for appellant.

Attorney for appellant, *J. Clulow*, Solicitor to the War Department.

Attorneys for respondent, *Sandys* and *Knott*, for *W. W. Hayward*, Rochester.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, April 22, 1871.

(Before Bovill, C.J., Martin, and Bramwell, BB., Byles and Blackburn, JJ.)

Reg. *v.* King.

Embezzlement—Receipt of the money.

A conductor of a tramway car was charged with embezzling 3s. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand him all the money received during each day on the following morning. The prisoner's money should have been 3l. 1s. 9d. according to his way bill for the day, but he paid in only 3l. 0s. 6d.:

Held that there was sufficient evidence of the receipt of 7s. 11d. the total amount of fares of the particular journey, and of the embezzlement of 3s. part thereof.

Case reserved for the opinion of this Court from the Surrey Sessions.

At the general quarter sessions of the peace, holden by adjournment at St. Mary, Newington, in and for the county of Surrey, on Monday, the 6th March 1871, Thomas King was tried and convicted upon an indictment charging him with feloniously and fraudulently embezzling on the 10th Feb. 1871, 3s. of the moneys of the London Tramways Company (Limited), his masters.

At the trial the following evidence was given:—

George Mellish, P.C. 50 W., said:

On Friday, 10th Feb. I made a journey in car 10, of which prisoner was the conductor, at 5.40. Robinson and I sat in different parts of the car. I am acquainted with the distances for which the fares are 2d. and 3d. Fifteen who got out were 3d. fares. Each paid money. Prisoner gave each a ticket. Twenty-five were 2d. I did not see each pay, nor see prisoner give to each a ticket. For a 3d. fare I put a bean in my left pocket, and for a 2d. fare I put a bean in my right. The number of beans in my pockets and in those of Robinson's corresponded. I saw prisoner make out a way bill at the end of the journey, at Brixton church. There is an interval of five or ten minutes before they start again. The car holds twenty-two.

Cross-examined:

The fifteen got in at starting at Westminster-bridge. They got out after they had passed Kennington. Prisoner received two fares, and gave no tickets. Two 2d. fares. We saw money pass.

By jury:

Both tickets were blue. 3d. were blue, and 2d. a shade lighter.

John Robinson, 252 W.:

I travelled by the same car. I know the 2d. and 3d. distances. Between Westminster and Kennington there were eight outside and seven inside. Fifteen at 2d. each. They got down before they came to Kennington church. I saw them all pay, but I do not know how much. All received tickets except two ladies, and no tickets were offered to them. Ten got in at Kennington church, and rode to Brixton church; all 2d. fares, making twenty-five 2d. fares. These ten all paid, and had tickets. There were fifteen 3d. fares, and they all paid, and had tickets. Some of the tickets were thrown on the floor of the car. I saw King make out his way bill; he had plenty of time to do it. I took prisoner into custody on Monday the 13th Feb., and charged him with embezzling 3s., and told him it would be explained to him at the station. He made no answer. I searched him, and found eight old 1d. workmen's tickets. No counterfoils were found upon him. I asked him what he had the tickets in his possession for, and he said, "It is very probable I might have more, for I often put them in my pocket." I compared the beans in my pockets with the other police constable, and they corresponded.

John Bemister, clerk to the Metropolitan Tramways Company, said:

Conductors have to send their way bills to me. This way bill, dated 10th Feb., is signed by the prisoner for the 5.40 journey. It is the duty of conductors to give tickets to each passenger. The items are nine 3d. tickets and sixteen 2d. tickets. The way bill does not state the time of the journey, but states eighth journey, 10th car, and it would be about the time. On the following morning he should pay in a bag the money he received. I make out a statement and send the way bills and bags to the chief office. No one can tamper with them. The whole amount paid for this day would be 3l. 1s., and for this one journey from Westminster to Brixton on this occasion was 4s. 11d. Prisoner had no business to have these old workmen's tickets in his possession.

Cross-examined:

Mistakes have been made in numbering the tickets consecutively. The practice now is to count the money brought in by the conductors; this plan was commenced about a fortnight since. The conductors have to find their own change.

William Meloy, traffic manager to the Metropolitan Tramways Company, said:

Prisoner was a conductor at 23s., and a bonus of 2s. 6d. per week. On Monday, the 13th Feb., I gave prisoner into custody at the thirteenth journey. The car No. 10, on the eighth journey, leaves Westminster Bridge about five, or sometimes after five.

Thomas Henry Cox, clerk to the Tramways Company at their office in Parliament-street, said:

The bags and sheets are sent to me. On the 11th Feb. I received returns of King, the prisoner. The account was for 3l. 1s. 9d., but the money in the bag was 3l. 0s. 6d. This deficiency would be deducted from his wages. Turner brings money and bags.

Charles Turner said:

I fetched the bags from Bemister on the morning of the 11th Feb. I took them as they were given to me to Mr. Cox.

The prisoner's statement before the police magistrate was read, which was as follows:

At 5.40 there is generally a great number of passengers, and I begin to take their fares and give them tickets when the car is nearly full, which is generally after we pass the Hercules, and if two or three get in after that I take their fares and give them tickets as they come out, and each passenger had a ticket. The constable has made an error in saying I said it was a usual thing for me to carry tickets. I said nothing of the kind. I had a few old penny tickets in my pocket rolled up, but I never used any, and those are the only tickets found on

me. The constable never told me I was charged with embezzling 3s.; he never mentioned the amount. They could not tell whether they were 2d. or 3d tickets that I delivered.

At the conclusion of the above-mentioned evidence the prisoner's counsel submitted that there was not sufficient evidence to go to the jury.

The court, however, left the case to the jury, who returned a verdict of guilty, and the court thereupon reserved the following points for the decision of the Court for Crown Cases Reserved:

First, was it necessary to prove the actual payment to the prisoner of the money charged as being embezzled, or were the jury at liberty to infer such payment from the whole of the circumstances proved in evidence.

Secondly, was there any evidence to show that the prisoner received more money than he accounted for, or sufficient evidence to go to the jury on the whole case.

The court respited judgment, and admitted the prisoner to bail until the decision of the Court for Crown Cases Reserved shall be known.

E. Richard Adams, Chairman.

Oppenheim for the prisoner.—The conviction was wrong, for the evidence was insufficient. It was necessary to prove that the prisoner actually received 7s. 11d., the aggregate amount of fifteen 3d. fares and twenty-five 2d. fares. The witnesses cannot say what sum each or any of the passengers paid, only that each paid money. It is not to be inferred that each paid the right fare simply because they ought to have done so. [Blackburn, J.—It is not an unreasonable inference that each passenger paid the right fare, and that the prisoner received it.] There cannot be embezzlement until it is proved that the money alleged to be embezzled has been actually received. [Byles, J.—There was evidence of the receipt, for that would be the reasonable and probable result from what was seen by the witnesses. Bovill, C. J.—The prisoner's own statement that each passenger had a ticket is as good evidence that he received all the fares as well could be.] In *Rex* v. *Chapman* (1 Car. & K. 119), where it was the duty of a clerk to receive money, pay wages out of it, and make entries of all moneys received and paid in a book, and enter the weekly totals of receipts and payments in another book, upon which last book he paid over his balances, the clerk having entered weekly payments in the first book 25*l*., he entered them in the second book as 35*l*., and two months after, in accounting with his employer, made his balance 10*l*. too little, and paid it over accordingly, it was held that he could not be convicted of embezzlement without proof that he had received some particular sum and had converted the whole or part of that sum to his own use; secondly, there was no evidence to shew that the prisoner received more money than he accounted for. The evidence was that the prisoner made out a way-bill for each journey, and on the following morning he paid in a bag the money he received—a lump sum of 3*l*. 0s. 8d.—to a clerk, who sent it and the way bills over, with a statement, to the chief office. There was only one way bill put in evidence relating to the journey in respect of which the money was alleged to have been embezzled. The other way bills for that day should have been produced:

Rex v. *Jones*, Car. & P. 834.

Bovill, C. J.—I think there was sufficient evidence on both points. It was the prisoner's duty to receive the fares when he issued the tickets, and the evidence was that fifteen of the passengers were 3d. fares, and twenty-five 2d. fares, and that each paid money to the prisoner, and the prisoner gave to each a ticket. The amount of these fares would be 7s. 11d., and it was the prisoner's duty to have received that money. The witnesses saw them all pay money to the prisoner. The evidence is almost conclusive that the prisoner received 7s. 11d. Then did he embezzle any part of that sum? He did; for he made out a false account of the number of passengers, and paid over only 4s. 11d. The conviction will therefore be affirmed.

Martin, B.—There was clear evidence on both points. It was not absolutely conclusive—it was circumstantial evidence; and I should have drawn the same conclusion as the jury, that the prisoner received 7s. 11d. and paid over only 4s. 11d., and embezzled the remainder.

The other Judges concurred.

Conviction affirmed.

Saturday, April 29, 1871.

(Before Bovill, C.J., Martin and Bramwell, BB., Byles and Blackburn, JJ.)

Reg. v. Fletcher.

Perjury—Affiliation summons—Jurisdiction to hear—7 & 8 *Vict. c.* 101—8 & 9 *Vict. c.* 10.

The 7 & 8 *Vict. c.* 101, *s.* 2, *in the case of an application by a woman before the birth of a bastard child against the putative father for a maintenance summons requires that "the woman shall make a deposition upon oath stating who is the father of the child." A summons having issued in such a case, the defendant appeared thereto, made no objection to the summons, and was examined, and committed perjury:*

Held, that the magistrate had jurisdiction to hear the summons, the defendant by appearing having waived any objection thereto on the ground that there was no written deposition of the woman made upon the application for the summons.

Case reserved for the opinion of this court by Cleasby, B.

The prisoner was tried before me at the spring assizes for the county of Derby for perjury alleged to have been committed by him at the hearing of an affiliation summons.

The following is a copy of the summons:

Derbyshire to wit.—To Thomas Fletcher, of Heanor, in the county of Derby. Whereas, application hath this day been made to me, the undersigned, one of Her Majesty's justices of the peace for the county of Derby, by Jane Bestwick, single woman, residing at Heanor, in the petty sessional division of the said county for which I act, now with child, of which child she hath this day duly sworn on oath before me, the said justice, that you are the father, for a summons to be served on you to appear at a petty sessions of the peace, according to the form of the statute in such case made and provided.

These are, therefore, to require you to appear at the petty sessions of the justices, holden at the Justice-room in Heanor, in the said county, being the petty session for the division in which I usually act, on Monday, the 1st Aug. 1870, at eleven o'clock in the forenoon, to answer any complaint which she shall then and there make against you touching the premises. Herein fail you not.

Given under my hand, at Heanor, in the said county of Derby, this 25th April 1870. M. Mundy.

Note.—If you neglect to appear at the petty sessions, as above stated, the justices, upon proof that this summons has been duly served upon you, or left at your last place of abode, may proceed, if they think fit, at the petty sessions therein named, to make an order upon you, as the putative father of the child above referred to, to pay a

sum to the said mother for its maintenance, and
ums for costs and expenses.

application for the summons was made
the birth of the child, and the magistrate's
who was called as a witness before me stated
o written deposition was made upon the
tion. He also stated that when the appli-
was made the complainant was sworn, and
y made a statement to the effect stated in
mmons.

counsel for the prisoner referred to the
s 7 & 8 Vict. c. 101, and 8 Vict. c. 9, and
ded that it was essential that there should
eposition in writing upon oath to give the
rate jurisdiction to hear the case.

erved the point for the consideration of this
and took the opinion of the jury whether
isoner had knowingly stated before the
rate what was untrue. The jury found him
and I let him go on bail to appear if called
o receive sentence at the next assizes.

question for the opinion of the court is,
r it is essential to give the magistrate juris-
to hear the application summons that there
have been a written deposition upon oath
complainant when the application for the
ns was made. A. CLEASBY.

. *Bristowe*, for the prisoner.—The conviction
ong, for the magistrate had no jurisdiction
e the summons upon the verbal statement
mother. The statutes require that she
make a deposition on oath stating who is
her of the child. The 7 & 8 Vict. c. 101, s. 2,
that any single woman who may be with
nay, before the birth of such child, make
tion to a justice of the peace for a summons
erved on the putative father, and when, as in
esent case, the application is made before
th of the child, the woman is to make "a
ion on oath," stating who is the father of
ild, and the justice is thereupon to issue
mmons to the person alleged to be the father
child to appear at, &c. And by sect. 3, on
pearance of the person so summoned, the
s are to hear the evidence, and may adjudge
an to be the father. Then the 8 & 9 Vict.
4, provides that justices in petty sessions may
an order "in respect of any such applica-
rithin two calendar months from the birth of
ild. The word "deposition" is defined in
r's American Law Dictionary to mean the
ent of a witness reduced into writing in due
f law, by virtue of a commission or other
ity of a competent tribunal, or according to
ovisions of some statute law, to be used on
l of a question of fact in a court of justice.
bster's Dictionary it is defined (1) the act
ing testimony on oath; (2) the attested
testimony of a witness — an affidavit.
WELL, B. — In indictments for perjury,
r verbal or written, it is usual to allege
e defendant did say, depose, swear, and give
e; and, by the 14 & 15 Vict. c. 100, s. 20, it
ted that it shall be sufficient in indictments
rjury to state "before whom the oath,
tion, declaration, affidavit, deposition, bill,
, notice, certificate, or other writing was
" That seems to class depositions among
documents.] The 8 & 9 Vict. c. 10, which
e read together with the 7 & 8 Vict. c. 101,
form of application by a woman before the
the child, which *concludes, "exhibited and* sworn before me the day and year first above written." [BOVILL, C.J.—In Richardson's Dictionary "depose" is said to mean "to give evidence or bear testimony."] There is a difference in the way of proceeding between applications before and after the birth of the child. Where the application is after the birth the form commences, "The information and application of," whereas in the case of an application before birth, it is "Application and deposition of." [BLACKBURN, J.—It would seem that a deposition is a record of what is said on oath before the magistrate. This form is a direction to the magistrate to make a record of the deposition of the applicant, but it is not a condition precedent to his jurisdiction to issue the summons that this should be done. I do not think that neglect by the magistrate to do that would make an order upon a summons so issued not enforceable, and *a fortiori* would not prevent a person from being indicted for perjury committed upon the hearing of the summons. BRAMWELL, B.—Was the magistrate acting without jurisdiction in hearing the summons for not having taken down the woman's evidence in writing?] In *Reg.* v. *Berry* (8 Cox C. C. 121; Bell's C. C. 46) and *Reg.* v. *Shaw* (L. & C. 579; 34 L. J. 169, M. C.) the objection was the non-production of the summons, which was held to be cured by the appearance of the man at the hearing of the summons; but here the doctrine of waiver cannot apply, for the statute requires the deposition on which the summons is to issue to be in writing. The following cases were then referred to:

Reg. v. *Simmons*, 8 Cox C. C. 190;
Reg. v. *Smith*, 37 L. J. 6, M. C.; 11 Cox C. C. 10;
Reg. v. *Pearce*, 32 L. J. 75, M. C.; 9 Cox C. C. 258;
Reg. v. *Hughes*, 7 Cox C. C. 286; D. & B. 188;
Reg. v. *Millard*, 6 Cox C. C. 150.

BOVILL, C. J.—Mr. Bristowe has argued this case extremely well, and urged everything that could be said in favour of the objection. The jurisdiction of the magistrate in this case to hear the summons, and which was exercised when the false oath was taken, depends upon the 7 & 8 Vict. c. 101, s. 3, which enacts that after the birth of the child, on the appearance of the person summoned, or on proof that the summons was duly served, &c., the justices in petty sessions shall hear the evidence of the woman, and shall also hear any evidence tendered by the person alleged to be the father. A hearing of the summons did take place, and on that hearing the defendant was examined, and gave false evidence, for which he was afterwards indicted and convicted of perjury. On the trial of the indictment it was objected that the defendant was not regularly summoned before the magistrate, because the woman had not made a deposition on oath before the summons was issued. There was, in fact, a summons, and the defendant appeared to it. Mr. Bristowe contended that the statute meant that the woman should make a deposition in writing before the summons was issued. The statute does not say that the deposition is to be in writing, and I should have thought it meant an ordinary deposition. Ordinarily a deposition in proceedings before magistrates is understood to imply that the maker of it shall be sworn and examined, and his testimony taken down by the magistrates' clerk, and usually signed by the deponent. But so far as depositions before magistrates are concerned, they are taken down and signed under the 11 & 12 Vict. c. 42, s. 17, so

that they may be used in evidence in cases where the witnesses may become unable to attend at the trial. But that statute does not apply to cases like the present. No doubt the 8 & 9 Vict. c. 10, enacts that if the proceedings are in the form of or to the like tenor and effect as the forms in the schedule to that Act, they shall be taken to be valid and sufficient; but the statute does not require them to be in such form. And the section applies as well to proceedings taken before that Act as to future proceedings. Now, in this case it seems to me to be immaterial to determine whether the statute requires the deposition to be in writing or not, for if the woman is simply to depose orally, and the magistrate is to make some record of her evidence, there is in this case a written statement in the summons that the woman was with child, and had sworn that the defendant was the father, and had applied for a summons against him. That is a document to the like tenor and effect as the one in the schedule. Even if there had been no record at all of the deposition of the woman on the application for the summons, it is impossible to distinguish this case from *Reg* v. *Berry* (6 Cox C. C. 121.) That decision is the more important, because it was upon this very statute. The application in that case was more than twelve months after the birth of the child, and before the summons was issued there was no evidence on oath as required by 7 & 8 Vict. c. 101, s. 2, that the putative father had paid money for the maintenance of the child within twelve months next after its birth. The objection was that the magistrates had no jurisdiction to hear the summons, upon the hearing of which the perjury had been committed. This case and that seems to me to be identical. In that case the question was whether the proof on oath of the payment of money by the putative father. and in this whether a deposition in writing was a condition precedent to the issuing of the summons. The court held that the defendant's appearance to the summons was conclusive, he having made no objection to the summons on the hearing, but denied the paternity only. Lord Campbell, C.J., said: "The proceeding against the putative father of a bastard child to obtain an order of maintenance is not a proceeding *in pœnam* to punish for a crime, but merely to enforce a pecuniary obligation, and is a suit within the meaning of the 14 & 15 Vict. c. 99, ss. 2 and 3, for which reason the defendant was admitted as a witness on his own behalf. Then, what is the summons which we have to consider? The process to bring the defendant into court in a civil suit. I incline to think that, according to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money, although it is not expressly required by the statute to be on oath, as in the case where the complaint is made before the birth of the child." Here there was a summons which stated that evidence had been given that the woman was with child and the defendant was the putative father, as required by the statute; and even if it had not so stated, yet the defendant, having appeared, the magistrate had jurisdiction to hear the summons. The case is not distinguishable from *Reg.* v. *Berry*, and the conviction must be affirmed.

Martin, B.—I am of the same opinion. I agree *that* the word "deposition" in sect. 2 means *something in writing*. The definition of the word *in Webster's Dictionary* gives the ordinary understanding of it. The two Acts (7 & 8 Vict. c. 101 and 8 & 9 Vict. c. 10) are to be read together, and so reading them they satisfy me that that is the meaning of it. The 7 & 8 Vict. c. 101, s. 2, contains a positive enactment that if the application be made before the birth of the child, the woman shall make a deposition on oath stating who is the father of the child. And it seems to me, from the 8 & 9 Vict. c. 10, s. 1, that it is to be a statement on oath taken down in writing; and although the woman refuses to sign it, yet, if the magistrate signs it, that would be a deposition within the meaning of this enactment. I think, therefore, the proceeding was irregular, and that a written statement of what was deposed to by the woman on oath ought to have been drawn up to the like effect of the form in the schedule to the 8 & 9 Vict. c. 10. The defendant, however, appeared to the summons and made no objection to the irregularity. It was competent to the defendant to waive the objection, and he did so, and upon such waiver the magistrate had lawful authority to hear and decide upon the summons. They were then acting judicially, sufficiently so to make a man guilty of perjury who wilfully swore falsely upon a matter material to the issue then before them.

Bramwell, B.—I am of the same opinion.

Byles, J.—I am of the same opinion. I think that all the matters necessary to give the justices jurisdiction concur in this case. The parties were present at the hearing of the summons within the magistrates' jurisdiction. There had been an application for the summons; the summons had been issued; the defendant appeared to it, and committed wilful false perjury at the hearing of it. I agree that the word "deposition" means a statement of evidence reduced into writing in the ordinary form. But 7 & 8 Vict. c. 101, s. 3 varies this in the case where the appearance is after the birth of the child, and directs the justices merely to hear the evidence. To take the deposition of the woman as required by sect. 2, and to hear the evidence as directed by sect. 3, are in my opinion two distinct things. The summons, however, is only necessary to bring the putative father into court; and when he is in court the justices have jurisdiction to hear and decide the case, and any irregularity in the issuing of such summons is cured by the appearance.

Blackburn, J.—I am of the same opinion. On the construction of the 7 & 8 Vict. c. 101, s. 2, I think that the meaning of the words, "shall make a deposition or oath" is that the evidence shall be taken on oath, and taken down in writing under the sanction of the magistrate. But whether such deposition is to be signed by the witness and afterwards signed by the magistrate is a matter which we need not now consider. I doubt whether the statute is anything more than directory as to the matters required by sect. 2, for there are no words to oust the justices of all jurisdiction in case the requisitions are not complied with. The magistrate would be justified in refusing to issue a summons if the directions of the statute are not followed, but an order made on a summons after appearance would be good, notwithstanding such irregularity. The case of *Reg* v. *Berry*, which is undistinguishable, concludes this case, for it was there held that all irregularities in the issuing of the summons are cured by waiver. When a special jurisdiction is conferred by statute *pro hac vice*, proof must be given that it has been properly

exercised in every particular; but where the jurisdiction created is large, and the court has a general jurisdiction over many things, though its decision may be quashed in a particular matter, yet the jurisdiction to hear the matter remains. Take for example the case of an indictment tried in one county, and the offence was committed in another county, and the conviction therefore quashed for error in fact, yet I should be very sorry to say that perjury could not be assigned upon wilfully false evidence given on the trial.

Conviction affirmed.

Attorney for the prisoner, *S. Leech*, Derby.

Saturday, May 6, 1871.

(Before Bovill, C.J., Martin, B., Byles, J., Bramwell, B., and Blackburn, J.)

Reg. v. White and others.

Parent and child—Abandonment and exposure—Father's duty—24 & 25 Vict. c. 100, s. 27.

A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out, "Bill, here's your child; I can't keep it. I am gone." The prisoner some time afterwards came out, stepped over the child, and went away. About an hour and a half afterwards the father's attention was again called to the child still lying in the road. His answer was, it must bide there for what he knew, and then the mother ought to be taken up for the murder of it. When his attention was called to it again, he said he should not touch it; those that put it there must come and take it. Later on the child was found by the police in the road, cold and stiff; but by care it was restored to animation.

Held, that the father was properly convicted of abandoning and exposing the child within the meaning of the 24 & 25 Vict. c. 100, s. 27.

Case reserved for the opinion of this court at the Winchester Michaelmas Quarter Sessions 1870.

The prisoners were indicted at the quarter sessions for the county of Southampton, held at Winchester on the 19th Oct. 1870, under the Act 24 & 25 Vict. c. 100, s. 27, for that they did on the 1st Sept. 1870, unlawfully and wilfully abandon and expose a certain child, then being under the age of two years, whereby the life of the said child was endangered.

It appeared, from the evidence, that Emily White (the wife of William White), who was not included in the indictment, was the mother of the child, which was about nine months old at the time mentioned in the indictment. On that day she had an interview with her husband, from whom she had been living apart since the 11th Aug. of the same year, and asked him if he intended to give her money or victuals; he passed by her without answering, and went into his house, this was about 7 p.m. His mother, the prisoner Maria White, shut the wicket of the garden, and forbade his wife from coming in. The wife then went to the door of the house, laid the child down close to the door, and called out, "Bill, here's your child; I can't keep it. I am gone." She left, and was seen no more that night. Shortly after, William White came out of the house, stepped over the child, and went away. About 8.30 p.m. two witnesses found the child lying in the road outside the wicket of the garden, which was a few yards from the house door; it was dressed in short clothes, with nothing on its head; they remained at the spot till about 10 p.m., when William White came home. They told him that his child was lying in the road. His answer was, it must bide there for what he knew, and then the mother ought to be taken up for the murder of it.

Another witness, Maria Thorn (the mother of his wife) deposed also to the fact that about the same time, in answer to her observation that he ought to take the child in, he said, he should not touch it; those that put it there must come and take it. She then went into the house. About 11 p.m. one of the two witnesses went for a police constable, and returned with him to the place about 1 a.m., when the child was found lying on its face in the road, with its clothes blown over its waist, and cold and stiff. The constable took charge of it, and by his care it was restored to animation. At 4.30 a.m., the constable went to the house, and asked William White if he knew where his child was. He said "No." On being asked if he knew it was in the road, he answered "Yes." It appeared that, during the time which elapsed between William White leaving his house about 7 p.m, and his return about 10 p.m., he had been to the police constable stationed at Beaulieu, and told him that there had been a disturbance between him and his wife, and wished him to come up and settle it, but he did not say anything about the child.

The prisoner's counsel objected that upon these facts there was no evidence of abandonment or exposure under the Act by William White.

He also objected that there was no evidence against John White and Maria White.

The court were of opinion that there was no evidence against the two last-named prisoners, but overruled the objection as to William White, as to whom the case was left to the jury, who found him guilty.

The court, upon the urgent appeal of the prisoner's counsel, consented to reserve a case for the opinion of the Court for the Consideration of Crown Cases Reserved, and the question is whether the prisoner William White was or was not properly convicted upon the facts as above stated.

Judgment upon the conviction was postponed, and the prisoner remitted to prison, to be discharged on recognisance of bail to appear to receive judgment when called upon. The prisoner was subsequently admitted to bail, and released.

W. Clement D. Esdaile.

No counsel appeared on either side.

Bovill, C.J.—I am of opinion that the conviction is right, and ought to be confirmed. The prisoner was indicted for unlawfully and wilfully abandoning and exposing a child under two years of age, whereby the life of the child was endangered. The child was the child of the prisoner, and the facts are: [His Lordship stated the facts, and continued:] On these facts it was objected that there was no evidence of abandonment or exposure within the meaning of the statute. The words of the statute are "whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been, or shall be likely to be permanently injured, shall be guilty of a misdemeanor." And if either branch of the section

is proved, or there is evidence in support of it, the conviction was right. Now, the father was entitled to the custody and possession of the child, and he was entitled to exercise control over it, and was bound to maintain and provide for it, and to protect it, both morally and legally. The prisoner was aware that the child was lying at his door, and there was clear evidence that he knew it was there, and therefore he had the opportunity of protecting it. The only question is, was there evidence for the jury in support of the conviction; and I am clearly of opinion that there was evidence on which the jury might, and ought to have convicted the prisoner. The child was lying in the road exposed, and its life was endangered, and in consequence of the exposure it was nearly dying. The relationship of a father as regards his duty to his child is different from that of any other person, and in this case there was abundant evidence both of exposure and abandonment of the child by the prisoner.

MARTIN, B.—I concur. At one time I had some doubt upon the construction of the statute. The obvious and plain meaning of the enactment struck me at first as being that the person guilty of the offence of abandoning and exposing a child should have been in the actual possession of the child. But there is no doubt that a father is bound to maintain and support his child; and, upon the facts in this case, it may be said, without straining the language of the statute, that the prisoner was guilty of abandoning and exposing his child within the meaning of the statute.

BRAMWELL, B.—I am of the same opinion. If some one who had had the child to nurse had brought it and left it, as was done in this case, no one could have doubted that the prisoner under the circumstances had abandoned and exposed it; and it is just the same now, though the mother brought the child.

BLACKBURN, J.—I am of the same opinion. I agree that the other prisoners were entitled to be acquitted although they had not performed their duty, for their duty was one of imperfect obligation. But the father is in a different position: he is under a legal obligation to support and provide for his child, and he would be guilty of murder, or manslaughter at the least, if in consequence of his neglect of duty the death of his child were to follow. It does not depend on the father having the actual physical custody of his child; for as soon as he knows that his child is in a position of danger, as in this case, and he neglects his duty, he has abandoned and exposed his child within the meaning of the Act.

CHANNELL, B.—I represent my brother Byles, who formed one of the Court when this case was called on, and I am authorised by him to say that he agrees in the judgment of the other members of the court. For myself I may say that I have had an opportunity of consulting with the other members of the Court, and that I am of the same opinion.

Conviction affirmed.

COURT OF EXCHEQUER.

Reported by H. LEIGH, and H. F. POOLEY, Esqrs., Barristers-at-Law.

Wednesday, May 3, 1871.

CORNEWALL *v.* DAWSON.

Demise of lands and exclusive right of sporting—Covenant by grantee not to permit rabbits to become so numerous as to cause damage—Grantee prevented by tenants from going on the lands—Sporting rights not reserved by grantor—Grantee's inability to perform covenant—Action by grantor for breach—Grantee's failure to perform covenant caused by grantor's default—Plea in answer to action—Consideration—Covenant—Pleading.

Declaration, that the plaintiff and other persons, by indenture, demised to the defendant certain lands of the plaintiff, and also the sole right of shooting, &c., in, upon, and within all the lands of the plaintiff in S.. for twenty-one years, and the defendant by the said deed covenanted with the plaintiff that he would not permit the rabbits to become so numerous as to cause damage to any of the farm tenants of the said lands. Breach assigned, that the defendant, after the said indenture and during the said term, did, contrary to the said covenant, permit the rabbits to become so numerous as to cause damage to divers of the said farm tenants, whereby they were greatly damaged, and the plaintiff became liable to them for such damage, &c.

Plea, that at the time of the said demise, and thence hitherto, parts of the said lands, in, upon, and within which the plaintiff and the said other persons demised to the plaintiff the sole right of shooting, &c., as in the declaration mentioned, were and have been respectively held by and in the possession of certain persons, as tenants to the plaintiff and the said other persons, without there being reserved to the plaintiff and the said other persons, or any of them, the right of shooting, &c., or otherwise killing rabbits, in, upon, or within the same respectively. And the plaintiff and the said other persons had not, nor had any of them, at the time of the said demise or at any time since, any right or power to demise to the defendant the right of shooting, &c., rabbits on the said parts of the said lands; and that the defendant has never had, or been able to have or enjoy, the right of shooting, &c., rabbits in, upon, or within the said parts of the said lands, and has been wholly hindered and prevented, by the respective tenants thereof, from shooting, &c., rabbits in, upon, and within the same; and that the alleged breaches of covenant in the declaration assigned, are breaches arising from and consequent upon rabbits being permitted, by the respective tenants of the said lands, to become so numerous as to cause damage as in the declaration alleged, and not from any default by or on the part of the defendant:

Held, on demurrer, by the Court of Exchequer (Kelly, C.B., and Martin, Channell, and Cleasby, BB.) to be a good plea in answer to the plaintiff's action. The plaintiff not having, in the lease to his tenants, reserved the right of shooting over the lands, had no power to authorise the defendant to enter thereon for the purpose of shooting, and so was himself the cause of the defendant's breach of covenant, by having rendered it impossible for the defendant to enter upon the lands for the purpose of performing it.

By his declaration in this case the plaintiff charged

that by indenture, made the 18th April 1866, between Henry Hood, first part; William Cann, second part; Thomas Shapter, Lionel Roberts, and Charles Henry Kingdon, third part; the plaintiff, fourth part; Sir Thomas Dyke Acland, Samuel Trehawke Kekewich, and Sir John Buller Duckworth, fifth part; and the defendant, sixth part; it was and is witnessed that the plaintiff, and the said persons, parties thereto of the first and second parts, demised to the defendant certain messuages and lands belonging to the plaintiff, "*and also the sole and exclusive right of shooting, sporting, and fishing* in and upon, and within all the estate and lands of the plaintiff, situate in the county of Salop," for twenty-one years, from 25th March 1866; and the defendant, by the said deed, amongst other things, *covenanted* with the plaintiff that he "*would not permit the rabbits and hares to become so numerous as to cause damage* to any of the farm-tenants of the said lands and estate, and would, in the exercise of the rights thereby granted, do as little damage as possible to the property of the said farm tenants;" assigning, for breach, that the defendant, after the making of the said indenture, and during the said period of twenty-one years, did, contrary to the said covenant, permit the rabbits to become so numerous as to cause damage to divers of the farm tenants of the said lands and estates, whereby they were greatly damaged, and the plaintiff became liable to them for such damage; whereby, also, the plaintiff was greatly injured in his interest in the said lands and estate; and by reason whereof also one of the tenants, to wit, one Hoole, the farm tenant of one of the farms, called Delbury farm, part of the said estate, was so damaged that he gave notice to quit the said farm, and it became necessary to let the same to him at a lower rent than it otherwise would have been let at; and whereby also the said estate was much damaged, and the drains thereof were burrowed under and broken up, and obstructed.

The defendant by his third plea to the said declaration, pleaded that, at the time of the said alleged demise, and from thence hitherto, certain parts of the said lands of the plaintiff, in and pon and within which the plaintiff, and the said other persons, demised to the defendant the sole and exclusive right of shooting, sporting, and fishing, as in the declaration mentioned, were and have been respectively held by and in the possession of certain persons, as tenants thereof to the plaintiff and the said other persons, *without there being reserved* to the plaintiff and the said other persons or any of them, the right of shooting or sporting for, or otherwise taking, killing or destroying rabbits in upon or within the same respectively, and the plaintiff and the said other persons had not, nor had any of them, at the time of the said alleged demise, or at any time since, any right or power to demise to the defendant the right of shooting or sporting for, or otherwise taking, killing or destroying rabbits on the said parts of the said lands of the plaintiff. And that since the said alleged demise the defendant has never had or been able to have or enjoy the right of shooting or sporting for, or otherwise taking, killing, or destroying rabbits in, upon, or within the said parts of the said lands of the plaintiff, and has been wholly hindered and prevented by the said respective tenants thereof from shooting or sporting for or otherwise taking, killing, or destroying rabbits in, upon, and within the same; and that the alleged breaches of covenant in the declaration assigned are breaches of covenant *arising from and consequent upon rabbits being permitted and allowed, by the respective tenants of the said parts of the said lands of the plaintiff, to become so numerous as to cause damage*, as in the declaration alleged, and not from any default by or on the part of the defendant.

Replication. Issue taken and joined on each of the defendant's pleas; and demurrer and joinder in demurrer, to the third plea; the objection taken to the said third plea, as marked in the margin, being that the covenant is legal, binding, and absolute, and the breach not excused; and that, if the tenants will not allow the defendant to destroy the rabbits, he must take the consequences of not protecting himself against such a contingency.

The plaintiff's points for argument: First, the covenant is absolute; secondly, the defendant was bound to obtain the consent of the tenants; thirdly, prevention by *a stranger* is no answer to an action for breach of covenant; fourthly, the tenants may have had a remedy against the plaintiff for rabbit damage, and may have refused consent in order to make claims on the plaintiff, and the very object of the covenant may have been either to protect the plaintiff from or to indemnify him against such claims; fifthly, the defendant could easily have protected himself against the consequence of prevention, by inserting in the covenants an exception in his favour, when he should be prevented by tenants, if it had been the intention of the parties that, under such circumstances he should not be liable; sixthly, even as an equitable plea the facts would be much too shortly stated to show that the defendant has an equity; seventhly, if any of the following matters are material for his defence, the defendant should have alleged them, and they are not to be assumed in his favour: namely, (1) That the preventing tenants held under leases granted by the plaintiff; (2) that the defendant could not, by making some reasonable compensation, have obtained the consent of the tenants.

The defendant's points for argument. First, that the defendant is not liable on his covenant for damage arising from, and consequent upon, rabbits being permitted and allowed by the tenants of the lands, on which he never had the right of shooting, or sporting for, or otherwise taking, killing, or destroying rabbits, to become so numerous as to cause damage, as in the declaration mentioned, and not from any default by or on the part of the defendant; secondly, that it was in consequence of the plaintiff and the other lessors having no right or power to demise to the defendant the right of shooting or sporting for, or otherwise taking, killing, or destroying rabbits on the parts of the lands, in and upon and within which they *professed to demise* to the defendants the *sole and exclusive right* of shooting, and sporting, and fishing, that the alleged damage arose. Thirdly, that it was in consequence of the acts and defaults of the plaintiff and the other lessors that the said damage arose; fourthly, that the defendant's covenant is *not* absolute, but dependent upon his having the right of shooting and sporting which the plaintiffs and the other lessors professed to demise to him.

Harington (with him *H. James*, Q. C), argued on the part of the plaintiff, and submitted that the plea demurred to furnished no answer to the declaration. The declaration was founded upon and set out an absolute covenant by the defendant and a

breach of it; and the plea, if it showed any answer at all, amounted simply to this, that the defendant was prevented from performing it by the acts of *strangers*. There is no averment in the plea that the acts done were done by the plaintiff or by his direction, and no connection whatever is shown between the plaintiff and the acts of the tenants. It is no answer to an action for not keeping down the rabbits on the parts of the estate demised to him, that they were bred and increased on some other land. The covenant is either a covenant to keep down the rabbits upon the whole of the plaintiff's estates, or upon the estate over which the right of sporting is demised. Suppose a grant of sporting rights over Blackacre and Whiteacre, and a covenant by the grantee to keep down the rabbits generally, and then the grantee finds that he cannot get upon Whiteacre to shoot; it would be no answer to an action on the covenant providing against injury to Blackacre, to say that the rabbits increased in Whiteacre owing to the act of some third person. The contract being absolute, it became the defendant's duty to take all the necessary means to enable him to perform it, as by applying to the tenants for leave to enter on the lands to shoot. He chose to enter into an absolute covenant with open eyes, and must perform it, or take the consequences. *McNeill* v. *Reid* (9 Bing. 68), is an analogous case, where it was held that damages might be recovered upon an agreement by one of several partners to introduce a stranger into the firm, though the agreement be entered into without the knowledge of the firm. Tindal, C.J., in his judgment there, said, "Two objections have been made to the plaintiff's right to retain his verdict; one, that the plaintiff was aware of the fact that other persons were already in partnership with the defendant, consequently that the defendant could not, without the consent of such persons, force a stranger into the firm; and that the plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the defendant, for he should have secured the consent of his partner before he ventured to enter into such a contract, or is bound at all events to obtain it afterwards." So here, if the consent of the tenants was necessary to the performance of the contract, the defendant should have obtained it, either before or after entering into the covenant, and their refusing consent is no answer in his mouth to the plaintiff's action. The case of *The Dean and Chapter of Bristol* v. *Jones and others* (1 El. & El. 484; 28 L. J. 201, Q. B.) is also an authority in the plaintiff's favour. There a lessee had covenanted, at his own costs, to repair and keep in proper repair the demised premises, "having or taking upon the said premises, competent and sufficient housebote, &c., for the doing thereof without commiting any waste;" and it was held, in an action for not keeping the premises in repair, that the covenant to repair was absolute, with a licence to the lessee to take competent and sufficient housebote, &c., and that the finding such housebote, &c. on the premises was not a condition precedent to the lessee's liability to repair. In the present case the demise is not by the plaintiff alone, but by him and five other persons. The covenant is an absolute covenant with one of them, namely, the plaintiff. The plea is that the said persons had no power to demise, not *that the* plaintiff had not. The covenant is shown to *be separate from* and altogether independent of the demise. The demise of the game here is not the sole consideration, and even if the plaintiff has acted wrongly the defendant is not without remedy, and he can bring a cross action if he has been prevented by the plaintiff from being able to perform the absolute covenant into which he has entered: See *Boon* v. *Eyre*, cited in notes to *Pordage* v. *Cole* (1 Wms. Saund. 320 c., 320 d., 320 e.) He cited also *Spicer and others* v. *Barnard* (28 L. J. 189, M. C.).

Kemplay (for the defendant), *contra*, was not called on by the court to support the plea.

KELLY, C.B.—I am clearly of opinion that the defendant is entitled to the judgment of the court. The circumstances of the case are as follows: The plaintiff, together with five other persons, by deed granted to the defendant the right to enter upon and shoot and sport over a certain number of closes or lands—for illustration's sake, let me say over twenty closes of land—belonging to the plaintiff, and by the same deed the defendant covenanted with the plaintiff, and the plaintiff alone, that he would not permit the rabbits to become so numerous, or, in other words, that he would kill such quantities of them, upon these twenty closes of land, as would prevent their increasing in such numbers as to do damage to any of the tenants of the said land. Then comes the defendant's covenant, as correctly set forth in the declaration, and the plaintiff proceeds to assign a breach of it in these terms: "Yet the defendant, after the making of the said indenture, and during the said period of twenty-one years, did, contrary to the said covenant, permit the rabbits to become so numerous as to cause damage to divers of the farm tenants of the said lands and estates, whereby they were greatly damaged, and the plaintiff became liable to them for such damage, and whereby also the plaintiff was greatly injured in his interest in the said estate, and by reason whereof also one of the tenants gave notice to quit." That is, in effect, saying (without stating where or in what part or parcel the breach was committed), "I granted to you a right of shooting over twenty closes, and you covenanted to keep down the rabbits, and to kill as many as might be found anywhere on these twenty closes, so as to prevent them from doing damage to the tenants, or to any of the closes in question;" and then the breach assigned is, "you have not kept down the rabbits" —that is to say, "there are certain closes in which rabbits existed, and you have permitted them to increase in such numbers, by failing to destroy them; that the result has been that they have so increased as to do damage to one or more of these closes." Now, what is the defendant's answer? [Reads portion of the third plea.] That is to say, you, the plaintiff, granted to me the right of sporting over twenty closes, and as to ten of them they were in the hands of tenants, in whose leases or agreements there was no reservation of the right of sporting, therefore you had no power to grant to me any such right, and the consequence is that I have been unable to exercise the right, and to enter upon these closes, or to kill a single rabbit there. Now let us see what follows, "And the alleged breaches of covenant, in the declaration assigned, are breaches of covenant arising from and consequent upon rabbits being permitted and allowed *by the respective tenants of the said parts of the said lands* of the plaintiff, to become so numerous as to cause damage as in the declaration

alleged, and *not from any default by, or on the part of the defendant;*" which is in fact saying that the damage complained of, and the alleged breach of covenant, consist in this, that inasmuch as I was unable to enter upon these lands and to kill any rabbits there, the rabbits have been permitted by the tenants to increase so as to do the damage of which you complain, I having been unable to prevent that damage, through my being rendered unable to perform my covenant, by your not having any power to grant to me the right, which you pretended to grant to enter upon these lands. It is you, the plaintiff, therefore, and the other persons who concurred with you in the grant, who have deprived me of the power of performing my covenant, which could only have been performed by my killing rabbits in the very closes which you had no power to authorise me to enter. It seems to me to be substantially similar to a demise of a house for a year, where the lessee covenants that he will within the first three months paint and paper the house, but on proceeding to enter, in order to perform his covenant, he finds that the house belongs to a stranger, and that the lessor has no title, and so he, the covenantor, has no power to perform his covenant; can it be gravely argued that an action for breach of covenant could be maintained, and damages recovered in such a case, where the failure to perform the covenant is caused by the default of the plaintiff himself? If that be so, what difference would it make that there was a demise of two houses, and a covenant to paint and paper both of them, and on the covenantor proceeding to take possession, he is unable to enter into one of the houses so demised, in order to perform his covenant, but he enters into the other, and performs his covenant in respect of that one. What difference would it make that he was able to perform his covenant, in part, if he was not able to perform it wholly? If A. enters into a covenant with B. to do a certain act, and B. renders it impossible for him to do the act, the covenant is at an end. If A. says to B. you may go and kill as many rabbits as you please over any land belonging to me, provided you engage to kill them in such numbers that they shall do no damage to the growing crops, and when B. proposes to enter upon the lands in order to fulfil his engagement he finds that A. had no power to grant him a licence to enter on the lands, and that he would be a trespasser if he did enter, A. would in that case have rendered it utterly impossible that B. should perform his engagement. I am therefore clearly of opinion that, not only upon legal principle, but as a matter of common sense and understanding, the defendant is entitled to the judgment of the court.

MARTIN, B.—I am of opinion that the plea is a good plea; I thought so when I first read it, and I am of the same opinion still.

CHANNELL, B.—I am also of opinion that the plea is a good plea. The question is, whether the defendant was relieved from his contract by a state of facts suggested, which would go to show that as to some of the closes the plaintiff might have no title. This is not an action for any specific sum of money, but to recover damages for the particular breach which the plaintiff has proceeded upon. I agree with Mr. Harington, that possibly the plaintiff might have declared without noticing the particular terms of the demise, *that is*, he might have said that by a certain indenture, of a certain date, made between certain parties, the defendant entered into the covenant mentioned in the declaration, leaving out all reference to the particulars of the demise. If the particulars of the demise were important to the defendant's case, there would be nothing to prevent his introducing into his plea that which the plaintiff had left out of the declaration. The defendant has not put into his plea the contents of the demise, but has rather stated two facts, one of which is, that as to certain closes, or certain parts of the lands, over which the right of sporting was intended to be demised, the plaintiff had no title or authority to demise such right, not having, in the leases of such closes, previously let to his tenants, reserved any right of entering upon their lands for sporting purposes. I think that in substance, therefore, taking the whole together, it involves this—a demise of the estate, coupled with a right of sporting over certain lands, the lessee covenanting to keep down rabbits on the lands of the plaintiff, but as to a part of the lands, in respect of which a breach is alleged, the plaintiff had not, nor had any of the other five persons joining in the lease, any right to give the defendant an opportunity of doing that which he covenanted to do, or which the covenant required him to do. Now, it is quite true that in a contract under seal you need not prove the consideration; but if the defendant is in a position to show that there was a consideration for a covenant, of which covenant he is alleged to have committed a breach, which consideration has wholly failed and was false, that I think is an answer to the action. The defendant, I think, does show that. The only breaches here are breaches, not in respect of all the lands, but in respect of that part of the lands (including nominally the right to sport) as to which the plaintiff had no right to grant the privilege and authority to enter. The defendant has been prevented by the plaintiff not having previously reserved to himself the privilege which alone could have enabled the defendant to do that which he is charged with not doing. I think, therefore, the plea is good, and is an answer to the action.

CLEASBY, B.—This is an action upon a contract, and the contract is to keep down the rabbits on a particular estate, which is a perfectly legal contract. The breach here is, not keeping down the rabbits upon the estate according to the terms of the covenant. In considering the plea, we must look at the whole declaration, and not only at the breach. The defendant has a right to import into his plea the statement contained in the declaration. The statement in the declaration is that this was a grant and demise by the plaintiff and others of the right of sporting over several farms. The difficulty which, to a certain extent, I felt on the plea was that it does not allege that the defendant did keep down the rabbits upon that part of the land over which he had the right of sporting, and that he kept them down without reference to where they came from, or how they came. He does not say, "I did keep these rabbits down, and perform my covenant, in that part of the land, and as to the other part you had previously dealt with the land in such a way that I could not do it. You undertook to provide me with the means, and the only means, of performing my covenant, namely, the right to go upon the land, and so far as I could go upon the land I completely performed my cove-

nant, because I did keep these rabbits down in a certain portion of the land, but as regards the rest of the land you, by your own act, had deprived me of the only means of doing so." That, I apprehend, would have been a good plea, and the question is, whether or not the plea amounts to that. Now, with regard to these words (for all the introductory part is no answer), "that the alleged breaches in the covenant in the declaration assigned, are breaches of covenant arising from and consequent upon rabbits being permitted and allowed by the respective tenants of the said parts of the said lands of the plaintiff to become so numerous as to cause damage." I think that, stopping there they are certainly not equivalent to what I have suggested. They do not amount to an allegation that he has kept down the rabbits upon that part of the estate where he had a right to go, however strong the inference in that direction might be; but the plea goes on to say, "*and not from any default by or on the part of the defendant*," and that I think is equivalent to saying that he was prevented altogether from going there. I cannot, therefore, say that I have any reason for differing from the rest of the court in this matter.

Judgment for the defendant.

Attorney for the plaintiff, *J. J. Darley*, 36, John-street, Bedford-row, W.C., agent for *Newstead* and *Wilson*, Leeds.

Attorneys for the defendant, *Bell*, *Brodrick*, and *Gray*, 9, Bow Church-yard, E.C., agents for *Maxsted* and *Gibson*, Lancaster.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, April 22, 1871.

(Before Bovill, C.J., Martin and Bramwell, BB., Byles and Blackburn, JJ.)

Reg. *v.* Wilmot.

False pretences — Remoteness of the pretence — Evidence.

An indictment for false pretences charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags.

The evidence was that defendant saw prosecutor and gave him his card, "J. W. and Co., timber and coal merchants," &c., and said that he was largely in the coal and timber way, and inspected some coal bags, but objected to the price. The next day he called again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. Prosecutor had only forty bags ready, and it was arranged that defendant was to have them, and pay for them in a week. They were delivered to defendant, and prosecutor said he let the defendant have the bags in consequence of his having the trucks of coals under demurrage at the station.

There was evidence as to the defendant having taken premises, and having a small business in coal, but he had no trucks of coal on demurrage at the station.

The jury convicted the prisoner, and on questions reserved, this court held, that the false pretences charged was not too remote to support the indictment, and that the evidence was sufficient to sustain it.

Case reserved for the opinion of this court at the general sessions of the peace, held at Exeter, in and for the county of Devon, on Tuesday the 14th Feb. 1871.

John Wilmot was tried at the sessions above set forth.

The material part of the indictment against him charged, "That he, on the 20th Dec. 1870, contriving and intending to cheat and defraud, did unlawfully, knowingly, and designedly, falsely pretend to one Joshua Caryl Clogg, that he, the said John Wilmot, was a timber and coal merchant, dealer in seeds, guano, and other manures, farm implements, &c., at 3, Bartholomew-street, Exeter, and that his yard and stores were in the Commercial-road, meaning in the city of Exeter. And the jurors aforesaid, upon their oath aforesaid, further present that, on the 21st Dec. in the year aforesaid, the said John Wilmot did unlawfully, knowingly, and designedly, falsely pretend to the said Joshua Caryl Clogg that he the said John Wilmot had a lot of trucks of coal at Queen-street Station, meaning thereby the Exeter Station of the London and South-Western Railway, and that the said trucks were under demurrage, and that he, the said John Wilmot, required forty coal bags."

The indictment then negatived the alleged false pretences in the usual way.

It appeared from the evidence of the prosecutor, Joshua Caryl Clogg, that he is a bag maker, in business at St. Thomas, in the county of Devon.

On the 20th Dec. 1870, the prisoner called at prosecutor's shop and gave him a card, on which was printed, "J. Wilmot and Co., timber and coal merchants, dealers in seeds, guano, and other manures, farm implements, &c., 3, Bartholomew-street, Exeter. Yards and stores, Commercial-road." He said, "That he was on largely in the coal and timber way," and asked to see some bags. Prosecutor showed prisoner some bags, but prisoner objected to the price and went away, saying that he would call again. The next day (Dec. 21st) prisoner came to the prosecutor again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the Queen-street Station under demurrage, and that he wanted some bags immediately. He also asked prosecutor to recommend him a carter. Prosecutor recommended a Mr. Newcombe. Prisoner then left, saying he would go to Newcombe, and returned soon afterwards, saying that he had made an arrangement with Newcombe, and wanted eighty bags. Prosecutor had only forty bags ready. It was then arranged between the prisoner and the prosecutor that the prisoner should have forty bags, and that he should pay for them in a week. The prisoner then left. On Friday, the 23rd Dec., the younger Newcombe called, and the prosecutor delivered the forty bags to him. The prosecutor stated that he let the prisoner have the bags in consequence of his having the trucks under demurrage at the Queen-street Station.

On cross-examination the prosecutor said that the prisoner took away the bags three days after he bought them. He also said that he had seen prisoner's advertisements in the newspapers, and that he had also seen a lease of premises in the Commercial-road from the town council of Exeter to the prisoner, and that before prisoner's arrest

ent to the place, and found that the premises being repaired for the prisoner by the town cil; but he could not say what was the extent isoner's trade, or whether he had any business l. The prosecutor swore that the prisoner's and his statement that he had premises in the mercial-road, and that he was in trade there had fect whatever upon his (prosecutor's) mind, and he parted with his goods solely on the faith o ner's statement that he had coals under de- age. The prosecutor said that he knew that the bags were delivered prisoner twice called is shop while he was absent and saw his ecutor's) son about payment, and that he elf also called once at prisoner's house, and l that prisoner was out. Twenty of the bags d hold a ton of coals. Prosecutor further said oss-examination that he never sent in any bill e prisoner up to the time of his arrest, which place at Bartholomew-square, Exeter, on the an. 1871 under a warrant.

wcombe proved that prisoner came to his e on the 21st Dec., and stated to him also he had five or six trucks of coal under de- age at Queen-street station, and arranged him to send five or six carts on the following y (the 23rd Dec.) to remove it.

the next day (Dec. 22) prisoner came to New- e, and said that he should only want one cart orse. On Friday, the 23rd Dec., Newcombe's the younger Newcombe, accordingly met ner with a cart and horse. The prisoner then the younger Newcombe to the prosecutor's for ags, and as soon as he returned with them ner told him to go to Queen-street station, fterwards countermanded this, saying, "We o to St. David's first."

ordingly prisoner and the younger Newcombe first to the St. David's railway station. The David's station belongs to the Bristol and r Railway Company. The Queen-street n belongs to the South-Western Railway any.

the St. David's station the younger New- e by prisoner's order loaded two tons of coal the Patent Fuel Company's stores, and de- d it at various houses in Exeter, under the ion of a man named Eden, whom prisoner with him. The prisoner then took the ger Newcombe, with the cart, to the Queen- railway station. There, by prisoner's direc- a ton of coal was loaded from a truck into which the prisoner had obtained from prose- , and was carted to the prisoner's premises in ommercial-road, where it and the bags were Durston proved that the two loads of coal l by the younger Newcombe from the St. l's station were sold by him to the prisoner e 22nd Dec. The prisoner told him that he he bags from Mr. Clogg, and had paid 8l. for , and had been allowed 10s. discount.

cross-examination this witness said that he partner named Broomfield, and that he knew Broomfield had sold prisoner some coal about ime. A coal merchant named David Perry, firm had trucks of coal at the Queen-street n, said that prisoner called upon him and d to buy some coal, on and previously to th, and that on the 22nd Dec. he sold prisoner ons of coal; consequently, on Dec. 23rd he d the ton carted away by the younger New- e to be taken. He also knew that prisoner had been corresponding with the Bristol and Exeter Railway Company about a special rate for the carriage of coals, and had seen a letter from the company to the prisoner on the subject. He also knew that the town council of Exeter had let premises in the Commercial-road, Exeter, to the prisoner. Eden, the man who accompanied the younger Newcombe when he delivered the coal taken from the St. David's station, proved that it was delivered at houses where orders had been previously obtained for it by him on prisoner's behalf, and that when later in the day, on Dec. 22nd, he came to the Queen-street station, prisoner asked whether he had any more orders, he said "No;" and prisoner then pointed to the truck from which a load was subsequently taken, and said, "That's my truck, I will have twenty bags out of it and take them to my stores."

In cross-examination Eden said prisoner had not been paid for the coal delivered at houses in Exeter on the 23rd Dec. Coals were hard to get just at that time; and several ships had been prevented from coming up the River Exe by the ice. A warehouse- man from the Queen-street Station said that there never was any coal at that station consigned to "J. Willmot," or "J. Willmot and Co.," and that there were no coals at the station under demurrage on Dec. 23rd.

The manager of the mines department of the Bristol and Exeter Railway gave similar evi- dence, except that he could not say whether or not there was coal at St. David's station under demurrage.

In cross-examination both these witnesses said that they should know nothing about goods till they actually arrived.

At the close of the case for the prosecution the prisoner's counsel objected, first, that under the circumstances of the case the statement by prisoner that he had coals at the Queen-street station under demurrage was too remote to support an indict- ment; and, secondly, that such statement had not been proved to be untrue.

The court overruled both objections. No wit- nesses were called for the defence.

In summing up, the chairman told the jury that the only false pretence on which they could con- vict was prisoner's statement that he had coals at the Queen-street station under demurrage; and that in order to convict, they must be satisfied that the prosecutor, on the faith of that representation, parted with his bags, and also be satisfied that the statement was false, and that the goods were obtained with intent to defraud.

The jury found the prisoner guilty, but recom- mended him to mercy. The prisoner was then sentenced to six months' imprisonment with hard labour; but the court reserved the questions raised by the counsel. The prisoner remains in custody.

The questions for the consideration of the court are:

First, whether, under the circumstances of the case, prisoner's statement that he had coal at the Queen-street station under demurrage is, or is not, too remote to support an indictment; and secondly, whether there was sufficient evidence of its being false to go to the jury.

If the court shall be of opinion that the false pretence in question was not too remote, and that there was sufficient evidence of its being false to go to the jury, then the conviction will be

confirmed. But if the court shall be of opinion either that the false pretence relied on was too remote to support an indictment, or that there was not sufficient evidence of its being false to go to the jury, then the conviction will be quashed.

Morley, Chairman.

G. Lewis for the prisoner.—The conviction was wrong. Here the false pretence that the prisoner had coals at the Queen-street station under demurrage was not sufficiently connected with the obtaining of the coal bags from the prosecutor to support the conviction. It amounted to no more than this, that the prisoner represented himself, as he was in fact, to be a coal merchant, and that he required the coal bags in the way of his business. The mere fact of not having coals on demurrage at the station was not sufficient to found the charge of false pretences, for he had coals there, as was proved. [Blackburn, J.—In *Rex* v. *Villeneuve* (2 East P. C. 830), where the defendant falsely pretended to J. N. that he was entrusted by the Duke de Lauzan to take some horses from Ireland to London for him, and that he had been detained by contrary winds, and had spent all his money, and thereby induced J. N. to advance him money; this was holden to be a false pretence within the Act. Why is not the present case within the Act?] No credit was given on account of this statement about the coal on demurrage. [Bramwell, B.—Is that so? Does not the representation amount to this? "I am a person of such credit that persons send me trucks of coal."] In *Rex* v. *Johnson* (1 L. T. Rep. N. S. 513; 2 Moo. C. C. 254), it was held where money was obtained by falsely pretending that the defendant intended to marry A., and wanted money for the wedding suit, that the case was not within the Act. [Martin, B.—The jury have found that the bags were obtained by the fraudulent representation that the prisoner had coals on demurrage at the station, and that the prisoner did not mean to pay for the bags. The only question is whether there was evidence for the jury.] The false representation was too remote. Where defendant represented himself to be a naval officer, and thereby induced the prosecutrix to contract to board and lodge him at a guinea per week, and so obtained various articles of food, it was held that the obtaining of the food was too remotely the result of the false pretences, and that a conviction could not be supported:

Reg. v. *Gardner*, Dears. & B. 40; 7 L. T. Rep. N.S. 471; *Reg.* v. *Bryan*, 2. Fos. & Fin. 567.

As to the second point, that there was no evidence to go to the jury. Here it is quite consistent with all the facts of the case that the bags were not obtained by means of this false representation:

Reg. v. *Stone*, 1 Fos. & Fin. 311.

H. Clark, for the prosecution, was not called upon to argue.

By the Court.—The conviction must be affirmed.

Conviction affirmed.

Saturday, June 3, 1871.

(Before Cockburn, C.J., Channell, B., Willes, Mellor, and M. Smith, JJ.)

Reg. v. Balls.

Embezzlement—Charging a gross sum in indictment—Evidence—24 & 25 Vict. c. 96, s. 71.

It was the duty of an agent and collector of a coal club to receive payments by small weekly instalments, and to send in weekly accounts on Tuesdays, and on each Tuesday to pay the gross amount received into the bank to the credit of the club.

An indictment charged the agent with embezzling 1*l.* 1*s.*, *and evidence was given that during a certain week payments of ten smaller sums, making together* 1*l.* 1*s.*, *had been made to the agent, and that the prisoner failed to account for those sums, or for any specific sum of* 1*l.* 1*s.*

There were two other counts containing charges of embezzlement of two other sums of 1*l.* 7*s.* *and* 1*l.* 5*s.*, *and supported by similar evidence:*

Held, that the indictment might properly charge the embezzlement of a gross sum, and be proved by evidence similar to the above, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum, and that although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of three of such small sums only.

Case reserved for the opinion of this court by Mr. Commissioner Kerr at the Central Criminal Court.

At a session of the Central Criminal Court, on Tuesday, the 2nd May 1871, Edmund Balls was tried before me on the following indictment:—

The first count charged "that he, being a member of a certain co-partnership of persons trading under the name, style, and title of the Alliance Industrial and Provident Coal Society (Limited), did on the 5th Dec. 1870 receive into his possession the sum of 1*l.* 1*s.* in money, for, and on the account of the said co-partnership, and fraudulently and feloniously did embezzle the said sum of money."

The second count charged him with having within six months from the offence in the first count, that is to say, on the 12th Dec., while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 7*s.*, and with having embezzled that sum.

The third count charged him with having within six months from the offences in the first and second counts, that is to say, on the 19th Dec., while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 5*s.*, and with having embezzled that sum.

It was proved that the prisoner was a shareholder in the society named; that he received dividends on his shares therein, and that he was also duly appointed an agent of the society, in which capacity it was part of his duty to collect moneys for the society in the manner hereinafter mentioned. He gave a bond for the faithful performance of his duties. It was his duty as such agent and collector to receive payments from numerous persons who bought coals from the society, for which they were to pay by weekly instalments. Of these payments, which were to be made weekly, it was his duty to send in weekly accounts on the Tuesday of every week. And it was his duty on the Tuesday of

every week to pay the gross amount received by him in the course of the preceding week into a bank to the credit of the society.

The prisoner did in fact pay money into the bank to the credit of the society every week, both before, during, and after the time covered by the three several counts of the indictment. On some occasions he paid into the bank a larger sum than by his account of the previous week's collection he ought to have done.

To prove the allegation in the first count of the embezzlement of the sum of 1*l.* 1*s.* on the 5th Dec., it was proposed by the counsel for the prosecution to give evidence of ten different payments in the course of the week ending on such 5th Dec.; that these payments were made to the prisoner by ten different persons, and that the several small sums so paid to him amounted in the whole to 1*l.* 1*s.* It was also proposed to prove that neither in the prisoner's account, sent in by him on the 5th Dec., when he ought to have accounted for the previous week's collection, nor in any subsequent account did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 1*s.*

To prove the allegation in the second count of the embezzlement of the sum of 1*l.* 7*s.* on the 12th Dec., it was proposed also to prove by ten different witnesses ten different payments in the course of the week ending on that day; that the several small sums so paid amounted in the whole to 1*l.* 7*s.*; and that neither in the prisoner's account sent in by him on the said 12th Dec., nor in any subsequent accounts, did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 7*s.*

To prove the allegation in the third count of the embezzlement of the sum of 1*l.* 5*s.* on the 19th Dec., it was proposed, in like manner, to prove by eleven different witnesses eleven different payments in the course of the week ending on that day; that the several small sums so paid amounted in the whole to 1*l.* 5*s.*; and that neither in the prisoner's account sent in by him on the said 19th Dec., nor in any subsequent accounts, did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 5*s.*

The prisoner's counsel, who was absent while the case was being opened to the jury, objected that the course proposed to be taken would be admitting evidence of thirty-one different acts of embezzlement upon one indictment, whereas the statute only permitted evidence to be given of three. He contended that the non-accounting for each of these thirty-one sums was a separate and distinct act of embezzlement, and that only three of those acts could properly be included in one indictment.

On the other hand, the counsel for the prosecution contended that as it was the prisoner's duty to account once a week only for what he had received during the preceding week, there were only three distinct non-accountings, and, therefore, only three distinct acts of embezzlement; that the act of embezzlement was not committed upon receipt of the money, but upon the non-accounting and non-payment of it, if the jury should find such non-accounting and non-payment to be fraudulent.

I expressed my intention to confine the evidence to three separate and distinct receipts of three of the small sums so received by the prisoner as aforesaid, and to the non-accounting for the same; but, being pressed by counsel *for the prosecution*, I admitted the evidence so proposed to be given of the receipt by the prisoner of the thirty-one different sums, and of his non-accounting for the same.

This evidence was accordingly given, and the jury found that in not paying over on the 5th, 12th, and 19th days of Dec. respectively each and every of the several small sums received by him in each and every of the several weeks ending on those days respectively, the prisoner did fraudulently embezzle each and every of the said several sums, and that those sums collectively amounted in each of those weeks respectively to the several sums named in the first, second, and third counts of the indictment.

Thereupon I directed a verdict of guilty to be recorded against the prisoner on each of these counts, subject to the opinion of the justices of either bench and barons of the Exchequer, whether the evidence on which the prisoner was so convicted was properly admissible. If such evidence was not admissible in point of law, then the conviction of the prisoner is to be quashed. If properly admitted, then the conviction is to stand.

I postponed judgment, and allowed the prisoner to go out on recognisance, with sureties for his appearance to hear judgment when called upon.

R. MALCOLM KERR,
One of the Commissioners of the Central Criminal Court.

Collins for the prisoner.—The evidence objected was wrongly admitted, and the conviction should therefore be quashed. The indictment is framed upon the 31 & 32 Vict. c. 116, s. 1, which enacts that a member of a copartnership who shall steal or embezzle any of the partnership property, may be tried and committed for the same as if he had not been a partner. Then the 24 & 25 Vict. c. 96, s. 71, enables a prosecutor to charge three distinct acts of embezzlement in an indictment. It is not competent to charge the receipt of a gross sum of 100*l.*, and support that by proof of several acts of embezzlement. By the finding of the jury each of the thirty-one sums must be taken as the subject of a distinct embezzlement. [COCKBURN, C. J.—The jury also add, "And that those sums collectively amounted in each of those weeks respectively to the several sums named in the first, second, and third counts of the indictment."] The prosecutor ought to have been put to his election. In *Reg.* v. *Williams* (6 C. & P. 626), where the indictment charged the receipt of a gross sum on a particular day, and the evidence was that the money was received in different sums on different days; the prosecutor was put to his election, and directed to confine himself to one sum and one day. [COCKBURN, C. J.—In that case the prisoner was bound to account for each sum and not for the gross amount. Here the prisoner was bound to hand in weekly accounts on the Tuesday in each week. It is an account of the aggregate of all he received.] That may be so in one sense, but nevertheless the thirty-one sums were distinct acts of embezzlement. [COCKBURN, C. J.—The prisoner might have been indicted for the embezzlement of each sum, but the question here is whether he did not embezzle the gross amount?] The moment three acts of embezzlement had been proved, the evidence ought to have been stopped: (1 Taylor on Evidence, 272.) If the jury had found simply that the sums charged had been embezzled, *Reg.* v. *Lambert*, 2 Cox C. C. 309, would have applied. In

that case the prisoner had debited himself with an amount forming the balance of a number of receipts and payments; and it was held that the offence was made out if the jury were satisfied that the prisoner received in the aggregate the amount with which he had charged himself; and that he absconded or refused to account, leaving a portion of the gross sum deficient; and that it was not necessary to prove that any particular sum or sums were received from any particular person. [MELLOR, J.—Have not the jury found not only that the prisoner embezzled each of the thirty-one sums, but the gross amount also? Is there anything to prevent the charging of three aggregate sums in an indictment? M. SMITH, J.—The indictment is right, and is supported by good evidence. Does it make it bad because the jury also say that they think each of the thirty-one sums was embezzled? CHANNELL, B.—There could have been no embezzlement until the Tuesday in each week. WILLES, J. referred to *Reg.* v. *Richardson*, 8 Cox C. C. 448 and *Reg.* v. *Proud*, L. & C. 37; 5 L. T. Rep. N. S. 331.]

Besley, for the prosecution, referred to *Reg.* v. *King* (24 L. T. Rep. N. S. 670).

COCKBURN, C.J.—Without reference to *Reg.* v. *King*, we are satisfied that the conviction was right. We agree that where a man has to account for each sum that he receives, no more than three such receipts can be charged in an indictment. Even then, if it is necessary to explain the intention of the prisoner, and to show that the omission to account was not accidental or an oversight, evidence may be given of other instances to show a fraudulent intent. The present case is free from difficulty, for although anyone of the receipts might have been charged as a distinct act of embezzlement, it is distinguishable from the ordinary case by the fact that the prisoner was only to account once a week and pay over the aggregate amount he had received during the week. The account must necessarily be made up of all the items composing the aggregate sum to show how that is made out, but the handing over is of one gross amount, and the prisoner might, therefore, be charged with embezzling the gross amount, and it was not necessary to charge the embezzlement of the different sums received. The evidence objected to was, therefore, admissible, and it would be mischievous if persons in such cases as these could not be convicted of embezzling a gross sum, especially as there is no rule of law against it.

The other learned judges concurred.

Conviction affirmed.

Attorney for the prosecution, *W. T. Ricketts.*

Attorney for the prisoner, *J. H. B. Wakeling.*

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

May 30 *and June* 5, 1871.

COWLES v. GALE.

Vendor and purchaser—Specific performance—Agreement for sale of public-house—Transfer of licence—9 *Geo.* 4, *c.* 61, *ss.* 11, 14—*Licence in name of deceased owner.*

The trustees of a will sold a public-house as a going concern by auction under a power of sale. On the day fixed for completion the purchaser refused to complete on the ground that the trustees were not in a position to transfer the licence, which had been renewed in the name of the testator after his death.

Held that, though the renewal was irregular, the purchaser would not incur any risk on that account, and that under the licence, endorsed by the vendors, he would have an unimpeachable title to carry on the trade of the public-house.

Decree accordingly for specific performance with costs.

Day *v.* Luhke (*L. Rep.* 5 *Eq.* 336), *and* Claydon *v.* Green (18 *L. T. Rep. N. S.* 607; *L. Rep.* 3 *C. P.* 511, *distinguished.*

THIS was a suit by vendors for the specific performance of a contract to purchase a public house at Romford, in the county of Essex, called the Durham Arms.

The public house in question was held down to the time of his death in July 1870 by George ROSS, who, by his will dated the 21st Aug. 1868, gave all his real and personal estate to the plaintiffs upon trust for sale, and appointed them and his wife executors and executrix of his will.

At his death, George Ross was entitled to the Durham Arms in fee, and he was also possessed of the usual magistrates' and excise and other licences, under which he had carried on the business of a publican on the premises, and which had been granted to him and made out in his name under the General Licensing Act (9 Geo. 4, c. 61).

Under the power of sale contained in the will the plaintiffs on the 12th Oct. 1870, put up the public house for sale by auction, and the defendant Charles H. Gale became the purchaser at the price of 745*l.*, and the 16th Nov. following was the day fixed for completion.

On the 19th Oct. the abstract of the plaintiff's title to the public-house was delivered to the defendant's solicitors, who, on the 21st of the same month sent in requisitions, one of which was in these words: "In whose name are the licences now standing?" To this requisition the plaintiff's solicitor sent the following reply: "In the name of the late George Ross. They will be transferred by the executors in the usual way." No objection was taken to this reply.

On the 16th Nov. the parties with their solicitors and brokers met on the premises, and the stock-in-trade, furniture, &c., were valued. But on ascertaining that the licences had not been transferred into the names of the executors, the purchaser refused to complete his purchase and accept a transfer of the licences.

The magistrates' licence had in fact been renewed on the 26th Aug. 1870, in the name of the deceased owner, George Ross, under the circumstances which are stated in the judgment.

After some negotiations, which led to no result, the trustees of the will instituted the present suit for specific performance of the contract; the testator's widow being made a defendant by amendment.

Southgate, Q.C. and *Horton Smith*, for the plaintiffs. Assuming that the licence was improperly renewed in the name of the deceased owner, and that the trustees are liable to a penalty for not having complied with the requirements of the 14th section of 9 Geo. 4 c. 61, we submit that the defendant Gale would not be affected by this, but that he would have been effectually protected

by the licence being duly indorsed by the executors of the deceased owner. But, if this be not so, we submit that the purchaser is precluded from now raising the objection, as he took no exception to the answer furnished by us to his question, in whose name the licences were standing, which answer of ours was in accordance with the facts.

Daniel Jones, for the testator's widow.

Roxburgh, Q. C. and *Morton*, for the defendant Gale.—As we purchased this public-house as a going concern, time is of the essence of the contract: (*Day* v. *Lukke*, L. Rep. 5 Eq. 336.) The 16th Nov. 1870 was the day fixed for completion. We contend that the plaintiffs were not on that day in a position to transfer the licence, for there was then no licence at all in existence. The licence had been renewed in the name of George Ross after his death, and we contend that a licence to a dead man is no licence at all. We were, therefore, entitled to repudiate the contract. In *Day* v. *Lukke*, upon the day fixed for completion of a sale of a public-house as a going concern, the vendors were not in a position to procure a transfer of the licence under the 11th section of the General Licensing Act, and it was held that the purchaser was entitled to repudiate the contract. In *Claydon* v. *Green* (18 L. T. Rep. N. S. 607; L. Rep. 3 C. P. 511) the vendor of a public-house had agreed to make a proper assignment of the licences on a given day or as soon thereafter as might be; the business of the house had been carried on under the management, and under a licence granted under 9 Geo. 4, c. 61, in the name of the vendor's son as servant to his father; three months before the sale the son had gone to America and had not since been heard of, and since that time, but without any transfer of the licence, the business had been continued under the management of another son of the vendor, and it was held that the vendor, not being able to obtain the indorsement of the licence by his son in whose name it was, was not in a condition to perform his contract, and consequently that the purchaser might recover back his deposit and the expenses which he had incurred in and about the purchase. In the present case the vendors were not in a condition, on the day fixed for completion, to perform their contract; and we contend that we are, therefore, entitled to recover back our deposit, and that the bill must be dismissed with costs.

Southgate, Q. C. in reply.

June 4.—Lord ROMILLY.—This is a suit for the specific performance of a contract to sell a freehold public-house in Essex, called the Durham Arms. Some other property was sold at the same time, but this need not be regarded, as the objection applied to the public-house only. The property was put up for sale by auction on the 12th of last October, and the defendant bought both lots for 745*l*. The sale being of a public-house, time is of the essence of the contract. The 16th Nov. 1870 was the day fixed for completion, or in other words the "change day," when the possession of the public-house, with its appurtenances and liquors, was to be delivered up and the licences transferred. This was not done, and the defendant contends that the plaintiffs were not in a position to do so. The plaintiffs contend that they were able and willing to do so, and that if the defendant and his agent had but waited another hour, as he had agreed to do, the licence would have been duly transferred to him. This is the question which I have to try—namely, whether the plaintiffs on that day could transfer the licence to the defendant. The facts which raise the question are not in dispute. George Ross, during the first half of the year 1870, was the owner and his son was the occupier of the public-house called the Durham Arms, holding a proper licence to carry on business there, which licence in the ordinary course of events would have expired and would have had to be renewed on the 26th Aug. 1870. On the 13th July 1870, George Ross died. By his will he appointed his widow and the two plaintiffs his executors. The son of the testator, shortly before the 26th Aug., went to the deputy clerk to the magistrates of the Romford district, in which the public-house was situated, informed him of the death of the testator, and asked him how he should proceed. Mr. Smith, the deputy clerk, told him to attend on the 26th Aug. to renew the licence in the testator's name, and stated that the transfer could be made on a subsequent day. This was accordingly done, and the licence was renewed in the name of George Ross, who was then actually dead. I think that this was a mistake, and that according to the statute 9 Geo. 4, c. 61, the executors ought to have obtained a protection order under the 14th section, and got the licence duly transferred, and if they had done so they could without difficulty or objection have transferred the licence to the purchaser. But in fact they did not do so till Dec. 1870, and in Feb. 1871 they transferred the licence to the widow, who, has since the death of the testator and does now, carry on the business. What took place was this. The change day was fixed for the 16th Nov. 1870. On that day the parties met: everything was completed except delivery up and transfer of the licences; but before the appraisement and delivery of the goods had begun, it was discovered that by some inadvertence the licences in connection with the Durham Arms had been left in London, and with the consent of the defendant and of his solicitors, a special messenger was sent by the 4.35 train to London to fetch the licences, and the defendant and his solicitors and brother agreed to wait for his return, and, thereupon, the appraisement and examination of the furniture and liquors continued to be made and was completed. The agreement was then produced, and a receipt for the amount was endorsed on the valuation and duly stamped and signed by the plaintiffs. The messenger sent to London returned to Romford at 8 o'clock in the afternoon. In the mean time this had occurred. I will read it from paragraph 21 of the written evidence, where it is told as shortly as I can tell it: "At a few minutes before 7 o'clock the said Mr. Fry, on behalf of the defendant, asked us whether the magistrates', and excise, and other licences had been transferred into the names of the plaintiffs, the testator's executors, and was told, as the facts were, that they had not. The said Mr. Fry thereupon arose and said that he should wait no longer, and that if the licences were not at once produced to be handed over, he should not allow the defendant to complete, on the ground that they should have been in the names of the executors." That, it is agreed, is what took place upon this occasion, and the question is whether the defendant was right in so doing. Having regard to the facts which I have already mentioned,

I am of opinion that it is exactly the same as if the licence had then been returned from London, and had been tendered at the time. The contention of the defendant's counsel is that a licence given to a dead man is no licence at all, and that the renewal of the 26th Aug. 1870 was merely a frivolous and inofficious act, having no operation at all; and consequently that there was no licence then to be transferred, and therefore none could be transferred; and that, according to *Day* v. *Luhke* (L. Rep. 5 Eq. 336) and *Claydon* v. *Green* (18 L. T. Rep. N. S. 607; L. Rep. 3 C. P. 511), such being the case, the defendant was entitled to abandon the contract. The answer of the plaintiffs is twofold; first, they say that assuming the executor acted improperly in not obtaining the protection order under sect. 14 of the Act, this misconduct in no respect affected the purchaser; that the licence, if duly endorsed by the executors, protected him, and the penalty, if any, would be confined to the executors; and that, according to the practice adopted in the cases before the Romford district magistrates, the licence endorsed by the executors would have been treated as a valid transfer of the licence by the magistrates, and renewed, as a matter of course, in the name of the purchaser; and, further, they contend that, even if this were not so, still the defendant is not at liberty to take the objection, inasmuch as on the 21st Oct. 1870, two days after the delivery and receipt of the abstracts of title of the public-house, the defendant's solicitor sent in the requisitions, one of which was in these words: "In whose name are the licences now standing?" to which the plaintiffs' solicitor sent the following answer in writing: "In the name of the late George Ross. They will be transferred by the executors in the usual way." No objection was taken to this answer; the change day was appointed, and the meeting took place as if nothing more was required, although the defendant knew or must be taken to have known, that the 26th of August, 1870, which was then past, was the day for renewing the licence, and they say that these acts constitute a waiver of the objection if otherwise it could be maintained. Upon a consideration of the whole matter, I think that the objection itself cannot be maintained, and, as to any technical or other nominal objection that the licence could not be transferred, because a licence to a dead man is nothing, and that therefore there was none to be transferred, I disregard that, because the document itself, purporting to be a licence granted by the magistrates, even if invalid, rendered it impossible for any person to obtain a licence other than the legal personal representatives of the testator or their assigns. And upon reading the evidence of Mr. Smith, the Deputy Clerk for the Romford district, I am of opinion that in that district the licence being endorsed by the plaintiffs as executors of the testator, the defendant would have obtained a negotiable title to carry on the trade of the public house called the "Durham Arms." This is clearly shown by his evidence. I will read this part of it—paragraphs 2, 3, and 4: "According to the custom existing with the Romford magistrates upon the transfer of a public house with reference to the transfer of the magistrates' licence held in connection therewith, there would be no necessity in order to make a *valid transfer of such licence* from the executors or *the acting executors of a deceased testator*, as vendor to a purchaser, that such licence should, as a preliminary, be transferred from the name of the testator, the deceased licensee, into those of his executors. All that would be necessary would be for the executors or acting executors, as the case might be, to sign a notice of application for transfer in the form required by the 11th section of the statute, 9 Geo. 4, c. 61, and for such executors or acting executors as the case might be, or someone duly authorised in that behalf by them, to have attended before the said magistrates (having previously given the requisite notices under the said 11th section of the said statute 9 Geo. 4, c. 61) and to have produced the probate of the testator's will, admitted or proved the signatures to the said notices and completed the transfer of the said licence in accordance with the provisions of the said section. On the 26th Aug. 1870, the renewed licence referred to in the plaintiff's amended bill was signed by two of the magistrates and on that day on the name of George Ross being called at the meeting of the said magistrates, a person came up to the table where I was sitting and paid me the usual fees in exchange for the renewed licence which was available from the 10th Oct. 1870 to the 10th Oct. 1871. And I further say that had such renewed licence been subsequently brought to me along with the notices of application for transfer as required by the 11th section of the statute 9 Geo. 4, c. 61, and had one of the said executors or acting executors, as the case might be, or some one on their behalf, attended at the special sessions then next ensuing and produced the probate of the testator's will and acknowledged his signature to the notices and proved that the same had been duly served, such renewed licence would (provided, of course, there existed no evidence of the intended transferee being an objectionable person) have been duly transferred without further requirement into the name of the said Gale. In fact it is within my own knowledge that such licence, so granted in the name of the said George Ross in Aug. last, was in Dec. last temporarily protected by the said magistrates to the said executors, and since then, namely in Feb. last, was transferred into the name of Ann Ross, in whose name the same now stands." I am also further of opinion that, assuming that the course which was so adopted was not the right course, and that it was contrary to the Act of Parliament, still that the defendant ran no risk in accepting such transfer, as the penalty (if any) would have fallen on the executors of the testator, and not on the defendant. It is to be observed that in *Day* v. *Luhke* (L. Rep. 5 Eq. 336) and *Claydon* v. *Green* (18 L. T. Rep. N. S. 607; L. Rep. 3 C. P. 511) a good title could not then have been made except under the 14th section of the Act, and a mere transfer of the licence under section 11, was not what the executors were able and willing to give. In *Day* v. *Luhke* it could not be done, because the licensee was alive and had absconded. In *Claydon* v. *Green* it could not be done for some reason, and although it does not appear that he had absconded, yet at all events he had gone to America and he could not be found to transfer the licence; but in case of death the executors are the persons who hold the licence, and who, if they endorsed it, would have given a sufficiently good title to the purchaser. I think, therefore, that the plaintiffs are entitled to a decree for specific performance and that the defendants must pay the costs up to and including the hearing.

The plaintiffs must pay the widow's costs and add them to their own.

Solicitor for the plaintiffs, *Frederick Mason.*

Solicitors for the defendant, *H. J.* and *T. Child.*

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-law.

Wednesday, May 3, 1871.

JONES (app.) *v.* COOK (resp.).

Petroleum—Keeping without a licence—25 *&* 26 *Vict. c.* 66—31 *&* 32 *Vict. c.* 56.

By sect. 3 *of the* 31 *&* 32 *Vict. c.* 56 (*The Petroleum Act* 1868) *the word "petroleum" is to include all such rock oil, &c., as gives off an inflammable vapour at a temperature of less than* 100 *degrees of Fahrenheit's thermometer, and by sect.* 4 *it is enacted that no petroleum shall be kept otherwise than for private use within* 50*yds. of a dwelling-house, &c., except in pursuance of a licence:*

Held, that an offence was committed under the last mentioned section, although the petroleum does not give off an inflammable vapour under 100 *degrees of Fahrenheit's thermometer.*

THIS was a case stated by justices under the 20 & 21 Vict. c. 43 upon a conviction by them of the appellant for keeping, otherwise than for private use, within 50yds. of a dwellinghouse, a quantity of petroleum without being licensed. The case stated as follows:—

1. At a petty sessions, holden at Kingston-upon-Thames, in and for the division of Kingston, in the county of Surrey, on the 8th Dec. 1870, an information preferred by William Cook (hereinafter called the respondent), against the said Slaney Jones (hereinafter called the appellant), under the Petroleum Act of 1862 and 1868, charging for that the said appellant did keep, otherwise than for private use, within 50yds. of a certain dwelling-house, then and there occupied by him, a quantity of petroleum without being licensed, in accordance with the Petroleum Acts 1862 and 1868, was heard and determined by us, the said justices respectively, being then present, and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to pay a fine of 10*s.* and costs, amounting to 17*s.* 6*d.*

2. And whereas, the appellant being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied to us, in writing, to state and sign a case setting forth the facts and the ground of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance, as required by the said statute in that behalf.

3. Now therefore we, the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case.

4. Upon the hearing of the information it was admitted by the appellant that he did keep such petroleum as charged in the information, and that he had no licence to keep it; and it was admitted by both of the said parties that the petroleum did not give off an inflammable vapour at a temperature of less than 100 degs. of Fahrenheit's thermometer, but that it did give off such a vapour at a greater temperature.

5. It was contended on the part of the appellant, that inasmuch as it was admitted that the petroleum in question did not give off an inflammable vapour at a temperature of less than 100 degs. of Fahrenheit's thermometer, that no licence in accordance with the Petroleum Act of 1862 and 1868 was necessary; and that the definitions given of petroleum in sect. 1 of the said Act of 1862 and in sect. 3 of the said Act of 1868, showed that the petroleum in question did not come within the provisions of sect. 4 of the Act of 1868, under which section we convicted the said appellant.

6. It was contended on the part of the respondent that the term "petroleum" not only included the substances mentioned in sect. 3 of the Petroleum Act 1868, as giving off an inflammable vapour at a temperature of less than 100 deg. of Fahrenheit's thermometer, but also included petroleum itself or any produce thereof in any form whatever; and that sect. 3 of the Act of 1868 extended the operation of the said Acts to other substances, and prevented the substances therein mentioned from being kept and sold without a licence, although some of the substances mentioned in the said sect. 3 were not products of petroleum at all, and would not, unless they had been specially mentioned in sect. 3 of the Act of 1868, have come within the provisions of the Petroleum Acts of 1862 and 1868, although they gave off an inflammable vapour at a temperature of less than 100 deg. of Fahrenheit's thermometer. It was also contended on the part of the respondent, that the words "other substances" in the preamble of the Act of 1868, and the words "petroleum shall include all such rock oil, &c.," in sect. 3 of that Act, instead of limiting the meaning of the word petroleum, had an enlarging effect, and made the word include the substances mentioned in sect. 3, in addition to the natural meaning of the word petroleum, and that no test whatever was necessary with regard to keeping petroleum, which was naturally a highly inflammable substance, although not always flashing at less than a temperature of 100 deg. of Fahrenheit, and that any person who kept it must be licensed under sect. 4 of the Petroleum Act 1868, or render himself liable to the highest penalty imposed by the Act (20*l.*). It was further contended, on the part of the respondent, that as two separate penalties were awarded by the Petroleum Acts 1862 and 1868, one of 20*l.* for keeping petroleum without a licence, and another of 5*l.* for selling or exposing for sale petroleum which flashed at less than 100 deg. Fahrenheit's thermometer, unless the bottle containing such last-mentioned petroleum was labelled as by sect. 5 of the Act of 1868 is directed. The respondent urged that the first kind of petroleum is dangerous, the second is highly dangerous, even in common use, but both are equally dangerous, in case of fire; and it was therefore the intention of the Petroleum Acts (as will be seen by sect. 5 of the Act of 1862) to prevent traders keeping either description in any improper place, so as to endanger the neighbouring public, for in case of fire it is impossible to extinguish it by water; and with regard to that petroleum that flashed at less than 100 deg. of Fahrenheit's thermometer, it was the intention of the said Acts to prevent it being even exposed for sale in small quantities, unless the public who purchased were fully cautioned against its extra dangerous properties. The respondent also cited in further proof that this was the proper construction of the Petroleum

Acts; the portion of sect. 4 of the Act of 1868, which amongst other things gives the local authority power, after actually granting their licence, to annex conditions to it, as, for instance, a power to test such petroleum from time to time, and he argued therefrom, that if a licence was only required in cases where petroleum flashed at less than 100 deg. of Fahrenheit, and this fact having been once admitted, and a licence granted to the person keeping such petroleum, there would be no necessity for any further test, whereas, on the contrary, these words showed that a trader having taken out a licence to keep petroleum, might store and sell as much as he liked, if it did not flash under 100 degs. Fahrenheit, without a label, but if on testing it he found it flashed at less than 100 degs., he was at once compelled by the Acts to put a proper label on the bottles in which he sold it, the same petroleum frequently, from atmospheric or other causes, differing in its degree of inflammability and requiring testing frequently in order to guard against such variations of inflammability. It was further contended by the respondent that sect. 6 of the Act of 1868, which gives an inspector of weights and measures power to inspect and test all petroleum kept, offered, or exposed for sale, and if he shall find any kept, offered, or exposed for sale contrary to the provisions of the Petroleum Acts of 1862 and 1868, the same shall be liable to be seized, and on conviction, forfeited, and the person or persons offending shall be liable to a penalty not exceeding 5l., fully confirmed all his previous arguments, for he argued that the section applies to the minor offence of exposing for sale petroleum that flashes at less than 100 deg. of Fahrenheit without having a proper label, and it gives an appeal from the test of such inspector, and the petroleum is only forfeited in case of conviction; whereas sect. 4 says that petroleum kept without a licence shall be forfeited with or without a conviction, and the occupier of the place in which the petroleum is kept shall be liable to a penalty of 20l., the respondent contending that the inspector under sect. 4 is not required even to test the petroleum, and that no appeal is therefore given against his decision. The respondent therefore contended that the Petroleum Acts prevented two things; first, the keeping of petroleum, &c., without a licence, whether it flashed at less than 100 deg. of Fahrenheit's temperature or not; secondly, the selling petroleum that flashed at less than 100 deg. of Fahrenheit's thermometer without a cautionary label on the vessel containing it.

7. We being of opinion that the contention of the respondent as stated in paragraph 6 was the correct construction of the Petroleum Acts of 1862 and 1868, and that the case was within the operation of sect. 4 of the Act of 1868, gave our determination against the appellant in the manner before stated.

8. The questions of law arising on the above statement for the opinion of the court, therefore, are: First, Whether any kind of petroleum, at whatever temperature it gives off an inflammable vapour, is contemplated by sect. 4 of the Act of 1868, and requires a licence for keeping it? secondly, whether only such petroleum as gives off an inflammable vapour at a temperature of less than 100 deg. of Fahrenheit's thermometer is contemplated by that section, and requires a *licence for keeping it?* thirdly, whether the petroleum, *for the keeping* of which the information was laid against the appellant, was shown to be within the provisions of the Petroleum Acts 1862 and 1868, and whether the appellant was rightly convicted by us the undersigned justices?

If the court be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said conviction should be quashed and the said information dismissed.

Given under our hands this 19th Jan. 1871, at Kingston-on-Thames, in the county aforesaid.

(Signed) Charles Cooke.
Edward Welch.

By the 25 & 26 Vict. c. 66 (An Act for the safe keeping of petroleum) s. 1, it is enacted that—

Petroleum, for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100 deg. of Fahrenheit's thermometer.

By sect. 3 it is enacted that—

From and after the 1st Oct. 1862, not more than forty gallons of petroleum shall be kept within 50yds. of a dwelling-house, or of a building in which goods are stored except in pursuance of a licence given by such local authority as is hereinafter mentioned, &c.

By the 31 & 32 Vict. c. 56 (the Petroleum Act 1868), it is by sect. 1 enacted that this and the former Act shall be read as one Act.

Sect. 3 enacts that—

For the purposes of the Petroleum Acts 1862, 1868, including all local Acts and bye-laws relating to petroleum or the produce thereof, "petroleum" shall include all such rock oil, Rangoon oil, Burmah oil, any product of the same, and any oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, and any product of them as gives off an inflammable vapour at a temperature of less than 100 deg. of Fahrenheit's thermometer.

By sect. 4 it is enacted that—

From and after the 1st Feb. 1869, the 3rd section of the Petroleum Act 1862 shall be repealed, &c., and that from and after the 1st Feb. 1869 no petroleum shall be kept, otherwise than for private use, within 50 yds. of a dwelling house, or of a building in which goods are stored, except in pursuance of a licence given in accordance with the Petroleum Act 1862. . . . Any petroleum kept in contravention of this section shall be forfeited, and in addition thereto the occupier of the place in which such petroleum is kept shall be liable to a penalty not exceeding twenty pounds a day for each day during which petroleum is kept in contravention of the Petroleum Acts 1862 and 1868, or either of such Acts.

Section 5 enacts that—

No person shall sell or expose for sale for use within the United Kingdom any description of petroleum from and after the 1st Feb 1869, which gives off an inflammable vapour at a temperature of less than 100 deg. of Fahrenheit's thermomer, unless the bottle or vessel containing such petroleum have attached thereto a label in legible characters, stating as follows: "Great care must be taken in bringing any light near to the contents of this vessel, as they give off an inflammable vapour at a temperature of less than one hundred degrees of Fahrenheit's thermometer." Any person acting in contravention of this section shall for each offence be subject to a penalty not exceeding five pounds.

Sect. 6 empowers any inspector of weights and measures, or other person or persons, duly appointed under the 22 & 23 Vict. c. 56, at all reasonable times to inspect and test all petroleum kept, offered, or exposed for sale; and if upon such inspection and test any description of petroleum shall be found, kept, or offered for sale as aforesaid contrary to the provisions of this Act, or of the Petroleum Act 1862, the same shall be liable to be seized, &c.

neither appeared for the appellant.—The con- n was wrong. The Acts upon the subject of eum apply only to liquids that give off an mmable vapour at a temperature of less than g., and it is found in the case that the petro- the appellant had upon his premises did not ff an inflammable vapour at less than 100 This is clear from the fact that the 6th n provides for testing the liquid, which would be unnecessary if petroleum of any quality within the Act.

d appeared for the respondent, and argued he conviction was right.

CRESSWELL, J.(a)—I am of opinion that the trates were right in their decision. By the eum Act of 1862 it is enacted that the term oleum" shall include any product thereof ives off an inflammable vapour at a tempera- f less than 100 deg. Then sect. 3 refers to eum both in its natural and its artificial state. It is argued for the appellant that in sect. 3 Petroleum Act of 1868, petroleum must such petroleum as gives off an inflammable r at less than 100 deg.; but that is not what s. Sect. 4 means that a person shall not petroleum nor such rock oil, as is described, es off an inflammable vapour, without a . Certainly sect. 6 appears to be some- inconsistent with the former provisions; but be construed to mean, that if upon inspec- se article is found not to be petroleum, no on as to test is to arise. At all events there hing in that section to repeal the distinct ions already enacted.

LUSH, J.—I am of the same opinion. If the 1862 stood alone, it is perfectly clear that troleum or any product thereof could be without a licence. In the year 1868 it was ly represented to Parliament that other oils petroleum gave off dangerous vapours, and pon the legislation of that year took place he subject, but it leaves petroleum proper ished. Sect. 4 is certainly important as g the distinction between storing and . The object of sect. 5 is to give a caution public as to the dangerous nature of the , and sect. 6 appears to be directed to cases petroleum is kept for sale, and not for e only. I think, therefore, that the convic- correct.

Conviction affirmed.

Attorney for the appellant, *Charles Walter*, Mark-lane-upon-Thames.

Attorneys for the respondent, *Bell* and *New*, Kingston-upon-Thames.

SECOND COURT.

May 3 and 5, 1871.

(Before MELLOR and HANNEN, JJ.)

MARSHALL (app.) *v.* FOX (resp.).

Habitual Criminals Act 1869—*Permitting thieves or reputed thieves to assemble, &c.—Purpose of meeting—Conviction.*

The appellant was convicted under sect. 10 *of the* 32 & 33 *Vict. c.* 99 (*The Habitual Criminals Act* 1869), *of knowingly harbouring thieves or reputed thieves, and permitting them to meet and assemble in his house. It appeared that there was held in the house of the appellant, who was an innkeeper, what was called a "friendly meeting" or "lead" for the purpose of getting up a subscription in aid of the wife and children of a man who had been committed to take his trial for an offence, or for procuring him means for his defence. The money was collected by cards of admission. The company sat round a table drinking and singing songs, and amongst them were several thieves, or reputed thieves, whom the appellant knew to be such. There was no disorderly conduct, nor were the parties assembled in pursuance of any absolutely unlawful design or to concert crimes or otherwise misbehave themselves:*

Held, that such an assembly was within the operation of the said 10*th section, and that the conviction was right.*

THIS was a case stated by one of the metropolitan police magistrates upon a conviction by him of the appellant for an offence under sect. 10 of the 32 & 33 Vict. c. 99, for that he, being a person who occupied and kept a place where excisable liquors were sold, did knowingly harbour thieves or reputed thieves, and knowingly permit or suffer them to meet or assemble therein, upon which conviction he was fined 5*l*. It was at the hearing proved on the part of the complainant that on the day named there was held in the house of the appellant what was called "a friendly meeting," or "lead," for the purpose of getting up a subscription in aid of the wife and children of a man who had been committed to take his trial for an offence, or for procuring him means for his defence. The manner in which the money was collected was by cards of admission circulated by the friends of the parties to be benefited. In the large room of the alehouse the company sat round a table drinking and singing songs, and amongst the company were several thieves or reputed thieves, whom the appellant knew to be such. There was no disorderly conduct proved. The magistrate, in convicting, held that there was such an assemblage as was within the meaning of the before-mentioned section, though at the same time he was not of opinion that the parties assembled there were there in pursuance of any absolutely unlawful design, or that they met together to concert crimes or otherwise to misbehave themselves.

If the court should be of opinion that upon the facts stated, the magistrate was bound to convict the said John Marshall, then the conviction was to be confirmed. But if the court should be of a contrary opinion, then the said conviction was to be quashed.

By sect. 10 of the 32 & 33 Vict. c. 99, it is enacted that—

> Every person who occupies or keeps any lodging house, beerhouse, public-house, or other place where excisable liquors are sold, or place of public entertainment or public resort, and knowingly lodges or harbours thieves, or reputed thieves, or knowingly permits, or suffers them to meet or assemble therein . . . shall be liable on summary conviction to a penalty not exceeding 10*l*., &c.

Francis appeared for the appellant.—The magistrate was not bound to have convicted, as it is clear that although there may have been some bad characters amongst the assembly, the purpose was a lawful and proper one; and the object of the section was to prevent the assemblages of thieves who might be congregating together to concoct unlawful designs. He referred to

(a) Cresswell and Hannen, JJ., were sitting in the Bail

Greig v. *Bendeno*, Ell. Bla. & Ell. 133; 27 L. J. 294, M. C.; and
Belasco v. *Hannant*, 31 L. J. 225, M. C.; 6 L. T. Rep. N. S. 577.

F. M. White for the respondent.—The magistrate was right. This was not a casual meeting, but was settled beforehand. The object of the section was to prevent thieves from assembling together in such houses.

Francis was heard in reply.

Cur. adv. vult.

May 5.—MELLOR, J.—We have considered the mode in which the question is referred to us, and we cannot help thinking that what the magistrate intended to ask us is, whether having stated the facts of the case, and having found nothing that ought to induce him to draw any other inference than that which he appears to have drawn, we ought to say he was at liberty to hold otherwise? That is the sense in which we think that he intended to leave to us the question whether he was not bound, the facts being proved before him, to hold that these facts bring the case within the statute, we think that he ought to have so decided upon the facts stated, and we think therefore he was bound in that sense so to decide. Now, the statute by the 10th section which is in Part 3, under the head "Habitual Criminals," enacts thus: "Every person who occupies or keeps any lodging-house, beerhouse, public-house, or other place where exciseable liquors are sold, a place of public entertainment or public resort, and knowingly lodges or harbours thieves, or reputed thieves, or knowingly permits or suffers them to meet or assemble therein," &c. Now, in this particular case, the occasion of the assembly was that some man who had got into trouble upon some criminal charge, sends out, by means of his friends, cards inviting people who took an interest in his fate to assemble together that they might be induced to subscribe funds for his defence. It is called a friendly meeting, or lead, and people are called together by means of cards. There were a number of persons sitting round a table singing and drinking, and so far as all the parties are concerned, even supposing them not to be thieves or reputed thieves, nobody can doubt that they did meet and assemble together in the appellant's house. It turns out that a number of them were thieves, or reputed thieves, and the magistrate has found as a fact that the appellant knew that some of the people there assembled, drinking and singing songs, were thieves, or reputed thieves. We quite agree that it is not every casual meeting of thieves, or reputed thieves, which can constitute this offence. It would be very hard indeed if it were so. We think the object of the Legislature was to prevent thieves, although they had no particular felonies or criminal object in view, from meeting together. The theory upon which the legislation in the Act is based is this, that where thieves or reputed thieves meet together, it affords an opportunity or inducement for the concoction and commission of future crimes and offences, and therefore the Legislature intended to strictly prohibit people who have public houses or other places of public entertainment from allowing thieves or reputed thieves to *assemble together* in such places. We think the *magistrate has found facts* upon which, if he *discharged his duty properly*, he ought to have convicted the appellant, and we think that that is the only meaning he could have put upon the word "bound." Therefore, although he has put the question to us in a form which at first presented some little difficulty, upon consideration we think that he has given the right meaning to it, and that the conviction should be affirmed.

Conviction affirmed.

Attorneys for the appellant, *Hickling* and *Washington*.

Attorneys for the respondent, *Ellis* and *Ellis*.

Saturday, June 3, 1871.

GORE AND OTHERS (apps.) *v.* THE SPECIAL COMMISSIONERS FOR ENGLISH FISHERIES (resps.)

Salmon fishery—Fixed engine—Stop net—Definition—28 & 29 Vict. c. 121, *s.* 39.

G. being the owner of a several fishery in a tidal navigable river, used a stop net for catching salmon. A boat was fixed or steadied by large poles tipped with iron which the fisherman carried in his boat, and worked into the bed of the river in contrary directions to which the boat was tied. The fisherman then had two poles extending beyond and resting upon the gunwales of the boat to which a net was attached. He kept his hand on the upper end of the poles, so that when he felt a fish had gone into the net, he could instantly jerk up the mouth of the net and enclose the fish. The weight of the poles and the net rested mainly on the gunwales of the boat, and they were nearly balanced, so that the fisherman's hand did not support or work the net which was thirty feet wide, the poles of the net not being fastened to the boat:

Held, that this net was a "fixed engine" within the definition of the 28 *&* 29 *Vict. c.* 121, *s.* 39, *which includes any net fixed to the soil or made stationary in any other way.*

THIS was a case stated for the opinion of the court by the Special Commissioners for English Fisheries, pursuant to the Salmon Fishery Amendment Act 1865 (28 & 29 Vict. c. 121), which incorporates the statute 20 & 21 Vict. c. 43, as follows. At a court holden by the said special commissioners at Newport, in the county of Monmouth, on the 13th Dec. 1869, for the purpose of inquiring into the legality of the fixed engines situated in the river Usk in the Usk fishery district. The Rev. George Gore and others, the trustees of the late Capel Hanbury Leigh (hereinafter called the appellants), having been duly summoned to appear before the said commissioners, and having appeared by their attorney, made claim to use a stop net in a certain fishery called the Lower Crown fishery in the river Usk, and also a stop net in a certain other fishery adjacent, for a certain number of hides, of which stop nets the said appellants were the owners, as being lawful engines and not merely privileged fixed engines within the meaning of the Salmon Fishery Acts, and the said commissioners having heard what was alleged and proved gave their decision on the 18th May that the stop nets were fixed engines and were privileged within the meaning of the Salmon Fishery Act 1865 (28 & 29 Vict. c. 21, s. 39). And whereas the said appellants being dissatisfied with the decision of the said commissioners, and having given notice of appeal to this honourable court, and having requested us to state a special case for the opinion of this court accordingly, and having also

entered into recognisances as required by the
te, the said commissioners hereby state and
such case as follows:

CASE.

the Salmon Fishery Act 1861 (24 & 25 Vict.
9, s. 11), it is enacted that no fixed engine
ld be placed or used for catching salmon in
nland or tidal water, and there was added the
ving proviso: "But this section shall not
any ancient right or mode of fishing as law-
exercised at the time of the passing of this
y any person by virtue of any grant or charter,
memorial usage. The fixed engines thus saved
the operation of the 11th section were de-
l by the subsequent statute, 28 & 29 Vict.
, s. 39, to be privileged fixed engines. And
ord "fixed engine" was defined to include a
at is secured by anchors or otherwise tem-
ily fixed to the soil. And by sect. 4 of the same
he words "fixed engine" were defined to in-
all fixed implements for catching or facilitat-
he catching of fish.

the Salmon Fishery Act 1865, sect. 40, the
l commissioners for English fisheries were
rised to inquire into the legality of all fixed
es erected or used for catching salmon within
mits of the Salmon Fishery Acts 1861 and
and to abate and remove all such as were not
d to their satisfaction to be privileged, and
e 41st section, where a claim is made by any
n on behalf of a fixed engine that it is privi-
, the commissioners shall, on proof being
to their satisfaction that such engine was
eged, certify to that effect, stating in the cer-
e the situation, size, and description of the
e.

the hearing of the said claim, before the said
issioners at Newport aforesaid, the appellant
claim to the said stop nets as being not
d engines," and therefore not within our
liction. And it is to be taken as a fact that
said stop nets are "fixed engines," there was
ient evidence to satisfy us that there was
eral fishery lawfully created, and that the
nets were lawfully used at the places herein-
described. We held that the appellants were
ed to our certificate to that effect, pursuant
e statute, and that our certificate must
ibe the situation of the engine. The said stop
were used in the river Usk between Caer-
and the town of Usk, and the river at
places where the nets in question were
is tidal and navigable, but not at the state of
ide when the nets are in use. The fisher-
on going out to fish with a stop net first
es his boat athwart the current. This he
irst by his anchor until he can set in position
long stakes or poles tipped with iron which
rries in his boat. One of these poles he
s or works into the bed of the river from one
f the boat in a slanting direction, the second
rks in like manner into the bed of the river
the other end of the boat, and a third pole is
ally slanted in a direction transverse to the
two from one end of the boat. These stakes
es are lashed to the boat with ropes, and the
ined effect of the poles when set and pene-
g the bed of the river is to keep the boat still
place, and to prevent the current carrying it
on to either side. When the boat is
steadied, the fisherman puts his net over-
, which is about thirty feet wide at
the mouth, and tapers to a point. The mouth which faces the current is distended by two light poles called rames, which are tied together at one end with a rope, and which end the fisherman keeps his hand upon when fishing. The rames diverge from this upper end gradually until at their furthest end they stretch out the mouth of the net to its full width of about 30ft. This stretching is facilitated by a cross stick or stretcher inserted between and fastened to the rames at about 7ft. from the upper end, and this prevents the rames closing together. The rames are about 22ft. long, and each lies over the edge of the boat, touching the edge at a distance of about 8ft. from the upper end where the poles converge. When the net is working the rames point against the current in a slanting direction, and form an acute angle of about twelve degrees with the surface of the water, the lower ends being under water, so as to keep the bottom rope of the net about three or four feet below the surface. The upper ends of the rames meet and are tied together, being pressed upon by the fisherman's hand, as the net and poles are almost self-balanced. The weight of the net and rames rests on the edge of the boat, the fisherman's hand being on the upper end, not to support or work the net, but merely so that he may be quite ready to jerk up the rames at a moment's notice in a horizontal position. The upper end of the rames could be equally well kept steady by tying it with a string to a part of the boat, but inasmuch as the fisherman must in any event be in a standing position to jerk up the rames on the instant while he is so standing, his hands or arms generally lean on that end of the rames, and thereby help at the same time to keep the rames steady. In jerking up the rames he uses the edge of the boat on which each rame rests as a fulcrum, but the rames are not tied to the boat. When the rames are raised to a horizontal position they raise with them the mouth of the net out of the water, and so prevent the fish escaping. The net need not, and seldom does, touch the bed of the river; but it is essential that its weight should rest on the boat, and that is effected by suspending the net to the poles or rames which lie over the edge of the boat. These rames are necessary, first, to distend the net, and keep it open, and, secondly, to jerk up the mouth of the net instantly when necessary. The fisherman began to fish as before described generally from two hours before the ebb to the flood tide, and remained fishing with his boat in position as above mentioned from two to three hours at a time. During that period the water was generally at its lowest, and was not, in point of fact, used for the purpose of navigation, and no evidence was given that any actual obstruction to the navigation was caused by the said stop nets and boats during the time these were used for fishing purposes. The said stop nets were set and used in the same spot, such spot being selected from some favourable peculiarity in the current at that place, and the reason given for their being used only immediately before low water was, that the current or tide would at other times be so strong as to sweep away the boat and cross poles, or render it more difficult to steady and fix the boat. It was essential for the working of the net used in the above manner that the boat in which it is used should be fixed or steadied in some way. It was admitted by the opponents of the claim that

the place where the stop nets in question were used was part of a legally created and existing several fishery, known as "The Crown Fishery," in the river Usk, and which had belonged to the kings and queens of England, in right of the Crown, down to the 12th March 1839, when it was duly conveyed by Her Majesty's Commissioners of Woods and Forests by deed to the predecessor in title and possession of the present appellants for the consideration of 600*l*. It was contended on the part of the appellants that the stop nets were fixed engines, and that the Court of Queen's Bench had so decided in *Holford* v. *George* (L. Rep. 3 Q. B. 639), and that such fixed engines would be illegal, being prohibited by statute 2 Hen. 6, c. 15, unless they had existed before that statute. On the other hand, it was contended by the appellants that the said stop nets were not fixed engines under the circumstances applicable to the spot where they were used in this fishery, and were not prohibited by the statute 2 Hen. 6 or any other statute, and were not within the prohibition of the Salmon Fishery Acts, and that the owner could use as many of such engines as he pleased within any and all parts of this several fishery where no obstruction to navigation was caused thereby; that the statute of Hen. 6 only applied to fixed engines which actually obstructed or were calculated to obstruct the navigation of the river at the places wherein and during the time when they were used; but here, there being no evidence of any such actual obstruction of navigation, but merely a use of poles and stakes to steady the boat, and the evidence on the contrary leading to the conclusion that at the state of the tide when the fishing actually occurred, no such obstruction could exist, that therefore there was nothing in that or any other act to render this mode of fishing illegal either before or since the Salmon Fishery Acts; and further, that the statute of Henry 6, and the other statutes for prohibiting the use of fixed engines, could not, and did not, affect the Crown, which might have used any number and description of fixed engines within the fishery in question, without any sort of interruption at all times down to the year 1839, and consequently that *quoad* the fishery in question, there was nothing on which the Salmon Fishery Acts of 1861 and 1865 could operate. We were of opinion upon the evidence as above stated, that the said stop nets were fixed engines within the meaning of the Salmon Fishery Acts; but inasmuch as the other evidence satisfied us that they had been lawfully used before those and any other statutes which prohibited them, we gave our decision that they were privileged "fixed engines," and that the appellants were entitled to our certificate to that effect.

The question for this honourable court is, whether on the facts we ought to have held that these stop nets were not fixed engines, and ought to have declined jurisdiction.

If the opinion of the court is in the negative, then our order and certificate will stand; if in the affirmative, the case will be remitted to us, that we may decide accordingly.

Given under our hands this 30th Nov. 1870.

JAMES PATERSON.
T. SPRATT.
HENRY SCOTT.

Mathews, Q.C. (*J. O. Griffits* with him) contended that this was no more a fixed engine than a man sitting on a punt and using a fishing rod could be called a "fixed engine." The man was essential to the working of the net which could not catch a fish unless he were there to do something to the net. If, instead of a boat in the river, a person were to hold the net over a bridge, it would be the same thing, and neither the man nor the bridge could be called a "fixed engine." This was not a fixed but a movable net. It was not within the mischief or the words of the Salmon Fishery Acts. There was nothing illegal in the mode of fishing, and a person might use as many of these nets as he pleased. The judgment of the commissioners ought, therefore, to be reversed.

Archibald (the *Solicitor-General* with him) for the respondents, was not called upon.

BLACKBURN, J.—I do not think we need trouble you to argue this case Mr. Archibald. It comes to be a question whether or not this net is a "fixed engine?" We have the case amended now, and can see how it is done, and whether this comes within the description of a "fixed engine." The 28 & 29 Vict. c. 121 was passed so as to make that term include "any net or other implement for taking fish, fixed to the soil or made stationary in any other way, not being a fishing weir or fishing mill-dam." The question therefore is, whether this net is made stationary? It is admitted that the rames—the poles I would rather say—on which the net works, are made stationary; and it is very much as Mr. Mathews puts it, as if there were a bridge across the river and this net rested upon it. When we have the description of the net, we find that it is of a very large size, and no human being would have any power to hold it up against the tide—a net thirty feet wide, and going a considerable distance into the water. It rests on the side of the boat by its own weight, and it is made stationary. As long as the boat is stationary it remains fixed and stands there. It is admitted that if there was not anything to steady it the net would from the pressure of the water below pass under the boat. It is as Mr. Mathews put it, as a teaspoon that is balanced, which would fall down if the part which is beyond extended a little further. Something there must be to keep it there. I would say that if it were tied with a piece of packthread and the fisherman was standing there resting one hand to hold it there, and if it is in consequence of this pressure of the hand upon it that it is made fixed, yet notwithstanding that it is a human hand that does it, and the net so becomes stationary, it is brought within the Act. It seems to me to be as much stationary when the man is there as though it had been fixed. I do not think that the mere intervention of the hand would in all cases make it stationary; but I think that here, when you come to consider whether it is made stationary or not, the quantum of degree is very material. I do not think that a mere casting net which a man throws into the water for a short time could be called stationary. But here it is made stationary and fixed by the man standing and keeping his hand upon it. If the net itself is stationary, and catches a fish because it is stationary by mechanical means, the case would be entirely free from doubt. The present case, however, is very near this. The net was kept there, and it is because of its being so kept stationary that the fish go into it, and when there the fisherman jerks it up. It is by means of its being stationary that

the fish are caught. I think that the respondents are right, and that our judgment should be for them.

LUSH, J.—I am of the same opinion. I think that it is impossible to say that this net was not made stationary. It was not fixed to the side of the boat, it is true; but if it is made stationary in any other way it is sufficient, and comes within the Act. If these poles or rames had been tied to the boat, there cannot be a doubt that that would make the net stationary. But if, instead of that, the tops of the poles be steadied by human agency, it is equally within the terms of the statute.

Judgment for the respondents.

Attorney for the appellants, *Benjamin Hunt.*

Attorney for the respondents, *Solicitor to the Treasury.*

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR and H. H. HOCKING, Esqrs., Barristers-at-Law.

Monday, June 5, 1871.

ALLEN (app.) *v.* TONBRIDGE (resp.).

Hackney carriage—Railway station—"Plying for hire"—The Metropolitan Public Carriage Act 1869 (32 & 33 *Vict. c.* 115) *s.* 4.

The driver of a carriage, standing on the premises of a railway company, by permission of the company, awaiting the arrival of the trains, applied to persons arriving by one of the trains to hire his carriage:

Held, that this was a "plying for hire" within the meaning of the Metropolitan Public Carriage Act 1869 (32 & 33 *Vict. c.* 115) *s.* 4, *and that the carriage was therefore a hackney carriage, and ought to be licensed.*

Clarke *v.* Stanford (24 *L. T. Rep. N. S.* 389; *L. Rep.* 6 *Q. B.* 357) *followed.*

CASE stated by justices under 20 & 21 Vict. c. 43.

1. Upon the hearing of an information preferred by the appellant, an inspector of the metropolitan police, against the respondent, charging for that he on the 23rd June 1870, was the owner and driver of a certain unlicensed hackney carriage, which unlawfully plied for hire at the Cannon-street Railway Station, in the said city, contrary to the Metropolitan Public Carriage Act 1869 (32 & 33 Vict. c. 115) s. 7, I dismissed the same.

2. The 7th section of this statute referred to is as follows:

If any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding five pounds every day during which such unlicensed carriage plies. And if any unlicensed hackney carriage is found on any stand within the limits of this Act, the owner of such carriage shall be liable to a penalty not exceeding five pounds for each time it is so found. The driver also shall in every such case be liable to a like penalty, unless he proves that he was ignorant of the fact of the carriage being an unlicensed carriage. Any hackney or stage carriage plying for hire, and any hackney carriage found on any stand without having such distinguishing mark, or being otherwise distinguished in such manner as may for the time being be prescribed by the said Secretary of State shall be deemed to be an unlicensed carriage.

3. The Secretary of State for the Home Department has by an order made pursuant to the power given him by sect. 6 of the said statute, dated the 1st Feb. 1870 (regulations Nos. 6 and 7), prescribed the distinguishing mark of a licensed four-wheeled hackney carriage to be a metal plate, bearing the number which is to distinguish such public carriage fixed on the back panel thereof. Subject to certain provisions contained in the said order of the said Secretary of State (regulations Nos. 4, 20, and 27), there is no restriction on the rates to be charged by the proprietor of a licensed hackney carriage.

4. In sect. 4 of the same statute, "stage carriage" is defined to mean "any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act, and in which the passengers, or any of them, are charged to pay separate and distinct, or at the rate of separate and distinct fares for their respective places or seats therein," and "hackney carriage" to mean "any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is not a stage carriage," the words "limits of this Act" being simply defined by sect. 2 to be "the Metropolitan Police District, and the City of London and the liberties thereof."

5. The words "plies for hire," in the 7th section, are not defined in the said statute, and no definition of them is given in the 1 & 2 Will. 4, c. 22, or any of the earlier Acts; but sect. 15 of the said Metropolitan Carriage Act 1869, enacts that "all the provisions of the Acts relating to hackney carriages and metropolitan stage carriages in force at the time of the commencement of this Act shall, subject to any alteration made therein by this Act or by any order or regulation of the said Secretary of State made in pursuance of this Act, continue in force and all such provisions of the said Acts as relate to licenses granted under those Acts, or any of them, shall, subject to any alteration as aforesaid, apply to licences granted under this Act.

6. It was proved or admitted before me, for the purposes of this case, as follows: that the respondent was the owner of a four-wheeled carriage of the class usually called "broughams," which carriage he, dressed after the manner of a private coachman, himself drove.

7. That the respondent's carriage had no "distinguishing mark" or "numbered plate," such as licensed hackney carriages ought to have, and presented the appearance of a private carriage.

8. That the South-Eastern Railway Company allowed to the proprietors of certain carriages, both of the class known as "cabs" and of the said class usually called "broughams," the right or privilege of coming into the railway station at Cannon-street, and of standing such cabs and broughams by the arrival platform in the interior of such station for the purpose of being hired; the said station in Cannon-street (where the alleged offence is stated to have been committed) being the property of the said South-Eastern Railway Company, to which the general public have no right of access, except when arriving or departing as passengers by the said railway.

9. That the respondent being allowed such privilege from the said South-Eastern Railway Company on the day in question, placed or stood his brougham alongside the arrival platform in the interior of the said station, and spoke to two several passengers who had arrived by train, his object being to get his carriage hired, but neither passenger engaged him.

10. That the railway company so allowed the

respondent to stand his carriage in their station for the purpose of accommodating some of their passengers who desired a better class of carriage than those known as "cabs."

11. Upon these facts it was contended by the counsel for the appellant that the respondent had committed the offence with which he was charged, on the following grounds.

(*a*) That the respondent's carriage was a hackney carriage within the meaning of the statutes.

(*b*) That there was a "plying for hire" within the terms of the section under which the respondent was charged, although the plying for hire was proved to have been within the said railway station; and upon this point the appellant's counsel relied on the fact that the definition of a hackney carriage given by sect. 4 of the 32 & 33 Vict. c. 115 is, that it is a "carriage for the conveyance of passengers, which plies for hire within the limits of the Acts," without adding, as in the definition given in the same section of a stage carriage, "in any public street, road, or place," and that such definition must be construed literally.

The counsel for the appellant also urged that the said statute having been passed some months after the decision of the Court of Exchequer in *Case* v. *Storey* (L. Rep. 4 Ex. 319; 38 L. J. 113 M. C.; 20 L. T. Rep. N. S. 618), the Legislature must be presumed to have intentionally omitted the words "in any public street, road, or place" from the definition of a hackney carriage, in consequence of that decision.

(*c*) That if it is necessary for the appellant to prove, to support the present information, that the respondent's carriage was plying in a public place, the said railway station was such a public place within the meaning of the Act.

12. On behalf of the respondent it was contended that,

(*a*) The respondent's carriage was not a hackney carriage within the meaning of the statutes.

(*b*) That the Hackney Carriage Act did not, as respects this case, extend to a railway station such as that at Cannon-street, where the alleged offence is charged to have been committed, which is private property.

(*c*) That there was no "plying" for "hire" within the terms of the section under which the respondent was charged, upon which point the respondent's advocate relied on the decision in the case of *Case* v. *Storey*.

(*a*) That prior to the passing of The Metropolitan Public Carriage Act 1869, the acts done by the respondent would not have constituted an offence, and that if the Legislature had intended to make so violent a change in the law as to prevent private broughams unlicensed as cabs being hired on private property, it would have enacted such a provision in express terms, or in specifying the limits of the Act, or in its definition of a hackney carriage.

13. I dismissed the information, being of opinion that the contention of the respondent's was the correct one; that the evidence and admissions of fact did not show that any offence had been committed by the respondent; and that according to the judgment in the cited case of *Case* v. *Storey*, there being no interpretation in the statute, the words "ply for hire" must be taken to mean a plying for hire by any one of the public who might *think fit to hire the* vehicle in question, and therefore *could not apply to* a standing or plying for hire under the circumstances which appear in this case, and which are analagous to those in the reported case of *Case* v. *Storey*.

14. The question of law arising thereupon, and the grounds of my determination are set out in paragraphs numbered 11, 12, and 13, and the opinion of the court is requested as to whether I ought to have convicted the respondent on the facts before me.

M. White (*Griffiths* with him) for the appellant. *Clarke* v. *Stanford* (24 L. T. Rep. N. S. 389; L. Rep. 6 Q. B. 357) is precisely in point in favour of the appellant, and was rightly decided.

Field, Q.C. (*Willis* with him) for the respondent. —*Clarke* v. *Stanford* is no doubt directly in favour of the appellant, but this court is not bound by it, and the case was wrongly decided. To constitute a "plying for hire" within the meaning of the 32 & 33 Vict. c. 115, s. 4, what is done must be in a public place, and a railway station which is private property is not such a public place. *Case* v. *Storey* (*ubi sup.*) is still an authority.

White in reply cited *Ex parte Painter* (2 C. B. N. S. 702) and *Bocking* v. *Jones* (23 L. T. Rep. N. S. 739).

WILLES, J.—Without saying what my opinion would have been but for the case in the Queen's Bench, I feel pressed with the authority of that court, and feeling, as I do, the great importance of a concurrence in our decisions, I am driven to the conclusion that the appellant is entitled to our judgment. The case in the Queen's Bench is precisely in point, and not only that, but this is a stronger case, for here it was given in evidence that the respondent applied to one or two persons to hire his fly. I must take it that the Court of Queen's Bench came to the conclusion that the words "in any public street or road" which are found in sects. 4 and 35 of 1 & 2 Will. 4, c. 22, were properly omitted from the Act of 1869 by reason of the decision come to by the Court of Exchequer in the case of *Case* v. *Storey*, where it was held that these words did not apply to a railway station. I take it that according to *Clarke* v. *Stanford* this carriage was a hackney carriage, although it was within the station. Was there then a plying for hire? According to the decision of the Queen's Bench there was. The carriage was in the station and was intentionally exposed so as to be hired by any person. Moreover, it was proved that actual application was made to two persons who arrived by the train, to hire the carriage, so that that strengthens the case as to plying for hire. I think, founding my judgment on that of the Queen's Bench, that there must be judgment for the appellant.

KEATING, J.—I am of the same opinion.

M. SMITH, J.—I am of the same opinion. I ground my judgment on the case in the Queen's Bench, where it was held that, if a person exposes his carriage in a place where everybody passing by may be willing to hire it, that is a plying for hire. That case also disposes of the suggestion that there is no distinction between this case and one in which the owner of a carriage keeps it in the stables ready to be hired.

Judgment for appellant.

Attorneys for appellant, *Ellis* and *Ellis*.

Attorney for respondent, *E. P. Cearns*.

HOUSE OF LORDS.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

June 27 *and July* 28, 1871.

(Before Lord CHELMSFORD, Lord WESTBURY, and Lord COLONSAY.)

MORGAN AND OTHERS *v.* CRAWSHAY.

Poor rate—43 Eliz. c. 2, s. 1—Galees of mines in Forest of Dean—Non-rateability of iron mines.

In an action by the defendant, the galee of iron mines in the Forest of Dean, against the plaintiffs, the overseers of the parish of East Dean, for having seized the plaintiff's goods as a distress for a poor rate:

Held (affirming the judgment of the Court of Exchequer Chamber), first, that the defendant was an occupier, and not a mere licensee of the mines, the stat. 24 & 25 Vict. c. 40, s. 1 having enacted that a gale of these mines shall be deemed to confer "an interest of the nature of real estate" on the grantee; secondly, that iron, and all other mines except coal mines, were exempt from liability to poor rates under the stat. 43 Eliz. c. 2, s. 1.

THIS was a proceeding in error upon a judgment of the Court of Exchequer Chamber, affirming that of the Court of Queen's Bench in an action brought by the defendant in error against the plaintiffs in error for having seized his goods as a distress for a poor rate.

A special case was stated, without pleadings, by consent and by judge's order, pursuant to sect. 46 of the Common Law Procedure Act 1852.

The question for the opinion of the court was whether the defendant in error, as galee of certain mines of iron ore in the Forest of Dean, was liable to be rated to the relief of the poor by virtue of the statute 43 Eliz. c. 2, which, by sect. 1, enables overseers to raise poor rates by taxation of "every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods in the parish."

The case came on in the Court of Queen's Bench on May 29th 1868, and that court gave judgment *pro formâ* for the defendant in error without argument.

The Court of Exchequer Chamber, on June 16th 1869, unanimously affirmed the judgment of the Court of Queen's Bench: (L. Rep. 4 Q. B. 581.)

Sir *R. Palmer*, Q.C., *H. James*, Q.C., and *Anstie*, for the plaintiffs in error, contended that the defendant as galee and occupier of iron mines was an "occupier of lands" within the meaning of the statute, and therefore liable to be rated.

Manisty, Q.C. and *Matthews*, Q.C., for the defendant in error, argued that the only mines rateable were those expressly named in the statute, viz., coal mines; and that galees of iron mines in the Forest of Dean were mere licensees under the Crown.

Reference was made to:

Reg. v. *Todd*, 12 Ad. & Ell. 816;
Governor and Company for Smelting Lead v. *Richardson*, 3 Burr. 1341;
Rex v. *Cunningham*, 5 East, 478;
Rex v. *Bilston*, 5 B. & C. 851;
Rex v. *Woodland*, 2 East, 164;
Case of Mines, Plowd. 333;
Jones v. *Mersey Docks' Company*, 12 L. T. Rep. N. S. 643; 11 H. of L. Cas. 443;
Crease v. *Sawle*, 2 Q. B. 886;
The Forest of Dean Mines Acts (1 & 2 Vict. c. 43; 24 & 25 Vict. c. 40); and
The Award of the Forest of Dean Mining Commissioners, dated June 20, 1841.

July 28.—Lord CHELMSFORD.—My Lords, with respect to the question whether galees of iron mines are liable to be rated as occupiers, the point has been determined by statute. At the time of the passing of the statute 23 & 24 Vict. c. 40, some doubts had been entertained as to the estate and interest conferred by grants of gales of coal and iron within the Forest of Dean. For quieting these doubts sect. 1 of the above Act enacts that the grant of such a gale shall be deemed to confer "an interest of the nature of real estate." The interest of the galee is not, therefore, a mere licence to work the mines, but is of the nature of real estate, and so capable of occupation. It was also admitted in the course of the argument, that the galees of coal mines in the Forest of Dean (and the gales of coal mines are granted in the same manner as those of iron mines) have always been rated as occupiers of the mines. On the further question, whether an occupier of iron mines is rateable, the decisions of both courts below, and the opinions of the six learned judges who have advised your Lordships, are all against his liability to be rated. After these uniform judicial decisions, after more than two and a half centuries of practical acquiescence in the construction of the statute of Elizabeth, there not being a single instance of any other mines than coal mines having been rated to the relief of the poor during this long period, unless it clearly appeared that the decisions had commenced and been continued in error, your Lordships would be very reluctant to disturb the settled law upon the subject. It may be difficult to say why coal mines only were specified in the statute of Elizabeth, and the reasons assigned by Lord Mansfield in the case of *The Lead Company* v. *Richardson* (*ubi sup.*) may not be satisfactory, but the statute must speak for itself, and, mentioning coal mines only, it must be taken to intend these only to be rated. *Expressio unius est exclusio alterius.* Nor are there wanting express decisions. In the first reported, that of *The Lead Company* v. *Richardson* (*ubi sup.*), decided in 1762, it was held that the lessees of lead mines, who paid no rent, but only a certain part of the ore raised, were not liable to be rated. The cases of *Crease* v. *Sawle*, and *Reg.* v. *Todd* (*ubi sup.*), are in no way opposed to the above decision, for these cases determined merely that the lessors of tin and lead mines, receiving a certain proportion of ore by way of rent, were liable to be rated in respect thereof. In *Rex* v. *Inhabitants of Sedgley* (2 B. & Ad. 65) it was held that mines, other than coal mines, were not rateable; and Lord Tenterden (p. 73) observed that, though many of the decisions and *dicta* cited before him were not satisfactory to his mind, yet "the rule of construction had been established and acted upon, and ought to be adhered to, unless it could positively be said to be wrong and productive of inconvenience." Even if the question were one to be considered for the first time, I should, acting on the ordinary rules for the construction of statutes, have been unable to gather an implied intention on the part of the Legislature beyond what it has expressed. I submit that the judgment of the Court of Exchequer Chamber should be affirmed.

Lord WESTBURY.—My Lords, assuming the interest of the galee to be a tenement and not merely an incorporeal right, I must still arrive at the conclusion that we should not attempt to disturb the

uniform interpretation that the statute of Elizabeth has received. To do so would be to shake rights and titles which have been founded through so many years on the conviction that that interpretation was right, and would not be departed from. The decision in *Jones* v. *The Mersey Dock Company* (*ubi sup.*) is not at variance with the present, for there your Lordships had, there being many conflicting determinations, to come to some settled opinion on the construction of the statute. But here you have everything upon which the people of this country are disposed to rely in the acquisition of property, namely, the uniform declaration of the law for more than two centuries.

Lord COLONSAY concurred.

Judgment affirmed.

Attorneys for the plaintiffs in error. *Rogerson* and *Ford*, agents for *Carter* and *Goold*, Newnham, Gloucestershire.

Attorney for the defendant in error, *Jones* and *Starling*, agents for *Wintle* and *Mutle*, Newnham, Gloucestershire.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

March 2, 8, 9, *and* 23, 1871.

(Before the LORDS JUSTICES.)

KELK *v.* PEARSON.

Light and air—Nature and extent of the right—How acquired—Effect of the Prescription Act (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3—*Injunction.*

The Prescription Act (2 *&* 3 *Will.* 4, *c.* 71), *has made a material alteration in the way in which a right to the access of light and air may be acquired, but it has not in any way altered the nature or extent of the right itself.*

In a suit to restrain an interference with the access of light and air to the plaintiff's house, the question for the court to determine is (just as it was before the passing of the Prescription Act), whether the interference complained of would substantially affect the comfortable occupation and enjoyment of the plaintiff's house, according to the ordinary notions of mankind.

The defendant was erecting a row of houses running east and west. The western wall of the house at the west end of the row immediately adjoined the eastern boundary of the plaintiff's garden, which was on the north side of the plaintiff's house. The south frontage line of the defendant's row of houses was almost in a line with the north side of the plaintiff's house. The defendant's houses when completed were intended to be about 32ft. deep, and 45ft. high, which height would exceed by a few feet that of the plaintiff's house. The evidence showed that the nearest house to the plaintiff's house would interfere with the access of light and air thereto, to such an extent as substantially to affect the comfortable enjoyment of the plaintiff's house.

Held, that the plaintiff was entitled to a perpetual injunction to restrain the building of the house nearest to his own.

THIS was an appeal by the defendants from a decision of Bacon, V.C. (reported 23 L. T. Rep. N. S. 458) granting an interlocutory injunction to restrain the defendants from building certain houses so as to interfere with the access of light and air to the plaintiff's house. The facts are very fully stated in the former report, and it is unnecessary now to repeat them. The appeal came on by way of appeal motion, but before the arguments were concluded it was arranged upon the suggestion of the court that the matter should stand over, and that the plaintiff should give a notice of motion for decree, which should be heard and finally disposed of by their Lordships with the appeal motion.

E. E. Kay, Q. C. and *Fielding Nalder*, on behalf of the plaintiff, contended that the Prescription Act (2 & 3 Will. 4, c. 71), s. 3, gave to the owner of a house an absolute and indefeasible right to the access of all the light and air which he had enjoyed for twenty years. They relied also upon the evidence in the case as proving that the defendants' houses would interfere to such an extent with the access of light and air to the plaintiff's house as to entitle him to the interference of this court.

R. P. Amphlett, Q. C. and *J. T. Crossley*, on behalf of the defendants, were directed to confine their arguments on the evidence to the case of the house nearest to the plaintiff's house. Upon this point they urged that the plaintiff had not made out his case. They also contended that no alteration in the nature or extent of the right to the access of light and air had been produced by the Prescription Act.

The following authorities were cited in the course of the arguments:

Yates v. *Jack*, 14 L. T. Rep. N. S. 151; L. Rep. 1 Ch. App. 295;
Dent v. *The Auction Mart Company*, 14 L. T. Rep. N. S. 827; L. Rep. 2 Eq. 238;
Courtauld v. *Legh*, L. Rep. 4 Ex. 126; 20 L. T. Rep. N. S. 496;
Tapling v. *Jones*, 11 H. L. Cas. 290; 12 L. T. Rep. N. S. 555;
Calcraft v. *Thompson*, 15 W. R. 387;
Isenberg v. *East India House Estate Company*, 9 L. T. Rep. N. S. 625;
Jackson v. *The Duke of Newcastle*, 10 L. T. Rep. N. S. 635;
Staight v. *Burn*, L. Rep. 5 Ch. App. 163; 22 L. T. Rep. N. S. 831;
Lanfranchi v. *Mackenzie*, 16 L. T. Rep. N. S. 114; L. Rep. 4 Eq. 421;
Truscott v. *The Merchant Taylors' Company*, 11 Ex. 855;
Harbridge v. *Warwick*, 3 Ex. 552;
Clarke v. *Clark*, 13 L. T. Rep. N. S. 482; L. Rep. 1 Ch. App. 16;
Robson v. *Whittingham*, L. Rep. 1 Ch. App. 442; 13 L. T. Rep. N. S. 730;
Johnson v. *Wyatt*, 2 De G. J. & S. 18;
Beadel v. *Perry*, L. Rep. 3 Eq. 465; 15 L. T. Rep. N. S. 345;

Lord Justice JAMES said that it had been contended that the Prescription Act gave to the owner of a house an absolute and indefeasible right of property in all the light and air coming to his premises, of which he had had twenty years' enjoyment. That Act, however, his Lordship thought had made no alteration in the previously settled law with regard to the nature and extent of the right to the access of light and air. Before that Act passed it had been well settled that the owner of a house had a right to the access of so much light and air as would, according to the ordinary notions of mankind, be sufficient for the comfortable use and enjoyment of his house. The owner of a house had a right to prevent his neighbour from building upon his land in such a way as to interfere with the access of light and air to the house to an extent which would make the occupation of the house substantially less comfortable than be-

In his Lordship's opinion that right re- ed since the Prescription Act exactly the as it was before. The question was in all one of degree, which the court, acting as a must determine on the evidence. In all the since the Act the law had been laid down in way. Applying this rule to the facts of the nt case, his Lordship said that in his opinion vidence adduced by the plaintiff far pre- erated over that which was adduced by defendants, and it was established that efendants' houses materially diminished the nt of light coming to the plaintiff's house so bstantially to affect the comfortable occupa- f it. His Lordship agreed with very much of was said in *Clarke* v. *Clark* (*ubi sup.*) as to fluence which the balance of convenience and venience should have upon the interference of ourt. The court, with regard to that, would more readily interfere by injunction in one han in another. In this case, if the injunc- was granted, the result would be that the dants would be prevented from making use of all piece of building ground, while, on the hand, if the injunction was refused, the com- f the plaintiff's dwelling house would be ially diminished. The balance of convenience vidently in favour of granting the injunction, he plaintiff ought to have his legal right en- l by the assistance of this court. A manda- injunction must be granted to compel the dants to pull down that house which was st to the plaintiff's garden, to the height at his garden wall formerly stood. The plain- ing thus successful in the suit, would, as a al rule, be entitled to his costs. It was d that he ought not to have his costs because d, by his bill, asked for too much, and because ce-Chancellor had granted an injunction which too far. It did not, however, appear that the dants had been put to any further expense by a of this, and, consequently, there was no ld for depriving the plaintiff of the costs of uit.

d Justice MELLISH was of the same opinion. ntirely agreed in thinking that no alteration nature and extent of the right to the access ht and air had been made by the Prescription The Act had made a very material altera- n the way in which the right was acquired, had made no alteration in the nature of the itself. It must be remembered that even now ght was not always gained exclusively by the tion of the statute, but it was often acquired ans of an implied grant from the owner of a bouring tenement, as, for instance, where was a severance of adjoining tenements held e owner. It would be a very inconvenient if the nature of the right to light and air lifferent when acquired under the statute from what it was when acquired by an im- grant. The rule at law was clearly settled the Act was passed, and it was thus laid in *Parker* v. *Smith* (5 C. & P. 438): "It is ery possible, every speculative, exclusion of which is the ground of an action; but that the law recognises is such a diminution of as really makes the premises to a sensible less fit for the purposes of business." question to be determined was always Is the plaintiff's house made by the lant's building substantially less fit for occupation than it was? That was the rule in a court of law, and the rule in this court was in effect the same. No general rule could be laid down as to the exact quantity of light to which a man was entitled; it was eminently a question of degree. Upon the evidence in the present case his Lordship was clearly of opinion that the plaintiff could maintain an action at law. The duty of this court was to decide the matter once for all and put an end to the litigation. This court could not deprive the plaintiff of his right to bring his action without giving him any relief. It must, therefore, either finally settle the matter in dispute, or it must leave the plaintiff at liberty to bring action after action at law. Then this court might adopt one of two courses, either grant a mandatory injunction, or compensate the plaintiff by damages once for all. Seeing, however, that the plaintiff desired to occupy his house with the same comfort as before, and that the granting an injunction would only deprive the defendants of the ground-rent of one house, which it appeared was about 12*l.* a year, his Lordship was of opinion that the case was one in which a mandatory injunction ought to be granted, instead of giving the plaintiff compensation by means of damages.

Solicitors for the plaintiff, *Fladgate, Clark,* and *Co.*

Solicitors for the defendants, *Lambert* and *Burgin.*

ROLLS COURT.

Reported by H. PEAT, Esq., Barrister-at-Law.

March 17, 18, 19, *and April* 19, 1871.

COUSENS *v.* ROSE.

Lease—Grant of right of way—Construction.

In a lease the lessor demised certain hereditaments, together with free liberty and right of way and passage, and of ingress, egress, and regress to and for the lessees and lessee, their or his workmen and servants, and all and every other persons and person by their or his authority or permission, from time to time, and at all times during the continuance of the lease, by, through, and over a certain roadway or passage, jointly with the lessor and other the tenant or tenants, occupier or occupiers for the time being of the adjoining land:

Held, that this gave a right of way for foot passengers only, and did not extend to horses and carts.

BY an indenture dated the 7th March 1860, Winn demised to the defendant Rose and his partner a shipyard and dry dock, together with free liberty and right of way and passage, and of ingress, egress, and regress to and for the lessees, their workmen and servants, and all and every other persons and person by their or his authority or permission, from time to time, and at all times during the continuance of the lease, by, through, and over a certain roadway, or passage, jointly with the lessor, his executors, administrators, and assigns, and other the tenant or tenants, occupier or occupiers for the time being of the adjoining land.

The plaintiffs, who were the lessees, under an agreement dated the 8th Dec. 1865, of a warehouse known as the Gun Wharf, which had been built by Winn on a piece of land separated from the dock by the roadway mentioned in the lease of the 7th March 1860, instituted the present suit to

establish their exclusive right to the use of the roadway.

The bill prayed, first, that it might be declared that the plaintiffs were, under or by virtue of the memorandum of agreement of the 8th Dec. 1865, entitled to the sole and exclusive right and use of the said strip of land or roadway partitioned to the said Gun Wharf as aforesaid for the residue of the said term thereby agreed to be granted, subject to the performance of the provisions in the said agreement contained on the part of the said Thomas Gooch, and that the defendants, William Comer Scott, and Thomas Isaac Large, as legal personal representatives of the said Charles Winn, might be decreed specifically to perform the said agreement, the plaintiffs being willing and thereby offering specifically to perform the same on their part; secondly, that the defendants might be decreed at their own costs and charges forthwith to remove, or to cause the said earth, stones, bricks, and rubbish, and all other obstructions, shot or placed by them, or any or either of them, their or any or either of their agents, workmen or servants upon the said roadway, or any part thereof, to be removed, and also to restore and repair the said fence broken down as aforesaid; thirdly, that the said several defendants, their respective agents, servants and workmen, might thenceforth, and at all times, during the residue of the term granted or agreed to be granted by the said memorandum of agreement of the 8th Dec. 1865, be restrained by the order and injunction of the court from shooting or placing any earth, stones, bricks, rubbish, or other matters, or things upon the said roadway, or any part thereof, and from in any manner obstructing or interfering with the plaintiffs in the right of use of the said roadway, and from removing, pulling down, or injuring, or causing, or permitting to be removed, pulled down, or injured, the said fence and buildings, or any part of such fence or buildings.

The other facts of the case will be found fully set forth in his Lordship's judgment, which was in writing.

Jessel, Q. C. and *Locock Webb*, for the plaintiffs.

Southgate, Q. C. and *Renshaw*, for the defendant Rose.

Sir *Richard Baggallay*, Q. C. and *Lindley* for Winn's executors.

The following cases were cited:

Henning v. *Burnet*, 8 Ex. 187;
Allan v. *Gomme*, 11 Ad. & Ell. 759;
Brunton v. *Hall*, 1 Q. B. 792;
Williams v. *James*, 16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577;
Watts v. *Kelson*, 24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. 166.

April 19.—Lord ROMILLY.—This is a suit instituted asking first for a declaration that the plaintiffs are entitled to the exclusive right of the roadway adjoining their warehouse, and secondly, seeking to obtain a perpetual injunction to restrain the defendants from interfering with the plaintiffs' right of way. The case and the frame of the bill are peculiar in many respects, but some statement of the facts is necessary in order to explain it. In Dec. 1857, Winn, Rose, and Crowder carried on business in partnership as shipwrights at the place in question, in Wapping, called the Gun Dock and Wharf. The land belonged to Winn under a lease for ninety-nine years from Michaelmas 1857. In *March 1860 the partnership* was dissolved as from the 30th Jan. preceding. Winn thereupon divided the property included in his lease into two portions, both fronting the river. The easternmost portion, called the Gun Dock, he demised to Rose and Crowder, and on the remaining or westernmost portion, called the Gun Wharf, he erected a set of warehouses, which he let to Messrs. Page and Son. Between the edge of the dock and the wall of the warehouses lay a strip of land, 23ft. in breadth, extending from the Wapping-road on the north to the river on the south, through the whole extent of the property. Of this strip a portion, consisting of 14ft. in breadth, was paved by Winn and a strong curb, 3in. in height, placed at the easternmost extremity of it. This is proved to have been done in the month of Jan. 1860, at the sole expense of Winn, and not at the expense of the partnership, as alleged by Rose. Upon this curb Winn erected a close wooden fence 6ft. high, The question at issue between the parties to this suit is whether the defendant Rose has a right of using this strip of land in every part of it as a general mode of access to his dock. After a change of tenants, and a short occupation by the War Department of the warehouse in question, Winn entered into a contract with the plaintiffs on the 8th Dec. 1865 to demise the warehouse known as the Gun Wharf to the plaintiffs for twenty-one years at the yearly rent of 1700*l*. The extent of the property demised is specified in a plan attached to the contract, and it includes the strip of land in question of 14ft. in breadth. Winn died in Jan. 1868. The defendants Scott and Large are his executors. The bill thereupon makes them parties, and prays specific performance against them as well as an injunction against Rose, who, by arrangement with Crowder, has become the sole owner of the Gun Dock. A suit so constituted is obviously multifarious, and, like most suits so constituted, is in a most inconvenient and irregular frame, but as objection has not been taken to it by way of demurrer, it is too late to do so now. I may, therefore, at once dispose of the case so far as the executors are concerned. They, on the whole, submit to act as the court shall direct. They admit the contract, and though they raise some difficulties as to obtaining a licence from the ground landlord to demise a portion of the property included in the contract made by Winn with the plaintiffs, they do not resist specific performance. It is, I think, reasonably clear that they can obtain the consent of the ground landlord for a reasonable sum of money, or, if they cannot, then the contract must be specifically performed with a compensation for this omission. They do, however, suggest that the including of this piece of land in the contract was not intended, but that doing so was a blunder and a mistake on the part of Winn. Still as regards them the suit must be treated as an ordinary suit for specific performance, and if they intended to object they have not done what they might and ought to have done for that purpose, viz., have demurred to the bill for multifariousness; and on the whole they seem to me to give their evidence fairly and honestly without favour to either side. The plaintiffs cannot, therefore, complain of them or the course they have pursued. Before filing the bill the plaintiffs should have tendered to Scott and Large the conveyance of the Gun Wharf according to the contract subject to such rights as Rose might possess.

e defendants had then declined to execute the eyance, or had refused to attempt to obtain onsent of the ground landlord for the little of land included in the contract, or if they declined to include in the conveyance the of land specified in the plan annexed to the act, I might, on a bill being filed for specific rmance against them, have compelled them y the costs of it. But not only was this not but no application was ever made to them ie subject, and as the plaintiffs had been for al years in occupation of the property demised, ut asking for a lease, the defendants might suppose that they were content with the occupation under the agreement, and did equire the conveyance. Such being the case, not, I think, refuse to give them their costs is suit, assuming, as I do, that they will now all the necessary steps for enabling them e the plaintiffs a proper lease according to ontract, or, if they cannot, allow compensa- or such part as they cannot convey, and the e as to them will simply be for specific per- nce with a reference to chambers to settle ase in case the parties differ. The case as to efendant Rose is very different, and is more licated. The lease by Winn to Rose and der unquestionably gives them a right of way the strip of land in dispute. About this I tain no doubt. I disregard entirely the sug- n that the words in the lease to Rose and der applied solely and exclusively to the 9ft. ning strip of the piece of land in ques- by the side of the dock. I am clear that ght granted extended to the whole strip of broad. Nor do I doubt that the plaintiffs lue notice of this right of way when they the lease. The next question is what was haracter of the right of way so granted, and privileges did it confer on Rose and Crowder? e referring to the exact words of the grant I it proper to point out the construction Mr. Rose himself has put upon them, and he claims to be entitled to do. During the 1867, and during the life of Winn, some pro- were made by Winn, in conjunction with to give the plaintiffs a building lease of the of the Gun Dock. Winn, as I have stated, n Jan. 1868, and then offers were renewed in following by Rose and Crowder, and were ed by the plaintiffs in June of that year. ly after, in the same month of June, the dant Rose removed a portion of the fence, eposited for a short period of time a consider- amount of rubbish and earth on the 14ft. of land in question. The defendant Rose ot justify the deposit of rubbish and earth, e says this was merely temporary and was diately removed, but the rest of his acts he es on the following grounds:—First, he says n 1861 he claimed this right, and mentioned he storekeeper of the War Department, then upation of the warehouse, and that again in by permission of the War Department, who ccupied the warehouse, and who had inquired is right, he was allowed to pull down the where it interfered with the power of loading from his dock. This was complained of by , through the defendant Large, who then is agent, and the fence was replaced, as ould seem, by Rose, or by some one s behalf. *Again in March 1864 Rose* and Crowder wrote to Winn to this effect: "Dear Sir, —We beg to call your attention to the fence and privies illegally erected upon the roadway between Gun Dock and Gun Wharf, and which materially interfere with the rights and privileges granted under our lease. We have, therefore, to request that they may be removed within seven days from the date hereof." And shortly afterwards Rose removed a portion of the fence. This was complained of by Winn in a letter of May 1864, to which I shall again refer. In it he denied Rose's right to do this, and insisted that his right of way was merely a right of way for persons, and not extending to anything beyond this. To this remonstrance of Winn's, no answer was made, and the palings were again replaced in a temporary manner. Nothing further seems to have been done till June 1868, when the trespass I have already stated occurred. Thereupon the plaintiffs filed this bill on the 13th July 1868, and obtained an injunction from Giffard, V.C., confined to the second paragraph of the prayer of the bill. I now come to consider the construction and the effect of the exact words of the grant made to Rose and Crowder, which is now vested in Rose, in order to ascertain whether they justify the claim made, or the act committed. The words are these: He gives them the property specified in the margin coloured pink, "together with the free liberty and right of way and passage and of ingress, egress, and regress to, and for them and him, their and his workmen and servants, and all and every other person or persons by their or his authority or permission from time to time, and at all times hereafter during the continuance of this demise, in, by, through, and over the said roadway or passage lying to the west of the said premises hereby demised jointly with the said Charles Winn, his executors, administrators, and assigns, and other the tenant or tenants, occupier or occupiers, for the time being, of Gun Wharf aforesaid, his or their agents or appointees," to hold and exercise the same for the term of twenty-one years. The first thing that strikes me on reading these words is that, whatever be the construction on the question whether the right of way extends to horses and carriages or whether it is confined to foot passengers, nothing can justify the conduct of the defendant Rose in pulling down the fence. The fence is admitted to be constructed on land not included in the demise to Rose and Crowder, and it is obvious that the common law right to build a wall or fence on his own land which belonged to Winn, was in no respect abrogated or controlled by anything contained in this demise, and it is clear that this right is conferred on the plaintiffs. It is also clear that the repeated trespasses of Rose could not create such a right or vest it in him, even if they had been unaccompanied by the repeated remonstrances of Winn. Still less could it justify the deposit of obstructions on the roadway, for however short a time. In the matter originally complained of, therefore, by the plaintiffs, viz., the pulling down the fence and the deposit of earth, I am clear that the defendant Rose was in the wrong. I am also of opinion that this grant is not that of a general undefined right of way such as existed in the cases referred to by Mr. Southgate, but that it is a right of way granted for foot passengers only and confined to them; that is, a right of way including the defen-

dant Rose, including his workmen, and also including any person or persons he may think fit to authorise, and all these persons are to be able to pass in, by and through this passsage or 14ft. roadway, but no one else, and nothing more. This also it is clear was the intention of the parties, as is shown in the following passage from the letter of Winn on the 17th May 1864, to which I have already referred, viz., "I am willing, however, to believe that you have acted upon erroneous impressions, so ask your attention to the fact, first, that the fence is my property and stands on my ground, being the partition between the premises leased to you and my roadway, and does not interfere with the reasonable exercise of your right of way over the road, provision for which, it being only for persons, was made by arrangement with you at the time of the erection of the fence and water-closets, by a wicket being placed at the south end of it (key of which was handed to you, and is, no doubt, still in your possession), so, that being mine, you have no right to interfere with it." Then he goes on with another subject, supposing it to be so. It is to be observed that no answer was sent or any denial or objection urged by Rose to this letter. This, in fact, disposes of the whole case. I cannot make the declaration asked for by the plaintiffs in the first paragraph of the prayer of the bill. But I will make it in these terms: I am willing to declare that, subject and according to the provisions in the said agreement contained, on the part of the said Thomas Gooch, and subject to the right of way to and for the defendant Rose himself, and to and for his workmen and servants, and to and for every other person authorised by him, in, by, through, and over the said strip of land, to enter and the like, in the words of the agreement, giving them an exclusive right of way, subject to this right; or I will make a declaration specifying how I limit the right of way granted in the indenture of the 7th March 1860, in the words I have already read. I think the plaintiffs are entitled to a decree in the terms of the second paragraph of the prayer of the bill (if not already done), and that they are also entitled to an injunction in the terms of the third paragraph of the prayer of the bill. And I am clearly of opinion that this suit has been rendered necessary by the misconduct or mistake of the defendant Rose, and that he must pay the costs of the suit, but not including the costs which the plaintiffs will have to pay the defendants Scott and Large. I do not except from the costs Rose will have to pay so much of the costs as relate to the specific performance, because in the first place they but slightly increase the amount of costs as between the plaintiffs and Rose, and are confined to a few paragraphs in the bill, and also because if the defendant Rose intended to insist on that he should have demurred for multifariousness.

Solicitor for the plaintiffs, *H. Wellington Vallance.*

Solicitors for the defendants, *W. Carpenter; William Hine Haycock.*

Thursday, April 27, 1871.

BUBB v. YELVERTON (LORD CHARLES KER'S CLAIM).

Racing bets—Betting agent—Authority to bet—Implied promise to pay.

A testator had requested a friend to bet for him on certain horses, and the friend had paid the amount lost by the bets.

Held, that the request to bet implied authority to pay the bets if lost, and that the friend was entitled to prove against the testator's estate for the amount paid by him in respect of the bets.

ADJOURNED summons.

This was an application by Lord Charles Ker for leave to prove against the estate of the Marquis of Hastings, which was being administered in the above suit, for the sum of 850*l.*, paid by him on behalf of the Marquis under the following circumstances:

The Marquis had requested Lord Charles Ker to bet for him at the Newmarket Houghton meeting 1867, telling him what horses to back and what amounts to lay. In accordance with his instructions, Lord Charles Ker laid twenty-nine bets in all, on which he won 605*l.* and lost 1455*l.*, the net loss amounting to 850*l.*

The losses were paid on the settling day following the Houghton meeting by a Mr. Brewer, who was Lord Charles Ker's commissioner, and Lord Charles Ker received the amount of the winnings. After the death of the Marquis, he applied to the executors, Admiral Yelverton and Mr. Padwick, for payment of the balance of 850*l.*, as a debt due from the estate; but the residuary legatees objected to the payment being made, contending that the claim was illegal, as the payment had been made in respect of racing debts.

Thereupon Lord Charles Ker took out the present summons to enforce his claim.

Southgate, Q. C. and *Brooksbank*, for the claimant.—The 8 & 9 Vict. c. 109, s. 18, does not make wagering contracts illegal, but merely incapable of being enforced; therefore there was nothing illegal in Lord Charles Ker's making the bets on account of the Marquis of Hastings. We have clear evidence that the Marquis requested the claimant to make the bet, and we submit that the request necessarily implied an authority to pay the bets if lost, and that the claimant is, therefore, entitled to recover the amount of his claim. They cited

Fitch v. *Jones*, 3 E. & B. 238;
Hill v. *Fox*, 4 H. & N. 359;
Rosewarne v. *Billing*, 9 L. T. Rep. N. S. 441; 15 C. B. 316;
Knight v. *Cambers*, 15 C. B. 562;
Oulds v. *Harrison*, 10 Ex. 572;
Bubb v. *Yelverton*, 22 L. T. Rep. N. S. 258; L. Rep. 9 Eq. 471.

Sir *Richard Baggallay*, Q. C. and *Pemberton*, for the residuary legatees of the Marquis, cited *Boyse* v. *Adams* (26 L. J., N. S., 841, Ch.), where the amount of a bet lost at a horse race had been paid by the loser into the hands of a third party, upon the faith of the promise of the latter to pay it to the winner, and the person who had received the money died before he had paid it to the winner, and a claim by the winner to be paid the amount out of the assets of the deceased was disallowed. They also referred to

Grisewood v. *Blane*, 11 C. B. 526.

Jessel, Q. C. and *Rowcliffe*, for the executors of the marquis.

Lord ROMILLY said that it was merely a question of evidence, and that he had no doubt that Lord Charles Ker's account of the matter was true. If the Marquis of Hastings asked him to bet, that implied authority to pay any bets that were lost, and a promise to repay the amount so paid. The applicant had expended 850*l.* on the faith of an implied promise of this kind. His Lordship was of opinion that Lord Charles Ker could have maintained an action at law against the marquis for the amount. Lord Charles Ker made the payment at the request of the marquis, he was a mere agent, and was not involved in the illegality of the transaction. The claim must, therefore, be admitted, and the costs added to the amount.

Solicitors for the applicant, *Robson* and *Tidy*.

Solicitors for the respondents, *Barlow, Bowling*, and *Williams; Pemberton* and *Reeves*.

V. C. MALINS' COURT.

Reported by G. I. F. COOKE and T. H. CARSON, Esqrs., Barristers-at-Law.

Friday, June 30, 1871.

Re KILVERT'S TRUSTS.

Bequest to charitable society—Inaccurate description—Claim by two charitable societies—Application cy près—Apportionment.

A testatrix by her will bequeathed a legacy to a charitable society in the diocese of W. Although there had been formerly such a society, there was not at the date of the will a society accurately answering the description, the diocese of W. having previously to the date of the will been increased by the addition of the archdeaconry of C., and the whole diocese divided into two archdeaconries, viz., W. and C. (the archdeaconry of W. being co-extensive with the former diocese of W.), in each of which there was at the date of the will a society in name and objects very similar to those of the old society named in the will, the old society restricting itself with a slight alteration in its title and objects to the archdeaconry of W.

Held, that there being no evidence that the testatrix was aware that the old society had restricted itself to the archdeaconry of W., the apparent general charitable intention towards the diocese of W. must be regarded, and the legacy divided between the two societies.

FRANCIS MARIA KILVERT, late of the city of Worcester, spinster, by her will dated the 7th July 1868, gave, amongst other legacies, a sum of 10,000*l.* free of legacy duty "to the treasurer for the time being of the fund for the relief of the widows and orphans of the Clergy of the Diocese of Worcester to be applied by him for the benefit of that charity," such legacy to be paid out of such part of her personal estate as she could lawfully charge with the payment of legacies to charitable uses. The will contained also a residuary bequest.

The testatrix died in Nov. 1870, and her will was proved in the same year. In April 1871, the executors paid the legacy into court under the Trustee Relief Act, on the ground that claims had been made by two charitable societies with respect to the legacy.

The contending claims arose under the following circumstances: The diocese of Worcester comprised, previously to the year 1837, only one archdeaconry, namely, the archdeaconry of Worcester, which was in extent identical with the diocese of Worcester, but in the year 1837 the archdeaconry of Coventry was separated from the existing diocese of Lichfield and Coventry, and united to the diocese of Worcester, which after that time consisted of two archdeaconries, namely, Worcester and Coventry.

The society named in the will of the testatrix was founded in the year 1777, but in the year 1848 its name was changed to that of "The Society for the Relief of Clergymen's Widows and Orphans and Necessitous Clergymen in the Archdeaconry of Worcester," as it was not intended to extend the operations of the society to the archdeaconry of Coventry.

Another society had also been formed with a similar object, under the title of the "Charity for the Relief of Necessitous Clergymen, their Widows and Children, within the Archdeaconry of Coventry."

It appeared that the father of the testatrix had been for many years a subscriber to the old society in the diocese of Worcester before the addition of the archdeaconry of Coventry had been made to the diocese, and that since his death the mother of the testatrix had continued his subscription to the society in the archdeaconry of Worcester, and that the testatrix herself had been a subscriber thereto.

Cotton, Q.C. and *Walker* for the society in the archdeaconry of Worcester, now applied to have the fund paid out to them. They submitted that the court must look to see what was the connection of the testatrix with the society, and would take notice of the fact of the testatrix's own subscription to the society in the archdeaconry of Worcester, and would inquire into every material fact for the purpose of ascertaining the object of the testatrix's bounty. They referred to:

Re Clergy Society, 2 K. & J. 615;
Still v. *Hoste*, 6 Madd. 192;
1 Jarm. on Wills. 2nd edit. p. 360;
Wigram Ext. Ev., 4th edit., p. 65.

Glasse, Q.C. and *Vaughan Hawkins* for the Coventry Society, contended that as the description in the testatrix's will did not accurately apply to either society, the fund must be applied *cy près*, and divided between the two societies. They argued further that evidence of the testatrix's subscription to one of the societies could not be admitted. They referred to the following cases:

Simon v. *Barber*, 5 Russ. 112;
Bennett v. *Hayter*, 2 Beav. 81;
Doe v. *Hiscocks*, 5 M. & W. 363;
Loscombe v. *Wintringham*, 13 Beav. 87;
Wilson v. *Squire*, 1 You. & Coll. 654;
Re Maguire's Trusts, 18 W. R. 623.

Warmington for the residuary legatees.

Cotton, Q.C. in reply.

The VICE-CHANCELLOR, after stating the circumstances of the case and referring to the fact of the subscriptions by the testatrix's father and mother, and to her own subscription, which he observed was not to the old society but to the present society in the archdeaconry of Worcester, said that if it had been shown that the testatrix had known that the old society had since the year 1849 restricted itself to the archdeaconry of Worcester, he should have held it clear that the society for which the petitioners claimed was entitled to the whole of the legacy; but it was not shown that she knew of this, though it might be conjectured that she did. He could not find any warrant for attributing to the testatrix an intention to exclude a clergyman from the benefit of her bequest, because

he resided in the diocese of Worcester but not in the archdeaconry of Worcester; that there was no society accurately answering the description in the will, and he could not come to the conclusion that the testatrix meant to confine her bounty to the archdeaconry of Worcester. He must hold that there being no one charity answering the particular description contained in the will, and being of opinion that the testatrix's bounty was meant to apply to the whole diocese of Worcester, the legacy must be divided between the two charitable societies.

Solicitors: *Eldred* and *Andrew*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barristers-at-Law.

Saturday, July 15, 1871.

Re THAKEHAM SEQUESTRATION MONEY.

Suspensio: — Sequestration — Right to surplus moneys on sequestration after payment of curate in charge.

In the year 1845 *the Rev. Mr. H., the rector of T., was suspended for three years, and the suspension was followed by sequestration. The bishop, after providing for the minister in charge, placed the surplus profits of the living to an account at his bankers, entitled, "The Bishop of C. Thakeham account." On the death of the bishop in* 1870 *this fund was claimed by his executors, and also by Mr. Hurst under an alleged agreement, by the churchwardens of Thakeham, and by the present bishop. The bankers paid the fund into court under the Trustee Relief Act.*

Held, that the representatives of the late bishop were absolutely entitled to the whole fund, and that the bankers ought not to have paid it into court.

In the year 1845 certain proceedings were taken in the Arches Court of Canterbury in a suit of *Travers* v. *Hurst*, and by a decree in that suit the Rev. John Hurst, rector of Thakeham, in the county of Sussex and diocese of Chichester, was suspended for three years from the discharge of his duty and from receiving any of the profits of the rectory; and in pursuance of that decree letters of sequestration were issued on the 18th July 1845. During the sequestration the profits and emoluments of the living were paid by the sequestrator into the bank of Messrs. Dendy and Co., to the credit of an account entitled: "The Bishop of Chichester. Thakeham Account;" and such account was from time to time drawn upon for the salary of the officiating minister and for other necessary expenses, and part of the moneys so paid in were invested in Exchequer Bills. The Right Rev. Ashurst Turner was Bishop of Chichester previously to the year 1845, and continued bishop till his death on the 21st Feb. 1870. He duly made a will by which he appointed Robert Wintle Wintle and the Rev. Thomas Morrell Gilbert, the petitioners in this matter, his executors. On the 18th April 1871 the bankers, Messrs. Dendy and Co., paid into court, under the Trustee Relief Act, the sum of 262*l.* 0*s.* 5*d.* cash to the credit of "The Bishop of Chichester. Thakeham account," and also deposited to the like credit two Exchequer Bills for 500*l.* and 100*l.* respectively. They stated that the whole or *part of* this fund had been claimed by the petitioners, *by Mr. Hurst*, the rector, by the churchwardens and overseers of the parish of Thakeham, and by the present bishop. It further appeared that Mr. Hurst's claim rested on a letter which had been written by the late bishop to one of the parishioners of Thakeham, in which he offered to pay Mr. Hurst "a portion of the surplus" if he would agree not to interfere with the sequestrator, and if certain conditions with respect to proposed schools were complied with.

Kay, Q.C. and *Pemberton* appeared for the petitioners.—They argued that the effect of suspension followed by sequestration was that the bishop became entitled to the whole of the emoluments of the benefice subject only to the duty incumbent on him to provide for the cure of the parish. They cited in support of this proposition:

Bunter v. *Cresswell*, 14 Q. B. 835;
Morris v. *Ogden*, 20 L. T. Rep. N. S. 978; L. Rep. 4 C. P. 687;
Pinden v. *Barr*, 24 L. J. 30.

They also urged that the agreement with Mr. Hurst could not be supported, because a letter to a parishioner cannot be considered to amount to an agreement with Mr. Hurst, or binding as between Mr. Hurst and the bishop; also the condition of the agreement was not carried out both with respect to the schools and to the institution of a suit which interfered with the sequestrator as far as the glebe lands of the living were concerned, and also because the agreement was too vague and Mr. Hurst had not made any claim for more than twenty years during the life of the late bishop, they submitted that his claim could not be supported.

Fry, Q.C. and *Freeman*, for Mr. Hurst, contended that the words "a portion of the surplus" was a sufficiently certain agreement to be binding in law, and especially as the agreement had been carried out on Mr. Hurst's part by non-interference with the sequestrator; they further contended that the suit referred to clearly showed that the sequestrator had no jurisdiction over the glebe lands, and argued that its institution could be no interference with his duties. As to the lapse of time, they stated that Mr. Hurst supposed the whole of the proceeds of the living were applied either to the support of the incumbent, or to the necessary law expenses, or towards building a church near Chichester. And lastly, they contended that it was impossible that the bishop could be entitled to this surplus for his own private benefit.

Kingdon, for the churchwardens and overseers of the parish, referred to

Hubbard v. *Beckford*, 1 Con. Rep. 307;
The Church Discipline Act (3 & 4 Vict. c. 86), ss. 12 and 13

to show that the bishop might have been, and to a certain extent must have been, a judge in the cause which deprived Mr. Hurst of the living, and it was therefore impossible he could be allowed to take any private benefit under the sequestration. He submitted that the parish was properly entitled to the surplus profits during a vacancy:

Burn's Justice, vol. 4, p. 1.

Woodroffe, for the present bishop, said he had put on a "moral distringas," but that he had no legal claim.

Alfred Smith appeared for the bankers, who had paid the money into court.

The VICE-CHANCELLOR said there was no doubt, and it was a point perfectly well established, both upon authority and in principle, that the profits and emoluments of a living, after sequestration,

. to the bishop. It was quite competent ishop, had he so desired, to perform the hich devolve upon the incumbent in his son, and indeed if he could not find a ; was his duty so to do, and then he would ed to the whole profits of the living. If, ther hand, he preferred to perform this deputy, then it was equally clear that, viding for the proper remuneration of ister whom he placed in charge, he itled to the balance of such profits. st had made no claim for twenty-two uring the whole lifetime of the late but now set up an alleged agreement. f that agreement was that he should rfere with the sequestrator, and he rly forfeited any claim he might have er such agreement by most effectually ng the sequestrator in his endeavour to e rents of the glebe lands. But in any greement to give "a portion of the sur- ould have been too vague and uncertain . His Honour thought that neither the bishop, nor the churchwardens, had any to appear at all, and that the bankers who the fund into court had occasioned the this absurd litigation. He said the funds paid to the petitioners as prayed, and o allow costs to any of the respondents.

or for the petitioner, *Girdlestone.*

ors for Rev. Mr. Hurst, *Senior, Attree, son,* for *Mant,* of Storrington.

ors for the churchwardens, *Palmer, Palmer,* for *Lear,* of Arundel.

ors for bankers and present bishop, *Robin- Preston.*

URT OF QUEEN'S BENCH

d by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Wednesday, May 31, 1871.

PANY OF PROPRIETORS OF THE NEATH CANAL TION (apps.) *v.* THE CHURCHWARDENS AND ERS OF THE POOR OF THE PARISH OF (resps.)

ill. 4, *c.* 90 (*The General Watching and g Act*), *s.* 33 — *Canal — Rateability — s, buildings, and property other than*

h Canal is possessed and maintained by an rated company of proprietors, under statu- nwers. The land occupied by the canal is faced and lined in certain parts with nd masonry) and towing-path, have on, longing, and incident thereto, and neces- the occupation and use thereof, certain r fastening vessels and barges, a paddle shut off the water for the purposes of re- one bridges, culverts, and a dry dock (used repairing canal boats), lined with masonry part of the said canal and towing-path.

eneral Lighting and Watching Act (3 & 4 , *c.* 90, *s.* 33) "*owners and occupiers of buildings, and property (other than land) to the relief of the poor in any parish,*" *be rated at "a rate in the pound three reater than that at which the owners and rs of land shall be rated." By sect.* 34, *courtyard, yard, or garden (such garden ng a market garden or nursery ground) shall be included in and make part of the assess- ment to be made on the house, buildings, or other property to which they may be respectively at- tached."*

The appellants were rated to a watching and lighting rate, made for the parish of Neath, in respect of the canal and towing-path, as occupiers of "build- ings . . . . or property other than land," at a sum three times greater than that at which the owners and occupiers of "land" were rated.

On appeal against a decision of sessions confirming the rate:

Held, that, as the masonry works in and about the canal were mere accessories to it, the whole con- struction was "land" simply, and as such, there- fore, liable only to the lower rate.

ON an appeal to the Glamorganshire quarter sessions against a rate or assessment for the watching and lighting of the parish of Neath it was ordered that the said rate or assessment should be confirmed with costs, subject to the following

CASE:

1. The appellants are, and at the time of making the rate hereinafter mentioned were, the owners and occupiers of a certain canal, towing path, and premises hereinafter more particularly mentioned and described, a portion of which is situate in the parish of Neath, in the county of Glamorgan.

2. By a rate or assessment duly made and published in the month of July A.D. 1870, in and for the parish of Neath, for the purposes of the watching and lighting of the parish, under 3 & 4 Will. 4, c. 90, the appellants were rated and required to pay, as the occupiers of that part of the canal and towing path, lying and situate within the parish, the sum of 9*d.* in the pound, on 161*l.*, the rateable value of the portion of the canal, towing path, and premises fixed by and mentioned in the said rate. This was the rate appealed against.

3. By 31 Geo. 3, c. lxxxv., amended by 38 Geo. 3, c. xxx., (both of which Acts are declared by the last sections to be public Acts), after reciting "That the making and maintaining a canal or navigable communication for the navigation of boats, barges, and other vessels from or near a certain place called Abernant, in the county of Glamorgan, to and through a certain place called 'The Brick- field,' near Melincrythan Pill, in the river of Neath, near the town of Neath, in the said county, will open communication with several extensive mines, quarries, woods, ironworks, and collieries, and be of great utility," the company of proprietors of the Neath Canal Navigation (the appellants) were incorporated by that style, and were accord- ingly authorised to make and maintain such canal, and to purchase, take and hold lands and grounds for that purpose.

4. By sect. 68 of the first-mentioned Act it was enacted "That the said company of proprietors shall from time to time be rated to all Parlia- mentary and parochial taxes and assessments for and in respect of the lands and grounds to be pur- chased or taken by the said company of proprietors, in pursuance of this Act, in the same proportion as other lands and grounds so to be purchased or taken would be rateable, in case the same were the property of individuals in their natural capacity." And by the 69th section of the same Act it was enacted "That the said company of proprietors shall not be rated or contributory to any parochial taxes or assessments for or in respect of the rates

and tonnage received by them, under and by virtue of the Act, from persons navigating the said canal."

5. Under the provisions and powers of the above statute the company proceeded to purchase and take the lands necessary for the construction of the works thereby authorised, which included the land now occupied by the canal and towing path and premises herein mentioned, in the parish of Neath, the mode of rating which is the subject matter of this appeal.

6. The said land occupied by the said canal (which is faced and lined in certain parts within the said parish with stone and masonry) and towing path, have on and belonging to them and incident thereto, and necessary to the occupation and use thereof, certain posts for fastening the vessels and barges on the said canal thereto, a paddle or valve used to shut off the water from one part of the canal for the purposes of repair, stone bridges, culverts, and a dry dock (used only for repairing canal boats), lined with masonry, forming part of the said canal and towing path.

7. There is a gas lamp erected upon the bridge carrying the turnpike road over the canal, which throws light partly upon the turnpike road and partly upon the canal and towing path. There are three other lamps erected upon a highway which runs parallel with the canal on the opposite side of the canal to the towing path, but upon the side of the highway nearest to the canal, and which throws light upon the said highway, and upon the canal and towing path. There are two other lamps upon or adjacent to the appellants' towing path, which also throw light upon the canal and towing path. There are two other lamps upon or adjacent to the appellants' towing path which also throw light upon the canal and towing path. The distance from the first, or turnpike road lamp, to the first of the three highway lamps is about 330 yards. The other lamps are at distances of from sixty to eighty yards apart, the whole being within a distance of three-eighths of a mile, while the total length of the canal in the town of Neath is about a mile and a half.

8. By 3 & 4 Will. 4, c. 90, intituled, "An Act to Repeal an Act of the 11 Geo. 4 for the Lighting and Watching of Parishes in England and Wales, and to make other Provisions in lieu thereof," it was enacted, by sect. 32—

That as soon as the inspectors have been elected as aforesaid, it shall be lawful for them, or any two or more of them, from time to time to issue an order under their hands to the overseers of the poor of any parish to which the provisions of this Act shall be extended, by which order they shall require the said overseers to levy the amount mentioned in the said order.

It was further enacted by sect. 33—

That the overseers aforesaid shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner and have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish: Provided always, that the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act: Provided also, that the total amount of the sum to be collected, raised, and levied for the purposes of this Act within any one year shall not exceed such sum as shall have been agreed on by the inhabitants of the said parish as aforesaid; and that the said sum shall be assessed upon the full and fair annual value to which lands, houses, buildings, and other property within the said parish shall be rated, or shall be rateable, according to the last valuation made and acted upon for the rate for the relief of the poor within the said parish.

And by sect. 34 it was further enacted—

That it shall be lawful for the overseers of the poor of any such parish, and they are hereby required, whenever, according to the rate made for the relief of the poor, one and the same person shall be rated in one sum in respect of land, and also of houses, buildings, and other property, to cause such land, and also such houses, buildings, and other property, to be separately assessed, and the sum hereby authorised to be levied shall be assessed accordingly: Provided always that every courtyard, yard, or garden (such garden not being a market garden or nursery ground), shall be included in, and make part of, the assessment to be made on the house, buildings, or other property, to which they may be respectively attached, provided always that such lands, houses, buildings, and other property, shall not in the whole be assessed at a higher amount than they were in the last rate made for the relief of the poor within the said parish.

This Act was duly adopted in the parish of Neath many years ago, and has ever since continued and now is in force therein.

9. The said land occupied by the canal and towing-path and premises in the parish of Neath the property of the company, has been assessed for the relief of the poor at the rateable value of 161*l.*, and the same value was adopted and acted upon in the rates made for the purposes of the watching and lighting of the parish of Neath under the provisions of the said Act.

10. In the last of such rates made in and for the parish of Neath (that appealed against) the rateable value of the said portion of the canal towing path and premises in the said parish, was assessed at the said sum of 161*l.*, but rated at the house-rate, namely, 9*d.* in the pound; and not at the land-rate of 3*d.* in the pound, which was the rate in the pound at which the owners and occupiers of land within the said parish were rated by the said assessment committee.

At the said quarter sessions the appellants objected to the principle so adopted by the respondents, and contended that the lands so occupied were not liable to the higher rate.

11. For the purposes of the appeal it was admitted and taken that the rateable value of the company's property, the subject of the appeal, was correctly assessed at the sum of 161*l.* (the amount mentioned in the rate) but it was contended, on behalf of the appellants, that on the state of facts above-mentioned and set out the land occupied by the said portion of the said canal towing path and premises, was properly rateable under the provisions of the statute 3 & 4 Will. 4, c. 90, as land only, and not as houses, buildings, and property other than land; and, further, that even if under that statute taken alone, it would be thus rateable as houses, buildings, and property other than land, that, nevertheless, by virtue of the provisions of the 68th and 69th sections of the Company's Special Act, still unrepealed and in full force and effect, it was excepted and protected in that respect from the operations and provisions of the later general Act (viz., the 3 & 4 Will. 4, c. 90) and rateable by virtue of those sections only as land, and that, therefore, 3*d.* in the pound as land, and not the higher rate of 9*d.* as houses, buildings, and property other than land was the amount at which it ought to be rated, and which ought to be paid in respect of it.

12. The court of quarter sessions, however, confirmed the said rate.

13. The Acts, herein referred to, were to be cited and referred to if necessary by either party on the argument of this case, and to be taken as incorporated therein, and the court was to be at liberty to draw any inference from facts above stated, which might have been drawn by the court of quarter sessions.

14. The question for the opinion of the Court of Queen's Bench was, whether the principle of assessment adopted by the respondents was based upon the correct construction of the provisions of the said statutes with reference to the facts and circumstances hereinbefore mentioned, and found and disclosed in the above case.

15. If the Court of Queen's Bench were of opinion that the said property should be rated as land only at the sum of 3*d.* in the pound, the order of the court of quarter sessions was to be set aside, and judgment to be entered for the appellants with costs, and the rate amended by reducing it from the sum of 6*l.* 0*s.* 9*d.* to the sum of 2*l.* 0*s.* 3*d.*

If the court were of opinion that the property was properly rated at 9*d.* in the pound, the order of the court of quarter sessions was to stand, and the rate to remain at the above sum of 6*l.* 0*s.* 9*d.* and be confirmed.

H. Allen and *E. Julyan Dunn*, for the respondents.—The question is whether this canal and towing-path is land within the terms of 3 & 4 Will. 4, c. 90, s. 33. In *Reg.* v. *Midland Railway Company* (4 E. & B. 962), the question was whether the line of the railway was made rateable towards the lighting of a town under a local Act, which made all houses, buildings, erections and works, tenements and hereditaments, liable to be rated, and excepted land out of that rateability; and Lord Campbell, C. J., delivering judgment, said, "We are of opinion that it was rateable under the word 'works,' and was not included in the exception of land." [LUSH, J.—There the language of the Act was very different from that of the statute now in question.] *Peto* v. *Overseers of West Ham* (33 L. T. Rep. 222; 2 E. & E. 146), is a decision upon the two sections upon which the present case depends. The question there was whether a wet dock always covered with water was assessable as "land," and the court held that it was rateable at the higher rate as "property other than land," and *ejusdem generis* with houses and buildings; Lord Campbell said, "The 34th section of stat. 3 & 4 Will. 4, c. 90, respecting 'gardens' seems to show clearly the intention of the Legislature, that what is accessory to 'houses and buildings' should come within the same category, and that the other category should only comprehend land used for agricultural purposes. When I look at the subject-matter rated here, I do not see how the dock and basin are to be separated from the jetties and warehouses. The dock and basin would be useless without the jetties, and warehouses would be useless without the dock and basin. They all form one undertaking, and one establishment." [LUSH, J.—Lord Campbell seems to have overlooked the exception as to market gardens in sect. 34; the proviso is, "that every courtyard, yard, or garden (such garden not being a market garden or nursery ground), shall be included in . . . the assessment to be made on the house, buildings, &c."] The case last cited is a strong one, for all the watching and lighting of the dock was done at the expense of the lessees thereof, who derived no benefit from the rates, yet they were held liable as occupiers of land covered with water. [MELLOR, J.—For it was no longer land but buildings. Here however the only building is the walling up of the canal.] Watching and lighting is, of course, very beneficial to a canal running through a town. This canal is not land in its natural state; it is used solely for a commercial purpose, and therefore is liable to a higher rate than agricultural land. [BLACKBURN, J.—I do not quite appreciate the *ratio decidendi* in *Peto* v. *The Overseers of West Ham.*] Par. 6 of the case describes this canal as being faced and lined in certain parts . . . with stone and masonry, and the towing path as having, belonging, and incident thereto, certain posts for fastening the vessels, and a paddle, stone bridges, culverts, and a dry dock lined with masonry. The mere passage of water through the land would be useless without those adjuncts. Lord Campbell says in the last cited case (p. 158): "There is no doubt that a large capital must have been laid out in excavating and puddling the dock and basin, and surrounding them with walls. If they had been used for carrying on a manufactory, without any buildings being erected upon them, and without water being introduced into them, they could not possibly have been considered "land" within the meaning of this section of the Act of Parliament; and can it make any difference that, instead of their being paved and goods being deposited upon them, water is introduced into them, which supports floating warehouses in which the goods are stored? [BLACKBURN, J.—The preceding passages must be read. The rateability does not depend on the fact of a large capital having been expended.] The land occupied by this canal is not used for agricultural purposes, and is therefore rightly rated at the higher rate.

G. B. Hughes (with him *J. W. Bowen*) for the appellants.—By sect. 68 of 31 Geo. 3, c. lxxxv., the company of proprietors are rendered liable to be rated to all Parliamentary and parochial taxes, and assessments in respect of the lands . . . . in the same proportion as other lands the property of individuals in their natural capacity. The Legislature in effect there says, "You are not to be rated on tolls, but shall be on land with its ordinary incidents—*i. e.*, you must pay the same as if for agricultural land." [They were stopped by the court.]

COCKBURN, C. J.—I am of opinion that the canal and those constructions which are described in the case as partaking of the character of buildings, and which seem to me to be mere accessories of the canal, must be treated as "land" in the sense in which that word is ordinarily used. With respect to the liability to assessment a case was cited in which Erle, J. differed from the rest of the court, but in which the majority were of opinion that a dock must be taken to form part of a larger whole, and that the whole taken together was rather buildings than land covered with water. But the circumstances there were altogether different from those in the present case, for there was a warehouse and works of considerable extent, and the dock was subsidiary and subordinate to the purposes of the operations of the company who occupied those warehouses and buildings. I cannot say, notwithstanding the strong reasons given by Erle, J., that the majority of the judges were not right in their decision.

Here, however, is a canal existing for the ordinary purposes of traffic and of affording means of transit for barges, and the works and masonry for lining the banks are parts of the canal itself; so also the bridges, and these are no benefit to the company, but, on the contrary, were works executed rather for the benefit of the public. I think, upon the whole, seeing that the dock is used merely for the purpose of repairing barges therein, it also is but subsidiary to the canal. Therefore, this case differs altogether in its facts from that in 2 E. & E. 146, and we must treat this canal as land covered with water, as indeed it actually is, and therefore decide that it must be rated to the Watching and Lighting Rate on the lower scale.

BLACKBURN, J.—I am of the same opinion. The question turns on the 23rd section of the 3 & 4 Will. 4, c. 90. [His Lordship read the section.] That word "land," perhaps, would include houses and buildings, but it is plain that the Legislature, making a distinction, divided "land," first into "houses and buildings," and secondly, into "property," which must mean property *ejusdem generis* with houses and buildings. In the first class is land in general, in the other, "houses," &c. I don't think *Reg.* v. *The Southwark and Vauxhall Water Company* is in point. There the Vauxhall Water Company were held to be rateable to a lighting rate on the lower scale, as occupiers of land; and that was obviously right, for it could not be said that they occupied the land through which the mains and pipes passed as property other than land. Then *Peto* v. *The Overseers of West Ham* is referred to. There was a difference of opinion there, but that case really comes to this, viz., that the docks were part of a large undertaking, that is especially dwelt on in the judgment of the majority of the court, and they said that the dock which was in amongst the warehouses was as much a part of the buildings as the courtyard of a house, and was therefore ancillary to the buildings; and it was on that ground that the judgment of the court was founded; not upon the ground that the land covered with water was ancillary to the dock, but that the dock was ancillary to the buildings, and, consequently, must be taken as part of the property, and, therefore, it was rated at the higher rate. Viewing it in that way, I think that was the result I also should have arrived at, and I think we must hold the majority to have been right. But does that case govern the present one? I think not. Here we have a canal, and a canal in the general acceptation of the term is a long ditch, and is not itself a building. Now a ditch is no more a building than a piece of ground running beside a highway, and unless it could be said that a turnpike road would be a building, we cannot go to the length of saying that a canal would be so. If the question arose which I suggested during argument—viz., whether Holborn Viaduct was a building or not, I should think it would be found that it was; but if it were a question as to whether the road over it were a building, I should incline to think we could not say that it was. Now, looking at the decision in the above-mentioned case, I can find nothing which would justify us in saying that this canal is a building. No doubt there is some building about it. True, it is lined with masonry, but that is no more than the other case I adverted to in the discussion—viz., that of a sunk fence or ha-ha in a field, faced with masonry, which certainly would not make the field a building. Then as to the dock, I think that is merely ancillary to the canal. I am of opinion that the canal cannot be considered a building, or in the nature of a building, and therefore does not fall within the terms "houses, buildings, and other property," and therefore must be deemed to be "land other than" houses and buildings.

MELLOR, J.—I am of the same opinion. This case is certainly distinguishable from that of *Peto* v. *The Overseers of West Ham*. There, no doubt, expressions are attributed to Lord Campbell which, in a very large and liberal sense, may go as far as Mr. Allen contended, but then they are confined to the circumstances of the case, as it plainly appears, for the learned judge says that the dock, jetties, and warehouses, "all form one undertaking and one establishment," that seems to me the ground on which Lord Campbell based his judgment. I read those words as a governing authority on the question as to what is property *ejusdem generis* with "houses and buildings," and putting that interpretation on the judgment, it cannot be said that that case governs the present one, for here there is really nothing to which these matters are ancillary, except the canal. That being so, it seems to me that as a yard attached to a house is ancillary to the latter, so here these masonry constructions are in their nature ancillary to the canal.

LUSH, J.—I am of the same opinion. Assuming *Peto* v. *The Overseers of West Ham* to be rightly decided, I think the ground of the decision was that the court, correctly or otherwise, regarded the dock or part covered with water, as accessory to the buildings. Neither is *Reg.* v. *The Midland Railway Company*, which is a decision on another Act of Parliament, containing essentially different words, an authority on the present case. There is nothing in sect. 33 to warrant us in holding that "land," to be assessed on the lower scale, must be only used for ordinary agricultural purposes. Sect. 34 clearly shows that such was not the intention of the Legislature, for that section provides that market gardens or nursery grounds shall not be assessed on the higher scale. For these reasons I am of opinion that the order of sessions should be quashed.

Judgment for the appellants.

Attorneys for the appellants, *Sawbridge* and *Wrenhouse*, agents for *Jones* and *Curtis*, Neath.

Attorney for the respondents, *James Kempthorne*.

Thursday, June 15, 1871.

JUDGE AND ANOTHER (apps.), *v.* SELMES (resp.)

The Highway Act 1835 (5 & 6 *Will.* 4, c. 50), *ss.* 27, 109—*Surveyors—Void rate—Notice of action—Blunders bonâ fide.*

The defendants, surveyors of highways, made a rate which purported to be laid under the 13 *Geo.* 3, c. 78 (*a repealed statute*), *and was altogether informal and void.*

They then, by their collector, applied to the plaintiff for payment of the rate, and received from him a sum of money, which the latter afterwards sought to recover back by action in the County Court.

The 5 & 6 Will. 4, c. 50 (*The Highway Act* 1835), s. 109, enacts that no action shall be commenced

against any person for anything done "in pursuance of or under the authority of this Act" until twenty-one days' notice has been given, nor after three calendar months.

The judge of the County Court gave judgment for the plaintiff on the ground that the rate was void, and that the defendants were not entitled to notice of action, inasmuch as the repealed statute, under which the rate had been illegally made, did not require any such notice. On appeal,—

Held, that as the defendants intended to act, and acted bonâ fide as surveyors in raising money for the repairs of highways, under an authority given to them by law, they were entitled to the notice of action prescribed by the 5 & 6 Will. 4, c. 50, s. 109, notwithstanding the fact of their having grossly blundered in carrying out their intention.

APPEAL from a decision of the judge of the County Court of Sussex, holden at Rye.

This was an action brought to recover 14*l.* 6*s.*, for money illegally demanded of the plaintiff by the defendants or their agents and paid by him as for a highway rate pretended to be made on the 1st Dec. 1868, at 1*s.* in the pound.

The summons came on for hearing on the 18th July last, but was adjourned to enable the plaintiff to prove that the defendants were surveyors of the highways at the time the rate was made.

At the adjourned hearing it was proved that at the general annual vestry meeting, holden on the 2nd April 1868, the defendants were, as appears from the vestry book, appointed surveyors of the highways of such part of the parish as lies within the borough of Rye for the year ensuing, and that James Duberly was appointed collector of the highway rate for the year ensuing at a salary of 5*l.*

On the 10th Dec. following, the defendants made a rate for the use of the highways, and which was entered in the rate-book in the following terms:

Rye. The 10th Dec. 1868. A composition of 1*s.* in the pound is agreed to be taken by Joseph Judge and James Collins Head, surveyors of the highways within the town and liberty of Rye, in lieu of statute work to be performed and done by the several inhabitants and occupiers of land, hereditaments, &c., due notice of composition being first given as by Act of Parliament in that behalf provided.

The said rate was not signed by the defendants as surveyors, nor allowed by two justices of the peace, nor published in accordance with sect. 27 of 5 & 6 Will. 4, c. 50.(*a*)

The rate book was in due course given to the collector to collect the rate.

Upon the 13th Jan. 1869, the plaintiff being ignorant of the facts, was applied to for payment of the rate. It was on a Rye Cattle Market day, while the plaintiff was in the market, no coercive means were used to enforce payment, the collector simply asked for the rate in the usual manner, and the plaintiff paid it without comment, and received from the collector the following receipt:—

Parish of Rye. The 13th Jan. 1869. Received of Mr. Charles Selmes the sum of fourteen pounds six shillings in respect of the highway rate made the 1st Dec. 1868, at 1*s.* in the pound. 14*l.* 6*s.* Received JAMES DUBERLY.

It was also proved that the supposed rate was made on the 10th Dec. 1868, but the defendants were sued for money illegally demanded as for a highway rate pretended to be made on the 1st Dec. 1868, and the receipt produced by the plaintiff was in respect of a highway rate made on the 1st Dec. 1868.

Upon the plaintiff becoming aware of the above facts this action was commenced to recover back the money so paid by him, on the assumption that the rate for which it was paid was a valid rate.

At the trial the plaintiff contended that he was entitled to recover back the money as money paid under mistake of facts, on the ground that the rate was illegal. First, because by sect. 29 of 5 & 6 Will. 4, c. 50, no rate could be made for more than 10*d.*; secondly, that the rate had not been signed, published, and allowed as required by the statute.

The plaintiff also contended that the defendants, as surveyors, were not entitled to notice of action under sect. 109(*b*) of 5 & 6 Will. 4, c. 50; because the making of a rate of 1*s.* could not be a thing done in pursuance of or under the authority of the Act, seeing that, first, the Act provided that no rate should exceed 10*d.* in the pound; secondly, that the rate was evidently intended to have been made under 13 Geo. 3, c. 78, which provided for such a composition as the rate purported to be, and which statute had been repealed by 5 & 6 Will. 4, c. 50.

The defendants, on the other hand, contended, first, that the defendants having been sued as surveyors of the highways were entitled to notice of action under 5 & 6 Will. 4, c. 50, s. 109; secondly, that more than three calendar months having expired since the fact was committed for which this action could lie.

The judge, who tried the cause without a jury, held, that the plaintiff was entitled to recover, and gave judgment for plaintiff for 14*l.* 6*s.* and costs, on the following grounds:—First, that the rate was void, it having been erroneously made as a composition in lieu of statute work under the repealed Act of 13 Geo. 3, c. 78, and, further, that the rate was not signed by the defendants, as surveyors, nor allowed by two justices of the peace, nor published as required by the 5 & 6 Will. 4, c. 50, s. 27; secondly, that the plaintiff had paid the money in ignorance of the facts; thirdly, that the defendants were not entitled to notice of action, inasmuch as the Act of 13 Geo. 3, c. 78, under which the rate had been illegally made, did not require any notice of action.

The defendants, being dissatisfied with such judgment, prayed leave to appeal against the same, on the grounds above mentioned, and the judge thought it reasonable and proper that such appeal should be allowed, and allowed the same accordingly.

The question for the opinion of the Court of

(*a*) 5 & 6 Will. 4, c. 50 (The Highway Act 1835), s. 27, in order to raise money for carrying the several purposes of the Act into execution, enacts that a rate shall be made, assessed, and levied by the surveyor upon all property liable to be rated and assessed to the relief of the poor. Provided that every such rate shall be signed by the said surveyor, and allowed by two justices of the peace, and published in the same way as poor rates are now allowed and published.

(*b*) Sect. 109 enacts that "no action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought . . . . nor after three calendar months next after the fact committed for which such action or suit shall be so brought . . . ."

Queen's Bench was, whether the ruling of the judge in this action was correct in point of law. If the court should be of opinion in the affirmative, then the judgment in favour of the plaintiff to be affirmed, but if the court should be of opinion in the negative, then judgment to be entered for the defendants.

Hance for the appellants.—First, this was a voluntary payment. No objection was made by the plaintiff to pay the rate, and no suggestion of any distress was made to him.—[BLACKBURN, J.—But he paid it under an impression that the collector had a right to demand it.] It may be admitted that the rate was informal and void. But the defendants were acting as surveyors, and the question is whether they had reasonable ground for the belief that they were entitled to do the act which is now complained of. It may also be conceded that the cases show that mere honest belief is not sufficient. [LUSH, J.—*Bona fides* is not enough.] There must be a reasonable belief. The informal heading matters not, for the heading is no part of the rate: (*Reg.* v. *Uttermere and another*, 26 L. J. 197.) In that case Lord Campbell, C. J., remarks, "I know of no authority for saying that the heading of the rate must, like an order of justices, show jurisdiction."—[BLACKBURN, J.—I don't think that the fact of the surveyors' calling it a "composition" when it really was a rate would make it bad.] By 5 & 6 Will. 4, c. 50, s. 29, it is enacted that every rate shall contain the names of the occupiers, the description of the premises or property they occupy, the annual value, and the sum in the pound at which the rate is made. There is no form of heading prescribed. The surveyors were entitled to notice of action, and the time within which the action should have been brought began to run from the making of the rate, and not from the demand: (*The Kennet Canal Company* v. *The Great Western Railway*, 7 Q. B. 844.) [BLACKBURN, J. referred to *Roberts* v. *Orchard* (9 L. T. Rep. N. S. 727; 33 L. J. 65, Ex.)] In that case it was laid down that when the question is whether a defendant is entitled to notice of action in respect of a thing done pursuant to a statute, the true rule is to ascertain whether the defendant honestly believed in the existence of such a state of facts as would, if it had existed, have afforded a justification for his acting under the statute. [BLACKBURN, J.—We there adopted the judgment of V. Williams, J. delivered in *Hermann* v. *Seneschal* (6 L. T. Rep. N. S. 646; 13 C. B., N. S., 392.] In *Greenaway* v. *Hurd* (4 T. R., 553) it was held that assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the Act imposing them is repealed if he have paid them over to his superior. The officer is in such case entitled to a month's notice of action by 23 Geo. 3, c. 70, s. 30. Kenyon, C.J. there says, "It has been frequently observed by the courts that the notice, which is directed to be given to justices and other officers before actions are brought against them, is of no use to them, when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it. Here the defendant acted as an officer of the excise when he received this money, and the plaintiff paid it to him in that character." So in the *present case, when the* collector received the money he *did so on behalf of the* defendants as surveyors, and the plaintiff paid it to him in that capacity. The case of *Waterhouse* v. *Keen* (4 B. & C. 200) was an action of assumpsit against a toll collector to recover back money alleged to have been exacted by him improperly as toll. The Turnpike Act, under which the toll was demanded, contained a proviso that no action should be brought for anything done "in pursuance of the Act" until twenty-one days' notice should have been given; and it was held that the twenty-one days' notice fixed thereby ought to have been given before action brought. Bayley, J. there says, "If an action be brought in consequence of a thing substantially done in pursuance of the Act of Parliament, it is a case within the Act." And Holroyd, J., "The action in substance is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, under colour of the authority of the Act. The demanding and taking the toll was an act done in pursuance of the Act. This is a case, therefore, within the words of the Act."

Lanyon for the respondent.—The defendants clearly intended to act as surveyors, but not under this recent statute. The judge found as a fact that the proceedings were not intended to be in accordance with the 5 & 6 Will. 4, c. 50, but under the old Act. [BLACKBURN, J.—If we were to proceed under some repealed Act, should we not be acting under the authority of the law? It seems to be monstrous to say that they thought they were not acting under the Highway Act 1835.] In *Downing* v. *Capel* (16 L. T. Rep. N. S. 323; L. Rep. 2 C. P. 461), A. purchased pine-apples of B., and directed him to take them to his house, and ask for payment. B. left them at A.'s house at one, p.m., and was paid by A.'s butler. A. returned home at three, p.m., and was informed that the butler had paid, and believing erroneously that he himself had paid B. at the time of the purchase, immediately sent for a policeman, and ordered him to arrest B. on a charge of obtaining money under false pretences. The policeman and A.'s butler at once went in pursuit of B., and apprehended him at ten p.m. By 24 & 25 Vict. c. 96, s. 113, it is provided that notice of action for anything done in pursuance of the Act shall be given, and by sect. 103, that any person found committing any offence under the Act (*inter alia*, obtaining money under false pretences), may be immediately apprehended. In an action for wrongful arrest: Held, that B. was "found committing the offence," if at all, at one, p.m., and the pursuit not having been commenced till A.'s return at three, p.m., A. could not have believed he was acting in pursuance of the statute, and was not entitled to notice. Here, as a matter of fact, the defendants did not intend to act under the present Highway Act. They made a rate under the old statute, which does not entitle them to notice of action. [BLACKBURN, J.—The news of King James's death did not reach Chester in time to prevent the chief justice of that city, whose commission to try prisoners was thereby determined, proceeding to hang a criminal; but it was held that the chief justice was not guilty of murder, for he was acting as a judge; and Lord Hale puts the case of the Common Pleas entertaining an appeal of death and hanging a man; and he says, "I think it is an error, a great misprision in them, but not felony, because they had colour to hold plea thereof by an original writ out of the Chancery under the Great

' (*a*). So here, the surveyors were guilty, as re, of a "great misprision," but yet are en- to notice of action.] In *Hardwick* v. *Moss* T. Rep. N. S. 802; 31 L. J. 205, Ex.), Bram- B. seems to think that the last question in cases is, "Had the defendants reasonable id for believing that they were acting under uthority of the Act?" which provides for e of action. So in *Leete* v. *Hart* (L. Rep. 3 322), "*Semble*, that even an honest belief in e of facts, which, if true, would have afforded tification, is not sufficient unless the de- nt had reasonable ground for his belief." , J. referred to the judgment of Byles, J. in v. *Leonard* (6 B. & C. 354).] In *Poulsam* v. (L. Rep. 2 C. P. 449), the acts complained of "done or intended to be done under the s of the Act," conferring the right to notice ion. [BLACKBURN, J. referred to *Wordsworth rley*, 1 B. & Ad. 391.] In *Smith* v. *Hopper* J. 93, Q.B.), the judgment of Lord Denman, supports the present argument. On the g of the County Court judge the respondent itled to judgment.

ce in reply.—None of the cases cited *contra*, t all displaced the proposition that the defen- having really acted *bonâ fide* as surveyors in ay affairs are entitled to the protection of atute. [BLACKBURN, J.—Have you any neat rity to show that one is entitled to the pro- n of an Act of Parliament who has been under it, but blundering terribly?] No; he *bona fides* of the defendants who were only as surveyors of highways, and had a able belief that they were legally empowered as they did, entitles them to the protection of & 6 Will. 4, c. 50.

CKBURN, J.—I think the defendants were ed to the notice prescribed, on the ground hey were within the meaning of the 5 & 6 4, c. 50, when they levied this rate and re- the money, those acts being things done and "in pursuance of the authority" of tatute. It has long been decided that those really apply to things that are done under thority of the Act of Parliament, but which, me mistake or blunder on the part of the doing them, are not actually defences; and egislature thought in such case that because ndividual was acting under the supposed rity of the Act of Parliament he was entitled ice of action. Here the defendants are sur- s of highways, elected under 5 & 6 Will. 4, and whatever they did as surveyors of high- they assuredly thought they were doing by of the Act of Parliament under which were appointed. No doubt they, not being rs, were not able to say what that Act liament was, but they perfectly well knew were elected surveyors under the Highway nd must have intended to have acted under thority of that statute. Then are they enti- notice of action? The County Court judge hat the rate was made most informally, and face of it was called a composition. In all bility the surveyors had taken some old form under the Act of 13 Geo. 3, c. 78, long since ed. They also stated the composition at 1*s.* d of 10*d.*, which was the limit of the rate, and, r, they did not go through the necessary formalities of signing the rate, nor of having it properly allowed and published. Therefore the County Court Judge thought that they could not in point of law have been acting under the Highway Act, and that they consequently were not entitled to the notice of action prescribed thereby. Now I quite agree that if a person knows he has not authority under a statute to do a thing, and goes intentionally out of his way to do it, he cannot shelter himself by pretending that it was done under colour of an Act of Parliament. But there was nothing here to show that the act in question was done by the surveyors, they knowing that it was contrary to the statute; and if the County Court judge had anything before him to show that they were so aware of their act being contrary to the statute, and were trying with a high hand to get money to which they had no right, they would not have been under the protection of the Act of Parliament. It was, however, not so found; but what they, in fact, did, was this, viz., they, being surveyors of highways, made a rate in this very informal way, making it for 1*s.* instead of 10*d.*, not signing nor publishing it properly, and so on. Having done that they proceed in the ordinary manner by the ordinary collector whom they sent round to get the money for the repairs of highways, and he actually receives it. Were the surveyors, then, in point of fact, acting and intending to act in the office of surveyors? I think that they were so intending to act, though they blundered in carrying out their intention. Now we come to consider the cases of *Roberts* v. *Orchard*, *Hermann* v. *Seneschal*, and *Leete* v. *Hart* (*sup.*), and I must point out that both in *Hermann* v. *Seneschal* and *Roberts* v. *Orchard* the question raised was, What was it that entitled the man to have notice of action?—not, What would limit the notice of action? In *Hermann* v. *Seneschal* the defendant had absurdly, rashly, and hastily given a man into custody for uttering a half-crown which was, in fact, a good one; but, said the Court of Common Pleas, however unreasonable the supposition of the defendant was, yet if he really thought the half-crown was bad he was acting within the statute, and the question having been left to the jury whether he really thought so, they found in favour of the defendant, and the court held that he was entitled to notice of action. In *Roberts* v. *Orchard* the question was raised by a bill of exceptions to the ruling of Martin, B., who held that the defendant was not entitled to notice of action. The exceptions tendered were that the learned judge ought to have left to the jury some particular state of things, and if the jury so found, to have said that the party was entitled to notice of action. The Exchequer Chamber said "No; *Hermann* v. *Seneschal* is right." There counsel required Martin, B. to leave to the jury a question which, according to *Hermann* v. *Seneschal*, would have been bad. But neither in that case, nor in the former one, was it laid down that the defendant would not be entitled to notice of action because he had blundered in the law. So also in *Leete* v. *Hart* (*sup.*) Now, several of the cases which we have had to look at have been those in which the same officers, who are the defendants in this instance, viz., surveyors of highways, were assuming to act in pursuance of a statute. Thus in *Hardwick* v. *Moss* (*sup*), surveyors obstructed a highway without any power so to do, nevertheless, said the

(*a*) See 1 Hale, P. C., p. 498.

Court of Exchequer, they were surveyors acting by the directions of the parish, and they thought that they were acting under the Highway Act. So again in *Wordsworth* v. *Harley*, the question arose upon the former Highway Act, which required actions for things done in pursuance of that statute to be brought within three months. In that case, apparently very high handed things had been done by a surveyor of highways, in taking a man's field and adding it to the public road without the owner's consent. An action having been brought for the injury, Lord Tenterden said that however unfortunate the case might be for the plaintiff, yet that the action could not be maintained. The point now before us was involved and taken for granted, rather than positively decided there, but it clearly was inferentially decided that if in repairing the highways the surveyor was illegally and improperly taking a portion of land, he was acting in pursuance of the statute, and had therefore a right to notice of action. In the present case there is nothing to show that the defendants were conscious they were acting illegally; what they were doing was the essence of their employment, viz., raising money for the repairs of the road. They certainly blundered excessively, but were, I take it, acting under the Act of Parliament, and were consequently entitled to notice of action. Our ruling happens here to work justice, the result of which I am glad; it might have worked unjustly, which I should have regretted. I should not be disposed to decide that there might not have been a defence on the merits to this action, on the ground that the payment might have been voluntary, or that the surveyor had applied the money to the purposes for which it was levied before he got notice of the facts, and I therefore guard myself against being supposed to decide whether those defences would have been good or otherwise.

LUSH, J.—I do not intend to express any opinion on all the points. It is quite sufficient to give judgment on the third. I entirely agree with my brother Blackburn in the decision which he has pronounced. The judgment of the learned judge of the County Court was "that the defendants were not entitled to notice of action, inasmuch as the Act of 13 Geo. 3, c. 78, under which the rate had been illegally made, did not require any notice of action." Now I cannot read that as a finding of the judge that, in point of fact, the defendants intended to act without supposed authority, or that they acted wantonly and in abuse of their power; but I understand him to express his opinion that as a matter of law, inasmuch as the rate appeared on the face of it to be made under the 13 Geo. 3, c. 78, and that Act is repealed, the defendants cannot be heard to allege that they had not made the rate under that statute, and cannot resort to the Highway Act (5 & 6 Will. 4, c. 50). I think that was an erroneous view. True, the rate purports to be a composition rate, but still, if it had been made under the statute of Geo. 3, it would have been bad because it has a wrong title. The question was whether the surveyors, in making it, intended to do what they were authorised to do by the Highway Act of Will. 4. I do not think it was necessary to find what was the particular enactment which gave them authority as they supposed, if they thought they were acting under an authority given them by law. They *bonâ fide* believed they were doing what was right, and that is all that is needed to entitle them to the protection of the statute.

HANNEN. J.—I am of the same opinion. The question is, did the defendants *bonâ fide* intend to make a rate as surveyors of highways. If that was their intention, though they might know nothing of the particular provisions of the Act of Parliament—if, I say, they intended to make a rate as surveyors under any Act of Parliament, giving them power to do so,—then they are entitled to notice. Now the statute which gave them power is the Highway Act, and that contains a provision that any person doing anything "in pursuance of or under the authority of this Act" shall be entitled to the protection afforded by the statute. Therefore I think the appellants had a right to notice, and that our judgment should be for them.

Judgment for the appellant.

Attorney for the appellants, *E. N. Dawes.*

Attorney for the respondent, *W. B. Farmer.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR and H. H. HOCKINS, Esqrs., Barristers-at-Law.

June 3 *and* 5, 1871.

RUSSELL AND OTHERS *v.* THE TITHE COMMISSIONERS FOR ENGLAND AND WALES.

Tithe commutation—Additional rentcharge by way of extraordinary charge on land newly cultivated as market gardens—"Beyond the limits of every district," &c.—6 & 7 Will. 4, c. 71, ss. 40 and 42—23 & 24 Vict. c. 90, s. 42.

After the making and confirmation of an award for the commutation of tithes in the parish of P., by which award no district was assigned within which the amount charged upon any hop grounds or market gardens within such district by way of apportionment of tithe rentcharge was distinguished into two parts, to be called the ordinary and the extraordinary charge, some land in the same parish of P. was newly cultivated as market gardens, and thereupon the vicar of the parish requested the defendants to award and fix an extraordinary charge per acre in respect of such lands so newly cultivated, and to declare the said parish of P. a district within which the said extraordinary charge should be payable in respect of all lands which then were, or thereafter might be, cultivated as market gardens. Thereupon the defendants sent down an assistant commissioner, who made an award by which he awarded the sum of 6s. per acre as an extraordinary charge on lands newly cultivated as market gardens in the parish, and declared the whole parish a district within which such extraordinary charge should be payable. The plaintiffs, who were landowners in the parish of P., now sued in prohibition, praying the court to prohibit the defendants from confirming this award, or from taking any further steps for declaring the parish of P. a district within which such extraordinary charge should be payable in respect of lands newly cultivated as market gardens:

Held, that the last-mentioned award was good.

Held also, that the words "beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens shall have been distinguished as aforesaid at the time of the commutation" (sect. 42 of 6 & 7 Will. 4, c. 71), are applicable to lands in any parish, no matter whe-

ther, at the original commutation, a district was or was not assigned in such parish (under sect. 40 of 6 & 7 Will. 4, c. 71), within which an extraordinary charge was payable (under sect. 42 of that Act), in respect of the lands cultivated as hop grounds or market gardens.

IN prohibition.

The declaration stated that the plaintiffs complained of the Tithe Commissioners for England and Wales, for that the plaintiffs were occupiers of lands in the parish of Plumstead, and they said that after the passing of the statute 6 & 7 Will. 4, c. 71 (that is to say), in the year of our Lord, 1842, proceedings were had under the said Act and other Acts then in force with reference to the commutation of the tithes arising in the said parish, and the assistant commissioner duly appointed under the said Acts duly made his award as follows (the declaration here set out the award):—And the plaintiffs said that the amounts by the said award to be paid in lieu of the tithes payable within the said parish were duly appointed, and certain parts thereof were duly apportioned and charged upon the lands, held and occupied by plaintiffs as hereinbefore mentioned. And they said that the said award and apportionment were duly confirmed. And the plaintiffs said that at the time of the said commutation proceedings and the making of the said award and apportionment, no notice was given by the owners of the lands in the said parish, which were then cultivated as orchards or gardens, that the tithes thereof should be separately valued; nor was the said parish or any part thereof assigned by the tithe commissioners, or the said assistant tithe commissioner, as a district; nor was it at the time of the said commutation proceedings, within any district assigned for the purpose of estimating or separately valuing the tithes of lands cultivated as orchards or gardens; nor was the amount charged by the apportionment upon and of the lands in the said parish distinguished into two parts, to be called the ordinary and extraordinary rentcharge. And the plaintiffs said that long after the completion of the said commutation proceedings and the confirmation of the said award and apportionment (that is to say) on the 24th Nov. 1868, the defendants were requested by the vicar of the said parish to award and fix an extraordinary charge per imperial acre in respect of the lands newly cultivated as market gardens after the said commutation, and to declare the said parish of Plumstead a district within which the said extraordinary charge should be paid, subject to the provisions of the Act for the Commutation of Tithes. And the plaintiffs said that upon such request the defendants appointed Charles Wood, Esq., an assistant commissioner in that behalf who held meetings, and ultimately made his award as follows (that is to say): (The declaration here set out this award, by which the asssistant commissioner awarded that the annual sum of 6*s.* per acre should be paid on all lands then or thereafter cultivated as market gardens and being newly cultivated as such since the commutation of the tithes of the said parish, to be paid by way of extraordinary rentcharge, &c., and declared all the lands in the said parish or district within which the extraordinary charge of 6*s.* an acre should be payable for the tithes of market gardens as aforesaid.)

And the plaintiffs said that the defendants would, unless prohibited, proceed to confirm, and have threatened to confirm, the said award. Wherefore the plaintiffs prayed that a prohibition might issue from this honourable court to prohibit the defendants from confirming the said award, or from taking any further steps for fixing the said extraordinary charge, or from declaring the said parish a district within which the said extraordinary rentcharge should be payable.

To this the defendants pleaded that at the time of the said commutation and thenceforth until the proceedings sought to be prohibited, all the lands in the said parish were and still were beyond the limits of any district in which any extraordinary charge for market gardens had then been distinguished, and after the said commutation divers lands in the said parish were newly cultivated as market gardens within the said parish, wherefore the vicar of the said parish, being a person interested within the meaning of the said Acts, requested the commissioners, as in the declaration mentioned, and the proceedings which and the award the confirmation of which the plaintiffs asked the court to prohibit by their writ of prohibition, were proceedings regularly taken to comply with the said request, and to fix an extraordinary charge upon market gardens, and to declare the lands in the parish a district within which the said extraordinary charge should be payable, as they lawfully might by virtue of the said Acts, and especially the said Act 6 & 7 Will. 4, c. 71, s. 42, and by the Act 23 & 24 Vict. c. 93, s. 42, wherefore the defendants pray that a prohibition may not issue.

Demurrer and joinder in demurrer.

Edlin, Q.C. (*Petheram* with him) for the plaintiffs.—It was the intention of the Legislature in 6 & 7 Will. 4, c. 76, that the commutation of the tithes should be final and conclusive. By sect. 42, however, of the Tithe Commutation Act 1836 (6 & 7 Will. 4, c. 71), it was provided that where a district had been assigned at the original commutation within a parish, and afterwards land, within the same parish, but not within the district assigned—in other words, "beyond the limits of every district"—should be cultivated as hop grounds or market gardens, the commissioners should have power to impose an "additional rentcharge by way of extraordinary charge" upon such land. But to give them power to impose such additional charge, it was essential that the land should be within a parish in which a district had been assigned. The words "every district" cannot have been intended to apply to every district in the kingdom, but every district in the parish; so that where (as was the case here) no district at all had been assigned in the parish, the words had no application. Had it been the intention of the Legislature to give the commissioners power to impose this additional charge upon any land, no matter whether it lay within a parish in which a district had been assigned or not, the provision would not have been introduced at the end of a section in this way. Sect 42 of 22 & 23 Vict., c. 93, is to be read in connection with and limited by sect. 42 of 6 & 7 Will. 4, c. 71. The intention of the Legislature was, that, as far as was possible, the commutation should be final and conclusive, and both parties might take their chance of gain or loss by a subsequent change of cultivation. For instance, if there were market gardens in a parish and no district was assigned, the landowners would have to go on paying a charge in respect of this higher cultivation. even if they ceased to cultivate the ground in this way. The statutes 2 & 3 Vict. c. 62, s. 28—33,

and 3 & 4 Vict., c. 15, s. 18, have no direct bearing on this question, but they indirectly support this contention.

Manisty, Q.C. (*F. M. White* with him) for the defendants.—The words in sect. 42 of 6 & 7 Will. 4, c. 71, "beyond the limits of every district," have not the meaning attributed to them by the plaintiffs, but are simply equivalent to the words in 22 & 23 Vict. c. 93, s. 42, "beyond the limits of any district." It was, therefore, not necessary that a district should have been assigned within this parish for the commissioners to have power to impose an additional rentcharge in respect of the land newly cultivated as market gardens. The commissioners acted upon the request of a person interested therein within the meaning of sect. 42 of 6 & 7 Will. 4, c. 71. It was the object of 22 & 23 Vict. c. 91, s. 42, to enable the commissioners not only to charge the lands newly cultivated (as they might have done under sect. 42 of 6 & 7 Will. 4, c. 71), but to declare the lands in Plumstead parish a district within which the extraordinary charge then fixed by them should be payable.

Edlin, Q.C., in reply.

WILLES, J.—The question in this case is whether the Tithe Commissioners, in dealing with a parish in which a commutation has taken place, by which no district was assigned, within which a special payment was to be made in respect of hop gardens and market gardens, can, at the request of the vicar, in respect of new market gardens arising within the parish, proceed to make a special and extraordinary charge in respect of the tithes of such new cultivation, or whether the power to impose such an extraordinary charge on any part of the parish not within a district assigned at the original commutation is not subject to the condition precedent that they should at the original commutation have assigned a district within the parish, within which district the land so newly cultivated happens not to be—in other words, whether the last clause of sect. 42 of the Tithe Commutation Act, dealing with the case of an additional rentcharge by way of an extraordinary charge upon hop grounds and market gardens newly cultivated as such, is not limited to parts of a parish in which a district or districts were appointed at the time of the original commutation, but which parts, not being then cultivated in this special manner, did not fall within such district or districts. It appears that the Tithe Commissioners have proceeded at the request of the incumbent to assess the additional charge in respect of some newly cultivated market gardens, which appear by the plea to have been cultivated as such only since the original commutation, and which are situated in a parish in which no district was assigned under the earlier part of sect. 42 at the original commutation, and the question is whether they had power to do so. We are dealing here with a special and peculiar case, in respect of which the Tithe Commutation Act has made particular provisions, and the tithes we are dealing with are no doubt the small tithes, because all these matter in respect of which the special provisions of the Act are made, appear to be cases of small tithes. In respect of some of the cases of small tithes, such as coppice, the 41st section makes *express provision by* reason of their not rendering *their produce* annually, and by reason no doubt *of the circumstances* which led to the old disputes, upon which it is not now worth while to enter. But in respect to hop and market gardens, special provision was made by the 42nd section by reason of the right of the parson to receive his tenth of the extraordinary profits made by such cultivation, and it was with reference to the larger amount of tithe recoverable in respect of such cultivation that an express provision was made by the 42nd section, by which, notwithstanding that under ordinary circumstances it was intended that the commutation should be final and conclusive, it was provided that the parson should be entitled to an increased payment in respect of lands subjected to such new cultivation. Now nothing is more certain than that the award was never intended to be final and conclusive in respect of each particular piece of ground in a parish, in the event of its turning out that a new cultivation as hop grounds or market gardens was resorted to in land falling within a district, as to which this extraordinary charge had been imposed. There can be no doubt that that is so because it is provided (sect. 42) "that the amount which shall be charged by any such apportionment as hereinafter provided upon any hop grounds or market gardens in any district so to be assigned" (a claim to have a district assigned having been made under sect. 40), "shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge . . . and all lands whereof the tithes shall have been commuted under this Act, and which shall cease to be cultivated as hop grounds or market gardens . . . shall be charged . . . only with the ordinary charge upon such lands." Therefore in respect of the cessation of cultivation in that way, the extraordinary charge was to cease and the ordinary charge alone remained. It is not easy to see the connection between sects. 40 and 42 in any other way but this, that in respect of lands subjected to the specially productive cultivation at the time when the award was made, the owners might choose to provide for the event of their giving up that cultivation, and might, instead of allowing the valuer to put on the land a proportion of the charge which should have reference to the special cultivation and its continuance, desire to have the opportunity of returning to the ordinary charge in the event of the special cultivation being discontinued. The 42nd section then goes on: "And all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop grounds or market gardens at any time after such commutation, shall be charged with an additional amount of rentcharge per imperial acre, equal to the extraordinary charge per acre upon hop grounds or market gardens respectively in that district." And it was finally decided in the case of *Walsh* v. *Trimmer*, in the House of Lords, that if a district has been assigned, not including the whole parish, in which district there are some common lands that produce nothing, so that the only commutation that could be suggested would be that the tithes should be commuted at nil, yet that such land, being within a district in respect of which there had been the extraordinary rentcharge assigned by reason of a claim in respect of other lands within the district, became liable to the extraordinary charge assessed upon the district in which it lay, on its being, subsequently to the commutation, inclosed and culti-

vated as a hop ground. Looking at the 40th section, we can perhaps understand by what accident the common lands in question fell within the district assigned; the reason probably was that a line had to be drawn, and that line happened to include a place which, at the time, no one ever thought in the least likely to become a hop ground, and, through that accident, the land in *Walsh* v. *Trimmer* became liable to the extraordinary charge. It, however, seems to me a most irrational conclusion to think that the land in that case, which was held, on its being turned into a hop ground, to at once become liable to the extraordinary charge assessed on the district in which it happened to be included, would, if it had not happened to fall within a district, have been liable to no charge at all. It was accordingly admitted by Mr. Edlin—and he could not help admitting it, else he could give no meaning at all to the latter part of the section—that, if the lands in *Walsh* v. *Trimmer* had been accidentally left out of the district which was assigned at the original commutation, the commissioners, on the lands in question being turned into hop grounds, would have had power, under the subsequent part of the 42nd section, and aided by the subsequent Act 23 & 24 Vict. c. 93, s. 42, to assign a new district in which such lands would have been included. But it is at the same time contended that if, on the original commutation, no district at all had been assigned within the parish, the waste lands in *Walsh* v. *Trimmer* would have remained exempt from the payment of tithes altogether, even after they were turned into hop grounds. Thus, according to the argument of the plaintiff, although no exemption could have been claimed for those lands by reason of the accident of their not having been included in a district, provided a district was assigned within the parish, still, if no district at all had been assigned, they would by reason of that accident have been exempt. That seems to me to be equally absurd, for, if that is the true construction of the statute, land newly turned into a hop ground or market garden, must or must not bear an extraordinary charge according to the accident of there having or not having been a district assigned within the parish at the original commutation. Putting a rational construction on the subsequent part of the 42nd section, that deals with the case of lands not within a district assigned by the commissioners at the original commutation, one would expect that the section applied not only to the case of lands accidentally or intentionally omitted from a district made at the time when the original commutation took place, but to all lands whatsoever, unless you can establish, on the construction of the section, that it was the intention of the latter part of the section to apply the machinery by which the original district was made, and the outcoming rentcharge for the extraordinary cultivation assessed, only to a case where it had become advisable to alter a district formed at the original commutation, so as to make it include land within the parish that was newly cultivated in this special manner. So if it had been made out that you were to refer to the proceedings to be taken in making an original district for the purpose of imposing the new charge on the new district or the land newly cultivated, then there would have been the connection between the former part of the section and the *latter, which would have* led me to think that the latter part of the section only applied to a case where such an original district had been made. If, however, there is no such connection, then the reason of the thing seems to suggest the true interpretation of the section, which is that all lands newly cultivated so as to be highly productive, are to give to the incumbent that which he would unquestionably have been entitled to receive, if no commutation had taken place. It may well be that as to all ordinary productions of the soil, the commutation of tithe is final and conclusive, but in respect of this exceptionally lucrative cultivation, these special provisions have been made. We now come, at the end of sect. 42, to the provision in question as to the additional charge on hop grounds and market gardens newly cultivated as such. It is quite obvious that the words, "shall be charged by the commissioners at the time of such new cultivation," do not refer to the charge to be made in respect of a district in the parish, if there was a district assigned in the parish at the time of the original commutation; but the section provides for a separate extraordinary charge in this case, distinct from a charge imposed on a district assigned at the time of the original commutation. It may, I think, be here observed, that the charge here spoken of in respect of a new district could not be taken to be the charge made at the time of the formation of the first district. I can understand a difference in time, in locality, and in the productiveness of the soil as having an effect on the valuation, and I can see no reason why these circumstances should not be attended to in the valuation to be made at the time of the new cultivation. It must, I think, be a new charge in respect of the new cultivation, and this new charge is not the same as the extraordinary charge imposed on land within a district formed at the time of the original commutation, it was only to be recoverable in like manner and subject to the same incidents. It thus appears to me that the charge is a new charge in respect of lands newly cultivated, and I do not see anything to connect the existence of a district in the parish with the liability of lands newly cultivated as market gardens in a parish in which no district was formed. To come back now to the words of the 42nd section, which deals with the case of "hop grounds and market gardens newly cultivated as such, beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens respectively shall have been distinguished, as aforesaid, at the time of the commutation." What is the meaning of these words? I believe they do nothing more than indicate the possibility of some connection between an original district and the additional rentcharge, which, under a later Act, the commissioners are called upon to make. But when you find there is no such connection between them, you must read the words, "beyond the limits of every district," &c., as equivalent to "beyond the limits of any district," and "beyond" simply means "not within." On the construction, therefore, of the 42nd section, I should conclude that which the reason of the thing points out, that this provision is applicable to the newly cultivated land, and that the commissioners have power to proceed. I by no means disregard the able argument of Mr. Edlin on the mode in which this clause comes in at the end of a section that starts with a provision as to the original commutation; but it seems to

me after all intended to fill up the measure of what was considered reasonable in respect of the right of the incumbent to the benefit of any future lucrative cultivation, and to recognise that right as extending over the parish. With regard to the sections of 2 & 3 Vict. c. 62, that were referred to, they extend to fruit plantations certain of the provisions of 6 & 7 Will. 4, c. 71. I do not mean to go at large into the construction to be put upon those sections, seeing that their language is different, and that market gardens are not referred to in 2 & 3 Vict. c. 62. I may further observe that in 6 & 7 Will. 4, c. 71, an unquestionable distinction is made between market gardens and other gardens producing fruit. Only market gardens are put on the same footing as hop grounds and on a different footing from ordinary gardens. It was a common thing to have a modus for a house and garden, but market gardens, unconnected with houses, were differently regarded. If a man having a modus for a house and garden were to turn his garden into a market garden, he would become liable in respect of the larger produce. Whatever the reason may have been we find the Legislature has made the distinction. I do not read the sections of 3 & 4 Vict. c. 15 that were referred to, as opposed to the view that I have taken. I should read the 33rd section of 2 & 3 Vict. c. 62 as intended to put a parochial agreement on the same footing as an award made by the commissioners, and I should treat the 42nd section of 6 & 7 Will. 4, c. 71, as applicable to the particular case now before us. The 42nd section of 23 & 24 Vict. c. 93 confirms the view that I have taken. That section provides that, when the commissioners are requested in the manner provided by the Act to charge an additional rentcharge on market gardens (they being the species to which we ought to confine our attention), the commissioners may declare the lands within the parish newly cultivated in this way, a district. The section uses the words, "beyond the limits of any district," the word "any" being here substituted for the word "every," which is used in the 42nd section of 6 & 7 Will. 4, c. 71. The word "every," which might be held in one sense to include some or each of a thing actually existing, is turned into "any." "Beyond the limits of any district," clearly means "not within a district." I think that the provisions of sect. 42 of 23 & 24 Vict. c. 93, justify the conclusion at which I have arrived. I see no reason for limiting the liability of the land in this case, and I find no language in the statute which enables me to say that the commissioners are wrong in proceeding to impose an extraordinary rentcharge in respect of these lands. I think, therefore, there ought to be judgment for the defendants.

M. Smith, J. I am of the same opinion. The question is, whether the power of the commissioners to impose an additional rentcharge on hop grounds and market gardens, newly cultivated as such, under 6 & 7 Will. 4, c. 91, s. 42, is by implication limited to the case of lands in a parish, in which, at the original commutation, a district or districts were assigned. There is no express limitation of their power to do so, for you can truly aver of the lands in this case that they are "beyond the limits of every district," &c. Their power, then, is not expressly limited to a case where a district was originally assigned within the parish. If, then, the power is so limited at all, it must be by implication. Is it so limited? I may remark, at the outset, that no sound reason could be pointed out for such a limitation; because, if there were such a limitation, this consequence would follow: supposing a piece of ground of twenty acres to be newly cultivated as a hop ground or market garden, ten acres being in parish A., within which a district had been assigned, and the other ten being in parish B., in which no district had been assigned, then, if such a limitation existed, this consequence would follow, that the ten acres in parish A. would be subject to an extraordinary charge, and the ten acres in parish B. would not. There seems to be no just reason why, in the case of such newly cultivated hop grounds, or market gardens, any such distinction should be made. Then, to see whether this limitation is to be found in the Act by necessary implication, we must look at the mode in which the scheme of the Legislature is framed. Now the object of having a district appointed is apparently this, that in case any of the land within a district shall cease to be cultivated as hop grounds or market gardens, they shall, on ceasing to be so cultivated, revert to the ordinary charge which lands under ordinary cultivation are subject to. Accordingly, under the 40th section of 6 & 7 Will. 4, c. 71, on the application of the landowner, a district was to be formed, and this provision was clearly inserted for the benefit of the landowner. The 42nd section then declared what was to be done on the commutation of the tithes—viz., that the amount which should be charged by such apportionment on any hop grounds or market gardens in any district so to be assigned should be distinguished into two parts, to be called the ordinary and the extraordinary charge, and that all lands which should cease to be cultivated as hop grounds or market gardens should be charged with the ordinary charge only. That is the first enactment. The second part went on to provide for the case of all lands that might be newly cultivated as hop grounds or market gardens after the commutation, which were to be charged with an additional amount of rentcharge equal to the extraordinary charge per acre on hop grounds or market gardens in that district. Therefore, when lands within an assigned district were brought into this new cultivation, they became liable to a rentcharge equal to the extraordinary charge in that district. Now comes the third part of the clause on which the question arises. (The learned judge here read the latter part of the 42nd section.) So far from the latter words being bound up with the existence of a district in a given parish and of an extraordinary charge upon that district, the mode of charge is left at large. If it had been intended to confine the imposition of an extraordinary charge upon newly-cultivated lands to the case of lands within a parish where a district had been assigned, I should have expected that the Legislature would have referred to the extraordinary charge imposed within the district as some standard for the commutation on the newly-cultivated lands beyond the district. But that is not done, and the charge to be made is independent altogether of the extraordinary charge to be made within a district. If that is so, why should not that be done in an adjoining parish, as well as in the parish in which a district has been formed. The later Act (23 & 24 Vict. c. 93, s. 42), which enables the commissioners to create a new district in respect of lands newly cultivated, seems to me to bring the case of newly cultivated lands in any

parish into precisely the same condition as the newly cultivated land in a parish in which a district has been formed. On reading the two sections together, I can come to no other conclusion than this, that, there being no express limitation in the Act, there is nothing to show by necessary implication that we ought to confine the last provision of the 42nd section of 6 & 7. Will. 4, c. 71, to the case of a parish in which a district was formed at the original commutation. The whole argument for the plaintiffs depends on the correctness of the proposition, that the formation of a district in a parish at the time of the original commutation is a necessary condition precedent to the bringing of lands, newly cultivated as hop grounds or market gardens, under the operation of a new assessment. The argument has not satisfied me as to the correctness of that proposition, and I therefore think our judgment must be for the defendants.

Judgment for defendants.

Attorneys for plaintiffs, *Andrew* and *Atkins*.

Attorneys for defendant, *White, Borrett*, and *Co.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

Tuesday, June 6, 1871.

THE ATTORNEY-GENERAL *v.* PHILLIPS.

Revenue—Stamp duty—Benefit building society—Receipt given by secretary of, for rent of premises mortgaged by a member to the society—Liability of to stamp duty—10 *Geo.* 4, *c.* 56, *s.* 37—6 *&* 7 *Will.* 4, *c.* 32.

By one of the rules of a benefit building society, duly registered pursuant to the 6 *&* 7 *Will.* 4, *c.* 32, *every member receiving an advance was to* give security by mortgage *to the satisfaction of the board, and repay the amount, with interest, by agreed monthly instalments. K. was the occupier of a cottage and premises as tenant to the owner, who, being a duly enrolled member of the society, had mortgaged the said premises to the trustees of the society as security for an advance made to him out of the funds of the society pursuant to the provisions of the said Act. The mortgagor having made default in his payments of interest and other moneys to the trustees under the mortgage deed, the latter, in pursuance of the powers in such deed contained, entered into the possession and into the receipt of the rents and profits of the said mortgaged premises, and whilst in such possession, and whilst the mortgage deed was in force and unsatisfied, K. paid to the defendant, as the secretary to such society, the sum of* 12*l. for rent of the said premises, and the defendant thereupon gave him an unstamped receipt for the same in the following form: "Temperance Land and Building Society (enrolled as the Temperance Benefit Building Society.) No. 2667. 4, Ludgate-hill, London. 15th Oct.* 1870. *Received of Mr. G. C. Knight* 12*l. rent of premises, Barnhove Cottage, East Moulsey, due Michaelmas* 1870. *For the trustees of the society, Henry J. Phillips, secretary."*

Held, by the Court of Exchequer (Kelly, C.B., and Martin, Bramwell, and Cleasby, BB.), giving judgment in favour of the Crown, that the receipt in question was liable to and required a stamp. It did not come within any of the several classes of documents exempted from stamp duty by sect. 37 *of the* 10 *Geo.* 4, *c.* 36, *but was to all intents a document given as between landlord and tenant, in pursuance of a contract between them, and by the express terms of the document itself was stated to be a receipt for rent received by the landlord.*

SPECIAL CASE.

1. This is a proceeding brought by the Attorney-General against the defendant, for the forfeiture by him of a penalty of 10*l.* for signing the receipt hereinafter mentioned without the same being duly stamped, and by the consent of the parties, and by the order of Martin, B., dated the 6th Dec. 1870, according to the Act (22 & 23 Vict. c. 21, s. 10), this special case, without pleadings has been stated for the opinion of the court.

2. The Temperance Permanent Land and Building Society is a Benefit Building Society, duly registered under the name of "The Temperance Permanent Benefit Building Society," pursuant to the Act of 6 & 7 Will. 4, c. 32. The defendant, who is the secretary of the said society, on the 15th Oct. 1870 received from Mr. G. C. Knight the sum of 12*l.*, and thereupon signed and gave to the said G. C. Knight the receipt set forth in this paragraph, the said receipt not being stamped.

Copy.

Temperance Permanent Land and Building Society (enrolled as The Temperance Permanent Benefit Building Society.)

4, Ludgate-hill.
No. 2667. London, 15th Oct. 1870.

Received of Mr. G. C. Knight twelve pounds, rent of premises, Barnhove-cottage, East Moulsey, due at Michaelmas 1870.

For the trustees of the society,
12*l.* HENRY J. PHILLIPS, Secretary.

3. The said G. C. Knight was, prior to the attornment hereinafter mentioned, the occupier of the cottage and premises mentioned in the said receipt as tenant to the owner thereof, who, being a duly enrolled member of the said society, had mortgaged the same to the trustees of the said society, as security for an advance made to him out of the funds of the said society, in accordance with the provisions of the Act 6 & 7 Will. 4, c. 32. In the mortgage deed were contained the following provisions:

And it is hereby agreed that if three of the monthly subscriptions herein provided for shall be in arrear and unpaid, or if default be made by the said mortgagor, his trustees, executors, administrators, or assigns, in observance or performance of same agreement, covenant, rule, or bye-law, herein contained or incorporated by reference, or if the said mortgagor shall be bankrupt, or in insolvent circumstances, or make any general arrangement with his creditors, whether by deed or otherwise, then, and in any and each of such events, the said trustees may at any time thereafter, and from time to time, in their absolute discretion, do all, any, or either of the following acts, that is to say, distrain for the amount of any monthly subscriptions and fines which shall be in arrear and unpaid, and of any payments made by the said trustees under the power hereby conferred upon them, as for rent in arrear upon a common demise; or enter into possession of the premises, or receipt of the rents and profits thereof, or appoint a collector of such rents or profits at a reasonable remuneration, or demise the premises, or any part thereof, for any terms, and upon any conditions, or complete any unfinished buildings thereon, or repair the said premises when and as the said trustees shall deem any repair needful or expedient, and for such purposes enter into such contracts as they may think proper and expedient, or insure any buildings on the said premises from fire in such sums as the said trustees shall deem expedient, or pay any rates or taxes due in respect of the said premises, and may, in their absolute discretion, either before or after doing any such act as aforesaid, and subject or not to any such

demise, sell the premises, or any part thereof, by public auction or private contract, subject or not to any special or other conditions, as to title or otherwise, and may buy in or rescind and resell without responsibility for loss, and may do all things necessary for effectuating demises and sales, and allow the whole or any part of the purchase-money to remain on security of the premises, on such terms as they shall think fit, and shall, out of the said rents and profits and moneys arising from sales, or any or either of them (so far as the same will extend), firstly pay the rates and taxes in respect of the premises, the costs, charges, and expenses of distraining, taking possession, or of the collection of rents and profits, and of the letting and sale, and of the completion of any buildings, and the repairs and insurance of the premises, and all other costs and outgoings incurred or payable in respect of the premises, together with interest thereon respectively, at the rate of 5*l.* per centum per annum, from the respective times of any such payments; and next retain for the said society all subscriptions, interest, fines, and other moneys due or payable by the said mortgagor, his heirs, executors, administrators, or assigns, to the said society, in respect of any share or shares therein, or otherwise by virtue of the rules or bye-laws for the time being of the said society, or of these presents, as on a redemption by the said mortgagor of the said premises, at the date of the receipt of such moneys; and pay the surplus (if any) to the said mortgagor, his executors, administrators, or assigns. And it is hereby further agreed that every such demise and sale as aforesaid may be made with or against any further consent from the said mortgagor, his heirs, executors, administrators, or assigns; and that the receipts of the said trustees shall discharge lessees, tenants, occupiers, purchasers, and other persons paying rents, profits, purchase, and other moneys to such trustees or to the said society, from the same and from seeing to the application thereof. And that the rules for the time being of the society shall apply to this mortgage, and be taken by reference as incorporated herein, except so far as the same has been waived by these presents.

A print of the said rules is annexed hereto, and is to be taken as part of this case.

The said mortgage was in force and unsatisfied at the time when the said receipt was signed and given by the said defendant to the said G. C. Knight, and the said member had made default in the payments to the said mortgage deed covenanted to be made by him to the said trustees, and the trustees had, by virtue of a power in that behalf contained in the said mortgage deed, entered into the receipt of the rents, and the said G. C. Knight had attorned tenant to the said trustees. The said sum of 12*l.* so received was forthwith paid by the secretary into the Union Bank, to the credit of the society's account, and was placed to the credit of the members in the society's books, and was received, and the receipt therefor was given, in exercise of the powers contained in the said mortgage-deed, and hereinbefore set out.

4. The question for the opinion of the court, which is to have power to draw inferences of fact, is, whether the said receipt was liable to stamp duty?

If the court should answer the question in the affirmative, judgment is to be entered for the Crown for a penalty of 10*l.* with costs; and if the court should answer the question in the negative judgment is to be entered for the defendant, with costs.

By sect. 37 of the old Friendly Societies Act (10 Geo. 4, c. 56) it was enacted that—

No copy of rules, power, warrant, or letter of attorney, granted or to be granted by any person as trustee of any society established under this Act, for the transfer of any *shares in the public funds*, standing in the name of such *trustee, nor any receipts given for any dividend* in any *public stock or fund, or interest of Exchequer bills, nor any receipt nor any entry in any book of receipts for money deposited in the funds of any such society*; nor for any money received by any member, his or her executors, administrators or assigns, or attorneys, from the funds of such society, nor any bond or other security to be given to or on account of any such society, or by the treasurer or trustee, or any officer thereof; nor any draft nor order, nor any form of assurance, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment; *nor any other instrument or document whatever required or authorised to be given, issued, signed, made or produced in pursuance of this Act*, shall be subject or liable to or charged with any stamp duty or duties whatsoever.

And by sect. 4 of 6 & 7 Will. 4, c. 32 (the Act for the regulation of Benefit Building Societies), it is enacted that—

All the provisions of the above-mentioned Act, 10 Geo. 4, c. 56, and also the provisions of 4 & 5 Will. 4, c. 40, amending the same, so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof, shall extend and apply to such benefit building society and the rules thereof, in such and the same manner as if the provisions of the said Acts had been herein expressly enacted.

The object of the society, as stated by Rule 1 of the printed rules thereof, was to raise, by subscription of the members, and in shares of 30*l.* each, a fund out of which each member should receive the amount or value of his share or shares for the erection or purchase of a dwelling-house or dwelling-houses, or other real or leasehold estate, pursuant to 6 & 7 Will. 4, c. 32.

By Rule 11 the Board were empowered to advance to members, out of the funds of the society, the amount of their shares; and by Rule 12 every member receiving an advance shall give security by mortgage to the satisfaction of the board, and shall repay the amount, with such interest as may be agreed upon, by such monthly instalments as shall be agreed upon.

Crompton Hutton (with him were *The Attorney-General* (Sir R. P. Collier, Q. C.) and *The Solicitor-General* (Sir J. D. Coleridge, Q. C.) for the Crown.—Independently of any statutory exemption from stamp duty, the form of this instrument is such that it would be liable to the ordinary penny receipt stamp; but then the defendant claims exemption under sect. 4 of 6 & 7 Will. 4, c. 32 (the Benefit Building Societies Act), which has been held to incorporate into it the exemption given by the 37th section of the previous Act (the Friendly Societies Act, 10 Geo. 4, c. 56). The defendant will, it is understood, contend that this instrument is exempt under this section as being a "receipt given for money deposited in the funds of any such society," &c., or at all events that it comes within the latter words of that section, "any other instrument or document," &c. (He was here stopped by the court, who called upon)

Quain, Q. C. (with whom was *Crompton*), for the defendant, to support the claim to exemption.—The 6 & 7 Will. 4, c. 32 (the Benefit Building Societies Act), clearly contemplated, in express terms (see sects. 1, 3, and 5), the carrying out its objects by the machinery of mortgages by means either of members or strangers mortgaging their property to the society. A mortgage, therefore, is the chief means and machinery upon which the society depends, and they have therefore to carry such mortgage out and enforce it in all its consequences. On such mortgages themselves it will be admitted by the Crown no stamp duty is required. One of the ways or means of enforcing such a mortgage is by the trustees becoming

mortgagees in possession, and receiving the rents of the mortgaged property; and clearly if, instead of taking possession, the society had received this money from the member himself, no stamp duty could have been enforced on the receipt. All, therefore that they have done is by the machinery of the mortgage, which the Act of Parliament expressly authorises, to enforce payment of the subscriptions; and the money received from the tenant, though it may, as between landlord and tenant, be rent in a sense, yet in the hands of the society it is merely a mode of enforcing the payment of the member's subscription. It was purely a building society's transaction within and contemplated by the Act of Parliament, and entirely different from the recent case in this court of *The Attorney-General* v. *Gilpin and others* (40 L. J. 134, Ex.; L. Rep. 6 Ex. 193) with reference to the stamp duty upon a negotiable instrument, where it was held that the drafts there in question were liable to stamp duty, because the transaction was clearly a banking transaction, and not one within the operations of either a benefit building society or a friendly society. The only difficulty in the defendant's way in the present case is that the receipt was given to the tenant. [BRAMWELL, B.—By your contention the Crown would needlessly lose a penny, because, if the society had paid it, they would be entitled to deduct it as part of their mortgage costs from the mortgagor; and if the society had not entered into possession, and if the mortgagor himself had given the receipt, the Crown would have got a penny stamp upon it. The truth is that, if you are right, the mortgagor will save a penny.] The Act of Parliament meant to exempt from stamp duty, not only the mortgagor and mortgagee, but all persons dealing with the society, and it has been expressly decided that a mortgage made to a stranger, not a member of the society, did not require a stamp: (see the case in Chancery before Sir W. Page Wood, V.C., of *Thorn* v. *Croft*, 15 L. T. Rep. N. S. 205; 36 L. J., 69, Ch.; L. Rep. 3 Eq. 193.) [MARTIN, B., refers to *The Trustees of the Royal Liver Friendly Society* v. *The Commissioners of Inland Revenue*, 21 L. T. Rep. N. S. 721; 39 L. J. 37, Ex. s. c. nom. *In the matter of the Royal Liver Friendly Society* (L. Rep. 5 Ex. 78.)] That was not the case of a building society, but one under the new Friendly Societies Act (18 & 19 Vict. c. 63, s, 37), in which certain words ("other security"), which were in the corresponding section of the old Act (10 Geo. 4, c. 56, s. 37) were omitted. The present case, however, was under the old Act of Geo. 4. What the Act intended was, it was submitted, to facilitate in every way the *bonâ fide* transactions of a society of this kind, and what was done here was an Act *bonâ fide* carrying out the objects of the society; and it was exempt from duty. Had the mortgagor directed the tenant to pay his rent to the society in payment of his subscriptions, it could not be contended that the receipt would be liable to duty, and how does what was done differ from that? The fact of Knight being a *stranger* was immaterial, according to *Thorne* v. *Croft* (*ubi sup.*), in which Wood, V.C. considered himself bound by the case of *Walker* v. *Giles* (6 C. B. 662; 18 L. J. 323, C. P.), the decision in which case, the Vice-Chancellor said, was solemnly affirmed in *Barnard* v. *Pilsworth*, cited in a note to *Walker* v. *Giles*. (6 C. B. 698, and 18 L. J. 330, C.P.) The words of sect. 37 of 10 Geo. 4, c. 56, cover moneys received from the society, and moneys received by the society in carrying out the purposes of the Act, and although the word "deposited" in that section may not strictly be applicable, yet it is *simili casu* to a benefit society. The only moneys received by a building society are the subscriptions of members in repaying advances, and the court would construe this as a receipt for money "deposited in the funds of the society." The latter words of that section too were very wide, "nor any other instrument," &c., and might be called in aid of the defendant's argument. This being clearly a document given for carrying out the machinery of the mortgage, authorised and contemplated by the Act, and if the court see it to be such a document they will hold it to come within these last words, if not within the earlier portion of the section. The construction put by the Vice-Chancellor upon that section was that it gave a general exemption from stamp duty, being drawn in the largest terms, and extending to every period of the existence of the societies formed under the Act. As a matter of fact this was the first time since the Act of Geo. 4, that the Crown had sought to charge the duty in such a case.

KELLY, C.B.—I think it is quite clear that the instrument in question in this case requires a stamp. It is not, and indeed it cannot be, contended under the Stamp Act, that a receipt between landlord and tenant for a sum of money for rent due is not within the Stamp Act, and does not require a stamp. The only question is whether this instrument comes within any of the classes of exemption to be found in the 4th section of the 6 & 7 Will. 4, c. 32. The only exemptions which could possibly apply to an instrument of this description are, first, "any receipt given for any dividend in any public stock or fund, or interest of Exchequer bills;" it is not within those words; "nor any receipt nor any entry in any book of receipt for money deposited in the funds of any society"—it is not within those words; "Nor for any money received by any member from the funds of such society,"—it is clearly not within those words. Then comes this further exemption, "Nor any bond nor other security to be given to or on account of any such society." It is clear that this is not a "bond or any other security" given to the society. But it has been contended by Mr. Quain that, because a mortgage given to a society, or on account of a society, of this description, does not require a stamp, therefore this receipt does not require one. I am quite at a loss to understand the connection, or even to see the slightest resemblance between the one and the other. It is quite clear that a mortgage, whenever it is executed, on account of a society of this description, is a "security" given to or on account of that society. That, however, has nothing to do with this receipt. Then come these final general words of the section, "nor any other instrument or document whatever required or authorised to be given or signed, made, or produced in pursuance of this section." Is this a document made in pursuance of the Act? It has nothing in the world to do with the Act; and has not the remotest connection with it. It is a receipt given between the landlord and tenant, in pursuance of the contract which they had entered into, creating a tenancy between them, and in pursuance of that only. Under that contract the tenant is, at certain periods, liable to pay a certain amount of rent to his landlord; he

has paid it in this case, not indeed to the landlord in person, but to somebody who has the authority of the landlord, whether in law or in fact, to receive it on his behalf, and it is simply the case of a receipt between the landlord and tenant, having nothing whatever to do with that section of this Act of Parliament. But it has to do with the operation of the Stamp Act, and therefore I am of opinion that this document requires a receipt stamp.

MARTIN, B.—I am clearly of the same opinion. In my judgment this exemption ought to be read according to its plain and ordinary meaning, namely, that those receipts are to be exempted from duty which are given for money deposited, belonging to the funds of the society. I am of opinion that this is not a receipt for money deposited, belonging to the funds of the society. The fact that this money, after it was paid by the tenant, was deposited in the funds of the society, seems to me not at all to affect the question; and, as to the concluding words of the exempting clause, "nor any other instrument or document whatever, required or authorised to be given, issued, signed, made, or produced, in pursuance of this Act," the receipt in question had nothing to do with that. It is a common receipt, as between the assignee of the landlord and the tenant, under an original tenancy. The truth is that it is not arguable.

BRAMWELL, B.—I am of the same opinion, and I think that all that is necessary, to show that the question is not arguable, is to read the receipt, which is as follows: "Received of Mr. G. C. Knight 12*l.*, rent of premises, Barnhove Cottage," &c. It is given as a discharge of the rent due from the tenants' landlord to a building society, because they are assignees of the lease granted to him. If the original mortgagor had given that receipt it would have borne a penny stamp. Why therefore should not the trustees pay it? As to the general words, at the end of the section, they manifestly apply to some document which is contemplated by the statute, and not to a document of this description which is given in pursuance of the requirements of the building society, apart from the purposes contemplated by the Act.

CLEASBY, B.—I am of the same opinion. The receipt is the discharge of the rent to whoever it is due, and might be an important document to him, but he has no claim on that ground to be exempted from stamp duty.

Judgment for the Crown.

Attorney for the Crown, *The Solicitor of Inland Revenue*, Somerset House, W.C.

THE MAYOR, ALDERMEN, AND BURGESSES OF BATH (apps.) *v.* THE COMMISSIONERS OF INLAND REVENUE (resps.)

Revenue—Stamp duty—Conveyance of land to local board of health—Liability of to ad valorem stamp duty—The Public Health Act 1848 (11 *&* 12 *Vict. c.* 63) *s.* 151—*Exemption of documents therein specified from stamp duty—Local Government Act* 1858 (21 *&* 22 *Vict. c.* 98), *ss.* 4, 5, 6, *and* 75—*Local Government Act Amendment Act* 1861 (24 *&* 25 *Vict. c.* 61) *s.* 29—*City of Bath Act* 1851 (14 *&* 15 *Vict. c. civ.*) *ss.* 19 *and* 85—*Local Government Supplemental Act* 1869 (*No.* 2) (32 *&* 33 *Vict. c. cl.*)—*Construction.*

By sect. 151 *of the Public Health Act* 1848 (11 *&* 12 *Vict. c.* 63) "*no* deed, *award, submission, instrument, contract, agreement, or writing*, made or executed by the general or local board, *their officers or servants, under or for the purposes of the said Act, shall be chargeable with any stamp duty whatever.*" *By their local Act, The City of Bath Act* 1851 (14 *&* 15 *Vict. c. civ.*), *the Mayor, Aldermen, and Burgesses of Bath were constituted the local board of health for that city, under the Public Health Act* 1848, *and by sect.* 19 *of the same local act it was enacted that the said Public Health Act, except (amongst other portions of it) the above mentioned sect.* 151, *should be incorporated with and form part of the said local Act. By sect.* 4 *of the Local Government Act* 1858 (21 *&* 22 *Vict. c.* 98), *which Act is under sect.* 5 *in force at Bath, that Act is incorporated with and is to be construed with and deemed to form part of the said Public Health Act; and by sect.* 29 *of the Local Government Act Amendment Act* 1861 (24 *&* 25 *Vict. c.* 61), *the provisions of the Local Government Act* 1858 *are to apply to all local boards constituted under or by virtue of local Acts.*

In Oct. 1870, *the Mayor, &c., of Bath, being empowered by the said Local Government Act* 1858, *sect.* 75, *and the Local Government Supplemental Act* 1869 (*No.* 2.), (33 *&* 34 *Vict., c. cl.*), *to purchase and take lands as the Bath Local Board for street improvements, &c., purchased certain property from Sir H. C. Rivers, Bart., for that purpose, and thereupon the conveyance in question was made, and was executed both by Sir H. C. Rivers the grantor, and the said mayor, &c., the grantees; and the appellants contended that such conveyance was exempt from stamp duty under the above mentioned sect.* 151 *of the Public Health Act* 1848, *the whole of which Act was incorporated in the Local Government Acts, and that the exception of that section from the City of Bath Act* 1851, *did not affect the deed in question. Upon a case stated by the Commissioners of Inland Revenue for the opinion of the Court of Exchequer, it was*

Held, by Kelly, C. B., and Martin, Bramwell, and Cleasby, BB., giving judgment for the appellants (Martin, B. not feeling so clear upon the point as the rest of the court, but not meaning to differ) that, as the land had been purchased and taken by the appellants under, and for the purposes of, the Local Government Act, and not under the City of Bath Act 1851, *the exception of sect.* 151 *of the Public Health Act from the City of Bath Act did not apply to the transaction, and that, in whatever they did under the powers of the Local Government Act, the corporation of Bath were as free from stamp duty as any other corporation or body carrying into effect the powes and objects of that Act would be:*

But quære, per Martin and Bramwell, BB., whether sect. 151 *of the Public Health Act* 1848 *includes or applies to a conveyance of this kind at all?*

THIS WAS a case on adjudication for stamp duty, which was stated by the Commissioners of Inland Revenue pursuant to the 13 & 14 Vict. c. 97, on the requisition of the mayor, aldermen, and burgesses of the city and borough of Bath, in order that they might appeal to the Court of Exchequer against the determination of the Commissioners as to the liability of the indenture hereinafter mentioned to stamp duty.

SPECIAL CASE.

1. By an indenture dated the 19th Oct. 1870, between Sir Henry Chandos Rivers, Bart., of the first part, the Honourable Philip Pleydell Bouverie,

· George Hamilton, Joseph Hoare, and Lam-
ble, of the second part, John George Priestly,
third part, Martin Harris and Alfred
as Rackham, of the fourth part, dame Cathe-
ivers, of the fifth part, William Frederick
r, and Thomas Frederick Inman of the
part, and the said mayor, aldermen, and
sses, being, and acting as, the local board
lth in and for the district of the city
th, of the seventh part. After reciting,
ıst other things, that the said mayor,
en, and burgesses, acting as the said
oard, and requiring the messuages and here-
nts thereinafter mentioned and thereby
ed, *for a street improvement* within their
t, *had agreed with the said Sir Henry
ge Rivers for the purchase thereof in fee
in possession for the sum of* 4832*l.* It is
ed that, in consideration of the sum of
paid as therein mentioned, certain free-
ereditaments, numbers 1, 2, 3, 4, 5, and
et-street, in the city of Bath, were conveyed
said mayor, aldermen, and burgesses, their
ors, and assigns, *for the purposes of the said
oard for ever.*

he said mayor, aldermen, and burgesses, by
olicitors, on the 10th March last, presented
d indenture, which was then unstamped, to
mmissioners of Inland Revenue at their
e Somerset House, under the provisions of
th section of the said Act of the 13 & 14
. 97, and desired to have the opinion of the
mmissioners whether the said indenture was
ir judgment chargeable with stamp duty,
ndered and paid to the commissioners the
10*s.*, as required by the said Act.

he said mayor, aldermen, and burgesses
y "The City of Bath Act 1851," constituted
al board of health, under the Public Health
48, for the municipal city and borough of

y the 19th section of the City of Bath Act
; was enacted that the Public Health Act
xcept certain portions thereof, including
tion 151 providing exemptions from certain
should be incorporated with and form part
Act.

was and is alleged on behalf of the said
aldermen, and burgesses that, although the
ection of the Public Health Act 1848 was,
ress enactment, not incorporated in the
f Bath Act 1851, the said indenture was,
eless, by virtue of some provisions con-
in the Local Government Act 1858, and the
lovernment Supplemental Act 1869 (No. 2),
of them, exempt from stamp duty, under or
rence to the said 151st section of the Public
Act 1848; but the commissioners were of
that the said indenture was not exempt
amp duty, but was liable, as a conveyance
for 4832*l.*, to the stamp duty of 24*l.* 5*s.*, and
nine progressive duties of 10*s.* each, and
essed the duty thereon accordingly.

hereupon the said mayor, aldermen, and
ss paid to the Receiver-General of Inland
ue the sum of 28*l.* 15*s.*, and the said inden-
re thereupon stamped with the proper
for denoting the said duties, and also with
ticular stamp provided by the said Commis-
under the said Act, to signify and denote
e full amount of stamp duty with which the
nture was chargeable had been paid.

7. But the said mayor, aldermen, and burgesses declared themselves dissatisfied with the determination of the said Commissioners, and having deposited with the Commissioners the sum of 40*s.* for costs and charges, pursuant to the 15th section of the said Act (13 & 14 Vict. c. 97), have required the said Commissioners to state, specify, and sign the case on which the question with respect to such stamp duty arose, together with their determination thereon, which the said Commissioners do hereby state and sign accordingly.

8. Prints of the City of Bath Act 1851 and the Local Government Supplemental Act 1869 (No. 2), are annexed, and are to be taken as part of this case.

The question to be decided by the court is, whether the said indenture is chargeable with stamp duty or not.

The following sections of the various Acts of Parliament, upon the construction of which the decision of the case rested, and which were fully discussed and commented on in the course of the arguments of counsel, and in the judgment of the court, are material to this report.

The Public Health Act 1848 (11 & 12 Vict. c. 63) by s. 151, enacts that:

No advertisements, &c. . . . under this Act, or for the purpose of carrying the same into effect, *nor any deed*, award, submission, instrument, contract, agreement, or writing, *made or executed by the general or local board*, the r officers or servants, *under or for the purposes of this Act . . . shall be chargeable with any stamp duty whatever.*

By sect. 19 of the City of Bath Act 1851 (14 & 15 Vict. c. civ.) (local), it was enacted that the Public Health Act 1848, *except* (amongst other parts of it) *the above sect.* 151, providing exemptions from certain duties, should be incorporated with and form part of the said City of Bath Act 1851.

By sect. 85 of the said City of Bath Act 1851, it was enacted that such Act should be subject to the provisions of *any Act for amending or extending* the Public Health Act 1848, passed in the present, or any future session of Parliament.

The Local Government Act 1858 (21 & 22 Vict. c. 98), which was An Act to amend the Public Health Act 1848, and to make further provision for the local government of towns and populous districts, enacted, *inter alia*—

By sect. 4:

That this Act shall be construed together with, and be deemed to form part of, the Public Health Act 1848; that words used in this Act shall be interpreted in the sense assigned to them in the said Public Health Act; bye laws framed under this Act shall be subject to confirmation, enforced and dealt with in all other respects, as bye laws under the said Public Health Act, *and the provisions of each of the said Acts shall, so far as may be consistent with the provisions of this Act, respectively be applicable to all matters and things arising under the other Act.*

By sect. 5:

That this Act shall take effect from 1st Sept. 1858, in places where the Public Health Act *is already in force, wholly or partially*. Provided always that nothing in this Act shall affect the qualification and number of the members of local boards of health in such places, *or any power, right, privilege, or liability* of any board of improvement commissioners, exercising powers of the Public Health Act 1848, or of any town council or local board of health, *under or by virtue of any general or local Act of Parliament other than the said Public Health Act.*

By sect. 6:

Local boards under this Act shall, subject to this Act, have all the powers, rights, duties, and liabilities of local boards of health constituted under the Public Health Act 1848 and the Acts incorporated therewith.

And by sect. 75:

The Lands Clauses Consolidation Act 1845 is incorporated with this Act, with an exception therein mentioned, and the steps to be taken by any local board, prior to putting the Lands Clauses Act into force with respect to the purchase and taking of lands otherwise than by agreement, are thereby prescribed.

By the Local Government Act (1858) Amendment Act 1861 (24 & 25 Vict. c. 61), sect. 29, it is enacted that:

The provisions of (amongst other Acts) the Local Government Act 1858, as amended by this Act, shall extend and apply to all local boards of health constituted under or by virtue of Local Acts, subject to (amongst others) this qualification, that the provisions of the General Acts, *opposed o or restrictive of* the provisions, whether adopted or original, of any such Local Act, shall be of no force in the district for which the Local Act was passed.

And by sect. 30:

This Act shall be deemed to be incorporated with the Local Government Act 1850, and shall be read as if the two were one Act.

By the Local Government Supplemental Act 1869 (No. 2) (32 & 33 Vict. c. cl.) it is enacted that,

The provisional orders recited in the schedules thereunto annexed under the Local Government Act 1858, shall from and after the passing of the Act be confirmed, &c.

And in one of the schedules thereto the following is contained:

Bath. Provisional order putting in force the Lands Clauses Consolidation Act 1845 within the district of the Bath (City) Local Board of Health, for the purchase and taking of lands otherwise than by agreement, for the purposes of a street improvement.

And then, reciting that the said local board had, in pursuance of sect. 95 of the Local Government Act 1858, and after complying with its requirements, petitioned the Secretary of State for authority to put in force the Lands Clauses Consolidation Act 1845, to enable the said local board to purchase certain pieces of land *for the purpose of a street improvement*, and that the said petition duly set forth in the said schedule the said pieces of land (being the premises in question in this case) and all other necessary particulars required by the statute, and prayed that the said board might be allowed to put in force the said Lands Clauses Consolidation Act with respect to the purchase and taking thereof otherwise than by agreement; and that the said Secretary of State had appointed an inspector to visit the district, who had inquired into the matter and duly reported thereon. The said Secretary of State, in pursuance of powers vested in him by the Local Government Act 1858, thereby ordered and directed that from the passing of any Act confirming this order the said local board should be empowered to put in force, with reference to the said lands, the powers of the Lands Clauses Consolidation Act 1845, with respect to the purchase and taking of land otherwise than by agreement, *for the purpose thereinbefore set forth and described.*

Murch for the appellants, the corporation of Bath.—The corporation are found by the case to be the local board of health for the district of Bath, under the Public Health Act of 1848 (11 & 12 Vict. c. 63). The City of Bath Act 1851, which incorporates portions of the Public Health Act 1848, expressly, by its 19th section, excludes from *such* incorporation, amongst other sections, the *151st section of that* Act, which provides exemption *from certain* duties. At the time, therefore, when the Local Government Act 1858 (21 & 22 Vict. c. 98) was passed, the Public Health Act 1848 was *partially* in force in the city of Bath. The question then is, whether or not there is anything in the Local Government Act 1858 which is a public general Act, or in any other Act, enabling the local board of health to take advantage of the exemption from stamp duty provided by the 151st section of the Public Health Act. By sect. 5 of the Local Government Act 1858 that Act is to take effect in places where the Public Health Act was already wholly or *partially* in force, and therefore it took effect in Bath, and so it was unnecessary that any of the steps mentioned in the 12th and other sections of the Local Government Act should be taken for its adoption; and by sect. 24, the duty of carrying the Act into execution is vested in the local board, which, in corporate boroughs, it is enacted shall be the mayor, aldermen, and burgesses acting in council. It is solely in pursuance of and under the powers of that Act (sect. 75) that the corporation are enabled to take and purchase, in the way in which they have done it, the lands which are the subject of the present conveyance. [BRAMWELL, B.—Was this taken by agreement?] No; it was taken by a provisional order, as is shown by the Local Government Supplemental Act 1869, No. 2 (32 & 33 Vict. c. cl.) which is made a part of the case. The schedule to that Act shows that these very premises were purchased by the corporation in pursuance of a provisional order under sect. 75 of the Local Government Act 1858, which was confirmed by this supplemental Act, which is incorporated with the Local Government Act of 1858, which last-mentioned Act incorporates the Public Health Act of 1848, which contains the exempting sect. 151. The City of Bath Act 1851 gave no power whatever to the corporation to take or purchase these lands, and it is solely in pursuance of their powers, as a board of health under the Act of 1858, that they have acted in this purchase. [MARTIN, B.—The case states the purchase to have been *by agreement* between the corporation and Sir Henry Rivers, and not at all under any compulsory or statutory powers, and the authorities at the Stamp Office look only to the terms of the deed, and impose a stamp accordingly; and this, on the face of the deed itself, looks very like an ordinary purchase. If it is any part of your argument that the purchase was "otherwise than by agreement," you should have the case amended.] The case states that the land was acquired "for the purposes of the board," and it is submitted that, that being so, it is immaterial whether it was by compulsion or agreement. The corporation were acting under the 75th section of the Act of 1858, and in pursuance of the Local Government Supplemental Act of 1869, and so, it is contended, the conveyance is exempt from duty. [MARTIN, B.—In Aug. 1869 the corporation got power, under the Local Government Supplemental Act referred to, to compel Sir Henry Rivers to sell; but between that date and the 19th Oct. 1870, it seems to have been thought better to agree, and not to have any compulsion in the matter. If that be so, and if it be a material matter, the case had better be amended. *Crompton Hutton* for the Crown (*contra*).—My friend may take it as he likes. On the part of the Crown I do not think it worth while to send the case back. The real question of course is, whether the appellants can get rid of the clause in the

Bath Act of 1851, excluding the exempting section of the Public Health Act 1848 from that Act. BRAMWELL, B.—Mr. Murch is not instructed that this was taken by compulsion, and the case states that it was not so. Why then should we trouble ourselves about it?] It is submitted that the statement in the case, that there was an agreement is not inconsistent with the grantor's having required the grantees to obtain from the Secretary of State the power to take the purchase. They were clearly acting under the provisions of the Act of 1858. As a matter of fact, the conveyance was executed by them, whether that was necessary or not, and then, it appearing on the face of it to be for the purposes of their Act, it would be a deed within sect. 151 of the Public Health Act 1858. [BRAMWELL, B.—I doubt very much whether the words of that section include a conveyance such as the present. MARTIN, B.—So do I. I doubt whether that exception has anything to do with this transaction.] But, if that section do apply, then this deed is within it. Being a board under the Local Government Act of 1858 by virtue of sect. 5, they are, under sect. 6 of that Act, entitled to "all the powers, rights, duties, and liabilities of local boards under the Public Health Act 1848, and the Acts incorporated therewith," and one of these "rights," or rather perhaps "privileges," is under sect. 151, that any deed executed by them as a local board shall be exempt from stamp duty. Then by sect. 85 of the City of Bath Act 1851, that Act is expressly made "subject to the provisions of any Act for amending or extending the Public Health Act 1848, passed in the present or any future session of Parliament," clearly contemplating alterations in the general law which might affect this local Act, and reading that 85th section with sect. 6 of the Local Government Act the effect is to make sect. 19 of the Bath City Act subject to that 6th section, and to override the exception or non-incorporation of sect. 151 of the Public Health Act in the Bath Act, the intention being that all the provisions of that Act should be subject to any public Act passed hereafter affecting the same subject-matter. Again, by sect. 4 of the Local Government Act, that Act is to be "construed together with and be deemed to form part of the Public Health Act," so that the words "under and for the purposes of this Act" in sect. 151 of the Public Health Act may be read as if they were in the Local Government Act; and, further, sect. 4 enacts that "the provisions of each of the said Acts shall, as far as may be consistent with the provisions in this Act (Local Government Act) respectively be applicable to all matters and things arising under the other Act." Now the provisions of sect. 151 of the Public Health Act are consistent with those of the Local Government Act, and should take effect and be applicable wherever the latter Act is applicable. The Crown will rely probably on the proviso at the end of sect. 5 of the Local Government Act 1858, that "nothing in this Act shall affect the qualification, &c. . . . or any power, right, privilege, or liability of any board, &c., exercising power of the Public Health Act 1848, or of any town council or local board of health *under* or by virtue of any general or local Act of Parliament other than the said Public Health Act." It will be contended, *contra*, probably that that leaves the Bath people just where they were; but I submit that it *does not* prevent the *application of the wide words of sect. 6*, nor is a liability to stamp duty a liability created by any local Act; but, if created at all, by the original Stamp Act. Moreover, the words at the end of that proviso must be taken to apply to general Acts having reference to the same subject matter. [MARTIN, B.—It is not a liability at all within the meaning of this 5th section.] Then, if that be so, sect. 5 does not touch the appellants. The Crown will also probably rely on sect. 29 of the Local Government Act (1858) Amendment Act 1861 (24 & 25 Vict. c. 61), but the provision in sect. 6 of the Local Government Acts 1858 is *not* "opposed to or restrictive of the provisions" of the Local Act, and certainly not so when sect. 85 of the Bath Act is taken into consideration.

Crompton Hutton (with him were the *Attorney-General* (Sir *R. P. Collier*, Q.C.), and the *Solicitor-General* (Sir *J. D. Coleridge*, Q.C.), for the Crown, *contra*.—[BRAMWELL, B.—Do you argue this case as upon the special liability of Bath?] Yes. There has been no decision that sect. 151 of the Public Health Act would not apply to a conveyance of land to a local board, and the practice of Somerset House, as a general rule, has been, whether rightly or wrongly, to treat such conveyances as exempt from duty, where the deed has been executed by the local board. That practice, however, would not exclude the Crown from now arguing that this 151st section would not apply to a conveyance of land, and showing that the practice of the commissioners had been mistaken hitherto from 1848. The present is the first case of such a special exception of sect. 151, and it is contended that that exception is still operative, and that there is nothing in any of the subsequent general Acts which can at all take away the effect of it. The general principle is that, where a certain body, in order to bring themselves within a public Act, require to have a private Act, and that private Act contains an express exemption from a particular portion of the General Public Act, no intention or implication can be drawn from a subsequent general Act to show a repeal of that exemption. Taken by itself this deed would of course be liable, as a conveyance, to an *ad valorem* stamp duty, and its exemption rests entirely on this 151st section of the Act of 1848. But that Act is *absolutely excluded and taken out of the private Act*, and it is just as if that section had never been enacted at all, because it is entirely on their private Act that the corporation found their right to take this land. [BRAMWELL, B.—Is that so? I cannot make out that under their Act of 1851 they would have had a right to take this land for this purpose. CLEASBY, B.—They have taken it under the other Act, the Local Government Act of 1858.] That may be so, but the private Act of 1851 is the charter of the corporation, the source and fountain, as it were, from which all their powers proceed, and all subsequent general Acts must be read with reference to it, and no general sections in any subsequent Act can be read, by implication or general words, to repeal a particular enactment, such as this 19th section, which deprives them of the exemption in sect. 151 of the Act of 1848, which, according to the argument on the other side, they would otherwise be entitled to. It is not indeed contended by the appellants that the Local Government Act 1858 expressly repeals this 19th section, but it is suggested that it is done by some of the early sections of that Act; but it is plain from

the words of the 4th section that the Local Government Act is to be read with the Public Health Act, which is the basis of all this legislation, and not that the Public Health Act is to be brought down to, and read with the Local Government Act. Sect. 29 of the Local Government Act (1858) Amendment Act 1861, referred to by my friend, clearly shows that his argument is wrong, and is, in fact, if such were necessary, a legislative declaration that any provisions of subsequent general Acts, which might have the effect of qualifying or repealing this particular exception, shall be of no force whatever, for that purpose. As to the point whether this is a deed within sect. 151, the words of that section are certainly very general, and, considering the past practice of the commissioners, with regard to the question, and relying most strongly on the other point, I will not at present argue the question whether this deed comes within that section.

March, in reply, relied strongly on sect. 85 of the City of Bath Act 1851, as removing any repugnancy or inconsistency arising from sect, 29 of 24 & 25 Vict. c. 61, and urged that there was nothing to deprive sect. 6 of the Local Government Act 1858 of its effect to extend the provisions of the Public Health Act to all matters which local boards had to deal with, and which, in this case, the appellants dealt with "under" the Local Government Act 1858; at any rate, if there was a doubt, the court, in the case of the imposition of a tax, would decide in favour of the subject.

Kelly, C. B.—There is a good deal of perplexity and complexity about this case, in consequence of the numerous Acts of Parliament, containing provisions bearing upon the particular point which is before us; but, upon carefully considering those several Acts of Parliament in the order of their dates, and with reference to the different periods of time at which they have come into operation, it appears to me that this deed is exempt from stamp duty. The appellants bear two different characters, and occupy two different positions in the city of Bath. They are the local board of health, and also the board, by whatever title it may be called or described, for the local government of the city of Bath. Looking at the course and order of legislation it appears to be this: That by the Act of 1848 (11 & 12 Vict. c. 63), local boards of health were established, and were under the 151st section of that Act exempted from stamp duty in respect of the different instruments enumerated in that section. Thus things continued until the year 1851, when the city of Bath Act (14 & 15 Vict. c. civ.) was passed, which received the Royal assent on the 24th of July, 1851, and that Act incorporated, to some extent and for certain purposes, the Public Health Act of 1848; yet nevertheless, by the 19th section clearly, and in express terms, excluding from such incorporation the 151st section of the Public Health Act of 1848. Consequently, the operation of the two Acts, taken together, clearly and undeniably is that, the local board of Bath was not, at that time, exempted from stamp duty with relation to these specified matters. But then that very Act, which thus excludes the City of Bath from that exemption, contains a clause (the 85th section) which is in these terms, "That this Act shall be *subject to* the provisions of any Act for amending *or extending the Public* Health Act 1848, passed *in the present or any future* sessions of Parliament." Then comes the Local Government Act 1858 (21 & 22 Vict. c. 98), and the question is what is the operation of that Act upon the matter now before the Court? We find in the 4th section that there is this provision "This Act shall be construed together with and be deemed to form part of the Public Health Act 1848." Now, if this Act of 1858 forms part of the Act of 1848, the Act of 1848 forms part of this Act of 1858, and they must be read as one Act of Parliament, and one only, that passed on the 2nd Aug. 1858. Therefore here will be an Act of Parliament of the 2nd Aug. 1858, including within it and containing this 151st section, the exemption section of the Act of 1848, and the question is whether that does not of itself, without anything more, override the exclusion of that exemption in the 19th section of the Bath Local Act of 1851, and apply that exemption to the local board of health, which comes within the provisions or the operation of this Act of 1858, for the local government of the city and borough of Bath. I think that it does. But the language of the 4th section goes farther, and says: "Words used in this Act shall be interpreted in the sense assigned to them in the said Public Health Act. Bye-laws framed under this Act shall be subject to confirmation, enforced, and dealt with in all other respects as bye-laws under the said Public Health Act," and then follows these remarkably effective words: "The provisions of each of the said Acts shall, so far as may be consistent with the provisions of this Act, respectively be applicable to all matters and things arising under the other Act." Then here we have it, in express terms, enacted by the Legislature, that this 151st section shall be, and form part of, this latter Act of the 2nd Aug. 1858. What then is the operation of all these various enactments on the question now before us? When we look at the section in question, sect. 151 of the Public Health Act 1848, the exemption is to apply to deeds, and so forth, "made or executed by the said general or local board, or any officer or servant under or for the purposes of this Act." We come now to the case of the instrument in question. Is it an instrument "made or executed under or for the purposes of" this Act of 1858? When we look at the Local Government Supplemental Act 1869 (No. 2) (the 32 & 33 Vict. c. civ.), we find that it is clearly and distinctly made to appear that this purchase was made under, and for the purposes of the Act of 1858, and that it was preceded by all the steps necessary to be taken in order to clothe the transaction with the protection, and the character, of a transaction under that Act and under the Lands Clauses Consolidation Act 1845, which is incorporated therewith. Under these circumstances, it appears to me (though it may not be absolutely clear and free from doubt), that this transaction having taken place under the Act of 1858, which Act contains the exemption clause of the Act of 1848, by the operation of sect. 4 this deed does come within that exemption clause, and consequently that the appellants are entitled to be exempted from the stamp duty. Though it may not be perfectly clear, on account of the complicated provisions to be found in succession in these several Acts of Parliament, yet, where the question is whether a tax should or should not be levied upon the subject, I always feel inclined to pronounce judgment in favour of the subject and

he Crown, though I really do not myself t there is any such doubt in the present impose upon me the necessity of acting . Under these circumstances the appeal llowed.

, B.—I do not see my way quite so clear rd Chief Baron does, but, nevertheless, I t all mean to differ from him. My own n rather was that that exception in section of the Local Act of 1851, in fact hat, in all procedings with regard to this rd of health, the corporation of Bath in the same condition as the rest of Her subjects with respect to stamp duty. I concur in thinking that the appeal allowed.

ELL, B.—I think that this appeal should l. I think that one may collect from the this property was taken by the board for ses of their public duties, and under the of the 21 & 22 Vict. c. 98, as put into he particular statute of 1869. Now, as he Local Government Act (21 & 22 Vict. my Lord has said, we are to read it as he Public Health Act of 1848 were it. If we do so it is quite clear that section would be in the 21 & 22 Vict. ppose, then, that it is there. Then here ses which are taken under the authority e purposes of that Act, the conveyance would have been exempt from stamp ey had been taken under the authority of c Health Act, and for the purposes of as they are under this Act, which in udes that 151st section within it. But said that there is a previous private Act nent (as we may call it), that is to say, f 1851, applicable to the city of Bath, s that sect. 151 of the Public Health Act all not be a portion of that private Act ough certain other sections are said to That then is the consequence? Does t the subsequent general Act conferring same body, which existed under the ct of 1851, certain additional duties and r does it merely continue to affect that y in so far as it is exercising the nd performing the duties which it ed upon it under the local Act of 1851? to me, in all reason, that it continues to that which the board shall do under the 51, their private Act, and not to that y shall do under the powers and in per- f the duties imposed upon them by the ct of 21 & 22 Vict. I cannot see why e otherwise. I cannot see why the city ould be more liable to pay stamp duty eyances to it for the purposes of an Act ent which is applicable to the whole of y, than any other place in the country. o me that it would be an injustice to were otherwise, and I can see no reason uing the statutes in such a way as to injustice upon them. If it should be ll, but it was so with reference to Bath ir private Act of 1851," the reason of to me to be obvious, and the answer is, was a particular Act which they got for purposes. It was an Act for the im- of the city and borough of Bath, hat improvement it incorporated cer- es of the *Public Health Act of* 1848. But it was also an Act for the regulation of markets, and for supplying the city of Bath with water, &c. Why then the corporation of Bath having, for their own profit, and the profits of the ratepayers of that particular place, made a lease of their tolls in the markets, should be exempt from duty, I can see no reason, and consequently I can well understand why the Legislature said that sect. 151 of the Public Health Act of 1848 should not apply to this private Act of the city of Bath. Whatever the corporation may do under the powers and authorities of their private Act of 1851 is as subject to duty as though sect. 151 of the Public Health Act of 1848 had never been passed, but whatever they do under the powers and authorities of the Act of 1858 (21 & 22 Vict. c. 98), the Local Government Act, they do, and ought to do, as free from stamp duty as any other corporation or body, carrying into effect the powers and objects of that Act, would do. I think that on that ground this appeal should be allowed, always, however, with this reservation. I must not be understood as expressing an opinion that this case is within sect. 151 of the Public Health Act of 1848, even if it had occurred in any other place than Bath; but, as the Crown does not ask for judgment upon the ground that this is not a deed within sect. 151, I do not give it to them. On the other point I think the appellants are right, and, consequently, that the appeal should be allowed.

CLEASBY, B.—I am of the same opinion. The City of Bath Act of 1851 introduces, by its 19th section, the Public Health Act of 1848, but it introduces it with (I may call it) a certain exemption, it takes something out of it. But then we have in that Act of Parliament (the City of Bath Act) the 85th section, and that section enacts that "this Act shall be subject to the provisions of any Act for amending or extending the Public Health Act 1848, passed in the present or any future session of Parliament." Therefore, if an Act of Parliament had passed in that, or any subsequent session, enacting that all the clauses of the Public Health Act 1848, including the 151st section, or that all the clauses, should be applicable to local boards, then we should have found this 85th section acted upon and carried into effect. There is an enactment to that effect in the Local Government Act of 1858. I do not propose to add anything to what my Lord and my learned brethren have said upon that subject, because I agree with what I have said, and I am satisfied with the reasons which they have given; but it does appear that, afterwards, considerable doubts arose as to how far local boards of health, acting under local Acts, were controlled by the General Local Government Act. That appears by the Act of the 24 & 25 Vict. c. 61, and sect 29 is found in that Act for the purpose of removing those doubts. I think it is tolerably clear that, but for the words at the end of that section, the effect of the 29th section of the Act would have been to have made the Local Government Act 1858 apply to all the local boards. There is certainly this exception, which has been referred to by the learned counsel for the Crown, and, if that applied, I think it would carry him to the conclusion to which he asked the court to come; but I do not think that it does apply. I think, if we look at what the effect of that exception is, that it comes to this: if there had been in the Local Act a pro-

vision that a particular building should not be improved or touched, and then there had been in the General Local Government Act a provision that all buildings might be taken, then the provision in the Local Act would have prevailed over the provision in the General Act, for this reason, that "provisions of general Acts opposed to or restrictive of the provision, whether adopted or original, of any Local Acts shall be of no force in the district" (these are the words made use of) "for which the Local Act was passed." That shows that the provisions referred to are provisions applicable to the particular district, and I do not think that that qualification of the Act of Parliament prevents the General Local Government Act from applying; but that section has the effect of removing the doubt, if any exists, as to the General Act overriding in this case the local Act.

Judgment for the appellants.

Attorneys for the appellants, *Dobinson* and *Geare*, 57, Lincoln's-inn-fields, W.C., agents for *Moger*, Bath.

Attorney for the commissioners, *The Solicitor of Inland Revenue*, Somerset House, W.C.

BAIL COURT.

Reported by JOHN ROSS, Esq., Barrister-at-Law.

Saturday, June 10, 1871.

REG. *v.* THE JUSTICES OF DERBYSHIRE (on the Prosecution of the London and North-Western Railway Company.)

Poor rate—Valuation list—Appeal against amended rate—Renewal of notice of objection to list—27 & 28 Vict. c. 39, *s.* 1.

Sect. 1 *of* 27 *&* 28 *Vict. c.* 39, *enacts that before any appeal shall be heard by any sessions against a poor rate, the appellant shall give twenty-one days' notice, with the grounds, to the assessment committee; provided that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by the committee, unless he shall have given to the committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just.*

The appellants were assessed to a poor rate. They gave notice of objection to the valuation list deposited, but did not appear on the day fixed for hearing objections. The list was approved, and a rate made in conformity with it. On the following day the appellants gave notice of their intention to dispute their liability to pay the sum at which they were assessed. The assessment committee heard the objection made by them and reduced the rate, whereupon the list and rate were amended. Being dissatisfied with the amount of reduction, the appellants gave notice of appeal against the rate as it was made in the first instance. The quarter sessions, however, declined to hear the appeal on the ground that the appellants were not "persons who had failed to obtain relief" within sect. 1 *of* 25 *&* 26 *Vict. c.* 103, *as they had not given to the assessment committee notice of objection to the amended list and rate.*

On a rule for a mandamus,

Held, that the appellants, having objected to the valuation list, and having failed to obtain such relief as they deemed just, were entitled to have their appeal heard, and need not repeat their notice of objection, although some reduction in the amount of the assessment had been made by the committee, and the list and rate amended.

On the 9th July 1870, a union assessment committee duly deposited a valuation list made by them for the parish of Fairfield.

On the 14th July the London and North-Western Railway Company, deeming themselves to be assessed too highly, served a notice of objection to the list upon the assessment committee, pursuant to 27 & 28 Vict. c. 39, s. 1.

On the day appointed by the committee for hearing objections to the list, viz., 25th July, no one appeared to object to the same, and it was approved.

On the 13th Aug. a poor rate was made in conformity with the list, and upon the following day the company gave notice to the parish officer of their intention to dispute their liability to pay the sum at which they were assessed. The 3rd Oct. was then appointed by the assessment committee for hearing the objection, and they ultimately reduced the rate. Whereupon the list and the rate were amended.

The company being still discontented, gave due notice of appeal against the rate of the 13th Aug.

At the April sessions 1871 the appeal came on for hearing, but the court declined to entertain it on the ground that the company were not "persons who had failed to obtain relief" within the terms of sect. 1 of 25 & 26 Vict. c. 103, as they had not given to the assessment committee any notice of objection to the amended list, or any notice of appeal against the rate made in conformity with the list.(a)

A rule *nisi* having been obtained, calling upon the justices to show cause why a *mandamus* should not issue commanding them to enter continuances and hear the appeal.

S. C. Bristowe and *Buzzard* showed cause, and contended that the appellants should have given notice of objection to the amended list, and of appeal against the amended rate by which they alleged that they were aggrieved. In *Reg. v. The Great Western Railway Company* (20 L. T. Rep. N. S. 481; L. Rep. 4 Q. B. 324) the appellants, having been assessed to a poor rate in conformity with a valuation list, gave notice of their objection to the list, but the committee refused to alter the list, and on appeal the rate was confirmed subject to a case. While the case was pending, a second rate was made in conformity with the list which

(a) 27 & 28 Vict. c. 39 (Union Assessment Committee Amendment Act 1864), sect. 1 enacts that: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that after the 1st Aug. next no person shall be empowered to appeal to any sessions against a poor rate framed in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their current rate accordingly."

ed unaltered as to the appellants, and the nts having given twenty-one days' notice of against the rate to the committee, applied quarter sessions to enter the appeal against cond rate, without having given a fresh to the committee of objection to the list; was held that a fresh notice of objection to was a condition precedent to the right to he appeal against the second rate. *A fortiori*, otice of objection should be given when the s been altered. The provision in sect. 1 notice of objection against the list "ap- by the committee" shall have been given any appeal shall be heard against the rate. re there was no objection to the amended ich was in fact the one approved by the ttee.

Mellor in support of the rule.—If there en a new rate there must also have been notices, as in *Reg.* v. *The Great Western y Company* (*sup.*). But this rate was not a e. It was the rate of the 13th Aug., although d, and against that rate the proper notices al were given. The appellants went before essment committee, and failed to obtain the asked for; surely the Legislature never d that they should repeatedly apply to the ribunal that had failed to give adequate

EN, J.—I think the justices were wrong in g to hear this appeal, and the rule must there- made absolute. By sect. 1 of the Union ment Committee Amendment Act 1864, it is condition precedent to the right of appeal a poor rate that notice of objection against uation list approved by the committee shall en given to such committee, and that the objecting shall have failed to obtain such s he deems just. Now, in the case before aluation list was made and notices of ob- thereto were served; the list was approved, rate made in conformity with it. To te the appellants objected; their objection ard by the committee, and the list and te were amended. The appellants were isfied with the deductions made in the t at which they were assessed, and gave of appeal against the rate as it was made first instance. That appeal the court ter sessions refused to hear, on the ground the list had been amended. and the rate in conformity with it, the appellants ought given the assessment committee notices of jection to the amended list, and to the rate d in conformity therewith. I am, however, ion that the appellants have done everything d by the statute to entitle them to have ppeal heard; and that it was not, therefore, ry for them to go through the same process cting over again—possibly a great number es. I cannot think that the Legislature d that to be done, and I therefore adopt the easonable construction of the Act of Parlia- -viz., that if there has been an objection to uation list, and that has failed to produce ief to which the person objecting thinks him- titled, although some alteration may have ade, such objection is sufficient.

Rule absolute.

rney for the appellants, *Blenkinsop.*
rneys for the respondents, *Wright* and *Venn.*

Monday, June 12, 1871.

REG. *v.* THE JUSTICES OF MIDDLESEX.

9 *Geo.* 4, *c.* 61, *s.* 14—32 *&* 33 *Vict. c.* 27 (*the Wine and Beerhouse Act* 1869)—*New tenant—Change of occupancy—Special sessions.*

R. the occupier of a beerhouse with respect to which a licence was in force on the 1*st May* 1869, *obtained, at the general annual licensing meeting holden for Middlesex in March* 1870, *a certificate for the renewal of the licence. He was afterwards fined for keeping his house open for the sale of beer during the prohibited hours of Sunday, and consequently yielded up possession of the premises to the appellant. R. applied, however, at the general annual licensing meeting in March* 1871, *and again at the adjourned meeting, for a renewal of the certificate, which was on each occasion refused, and, as he did not appeal, the certificate and licence lapsed.*

The appellant having entered into occupation of the premises on the 14*th April* 1871, *and not being in time therefore to apply at the general meeting in March, gave the proper notices, and applied at a special session, under* 9 *Geo.* 4, *c.* 61, *s.* 14, *for a certificate for a licence that would enable him to carry on the business until the ensuing general annual licensing meeting. The justices dismissed his application on the ground that as a new certificate had been refused to R., and as his former certificate and licence had lapsed, the provisions of the* 9 *Geo.* 4, *c.* 61, *s.* 14, *did not apply.*

An appeal to quarter sessions was dismissed for the same reason. A rule nisi for a mandamus having been obtained:

Held that the unsuccessful applications of R. did not affect the appellant, who, being a new tenant of the premises within the terms of 9 *Geo.* 4, *c.* 61, *s.* 14, *was entitled to apply at the special sessions; and that, in the absence of any objection to his character, or to that of the house, a certificate should have been granted.*

RULE calling upon the justices for the county of Middlesex to show cause why a writ of *mandamus* should not issue commanding them to enter continuances and hear an appeal by Joseph Parsons against a refusal of justices for the said county to grant to him a certificate for a licence for the sale of beer.

James Rose, the keeper of a beerhouse that had a licence in force on the 1st May 1869, obtained at the general annual licensing meeting, holden on the 4th March 1870, a certificate for a licence under the 32 & 33 Vict. c. 27, s. 5 (the Wine and Beerhouse Act 1869).

In the following Oct. he was fined 5*l.* for the offence of selling beer within the prohibited hours of Sunday, and his landlord consequently compelled him to transfer his interest in the house and licence to the appellant. Upon the 14th Feb. 1871 the latter entered into possession of the beerhouse, Rose undertaking to use his best endeavours to cause the licence to be transferred to him.

At the next general annual licensing sessions holden on the 6th March, Rose applied for a renewal of his certificate for a beerhouse licence, but the application was refused, as was also a subsequent application made by him at the adjourned meeting on the 20th March. He did not inform the justices on either occasion that he had transferred his interest to the appellant, and had ceased to be the occupier of the house.

After issuing the requisite notices, and stating therein that Rose had removed from and yielded up possession of the house, the appellant applied under 9 Geo. 4, c. 6, s. 14, to special sessions held for the St. Pancras division on the 12th April for a certificate for a licence, and it was argued on his behalf that as there was on the 1st May 1869 a beerhouse licence in force with respect to the same house, it was the duty of the special sessions to hear the application on the merits, and to grant a certificate, if neither the appellant nor his house were within the four exceptions in sect. 8 of the Wine and Beerhouse Act 1869.

The justices dismissed the application on the ground that the question had been decided on the application of Rose, and that, as he had not appealed, sect. 14 of 9 Geo. 4, c. 61 did not apply.

On appeal from the decision of the justices at special sessions to those at quarter sessions, the latter were of opinion that the refusal to entertain the application of the appellant was right. (a)

(a) 9 Geo. 4, c. 61, s. 1 enacts that general annual licensing meetings shall be holden in the county of Middlesex within the first ten days of March.

Sect. 14 enacts that if any person licensed to keep an inn under this Act . . . "shall remove from, or yield up the possession of the house specified in such licence, or if the occupiers of any such house being about to quit the same, shall have wilfully omitted, or shall have neglected to apply to the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail to be drunk and consumed in such house . . . . it shall be lawful for the justices assembled, as aforesaid, at a special session holden under the authority of this Act for the division or place in which the house so kept, or having been kept, shall be situate . . . to grant . . . . to any new tenant or occupier of any house having so become unoccupied . . . a licence to sell excisable liquors by retail to be drunk or consumed in such house or on the premises thereunto belonging. . . . Provided always that every such licence shall continue in force only from the day on which it shall be granted, until the 5th April or the 10th October then next ensuing, as the case may be. . . ."

32 & 33 Vict. c. 27 (Wine and Beerhouse Act 1869), s. 4, enacts that, "From and after the 15th July 1869, no licence or renewal of a licence for the sale by retail of beer . . shall (save as in this Act otherwise provided) be granted, except upon the production and in pursuance of the authority of a certificate granted under this Act."

Sect. 6 enacts that such certificate shall be in force for one year from the date of its being granted.

Sect. 8 enacts that, "All the provisions of the said Act of the 9 Geo. 4, as to the terms upon which and the manner in which, and the persons by whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice, shall, so far as may be, have effect with regard to grants of certificates under this Act.

Sect. 19, enacts that "Where on the 1st May 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer . . . to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer . . to be consumed on the premises, in respect of such house or shop except upon one or more grounds" . . . which are stated in sect. 8, and are shortly these: first, that the applicant has failed to produce satisfactory evidence of good character; secondly, that the house or any adjacent house is of disorderly character, thirdly, that the applicant has previously forfeited a licence for the sale of beer, &c., for misconduct; fourthly, that the applicant or the house is not duly qualified as by law is required.

38 & 34 Vict. c. 29 (Wine and Beerhouse Act Amendment Act 1870), s. 9, enacts that "Where the renewal of any certificate granted under the principal Act is refused, any licence held under any authority thereof shall, if the person aggrieved do not give notice of appeal . . . within the time limited for such notice, or if such notice having been given the appeal be not prosecuted or be dismissed, become void to all intents from the time of such failure to give notice of or to prosecute the appeal or of such dismissal as the case may be. . . ."

The above rule having been obtained,

Poland showed cause.—The certificate obtained by Rose in March 1870, being in force for one year, lapsed in March 1871, and with it the licence. Consequently the house was unlicensed in April 1871, when the appellant sought to obtain a certificate at special sessions, and the provisions of 9 Geo. 4, c. 61, s. 14, do not apply to such a case; they were intended to operate only where a licence is actually in force but the tenant of the house has died or given up possession. Then an interim certificate may be granted to the new occupier authorising him to continue the business until the ensuing licensing meeting. If a certificate expires, a fresh one must be obtained, but it cannot be granted at the special sessions, which would be converted into general annual licensing meetings at once if applications for new certificates were allowed thereat. A certificate having been refused to R., no subsequent application could be made until the next general annual meeting. The justices were right in coming to the conclusion that they had no power at special sessions to grant such a certificate.

McMahon for the appellant.—The Wine and Beerhouse Act 1869, attached a kind of vested right to houses having a licence which was in force on the 1st May 1869, by enacting that it should not be lawful for the justices to refuse an application for a certificate for the sale of beer, &c. to be consumed on the premises in respect of such house or shop, except upon certain grounds. This house was licensed on the 1st May 1869, and the occupier was therefore entitled to a certificate, as no objection upon any of those grounds was raised to himself or the house. It matters not that the former certificate had lapsed. A very similar case to the present was *Reg.* v. *The Justices of the West Riding* (21 L. T. Rep. N. S. 490; L. Rep. 5 Q. B. 33). There B. applied at a general annual licensing meeting for a certificate for a certain house. It was proved that he had been convicted of misconduct in another house. The justices refused the certificate. At an adjourned meeting D. applied for a certificate for the first house. Held, that the fact of the certificate having been refused to B. was no bar under sect. 8 of the Wine and Beerhouse Act 1869, to the application by D. Now, Rose was duly licensed when he gave up possession of the premises to the appellant on the 14th Feb. There was not time, however, between that date and the following 4th March, for the appellant to give the notices necessary to found an application to the general annual licensing meeting holden on the last-mentioned day. Therefore, he was entitled to apply at the next special sessions, under 9 Geo. 4, c. 61, s. 14. [HANNEN, J.—You say, then, that he was in no worse position through Rose having made a wrongful application when he, Rose, had ceased to be in possession of the premises?] I do. The Legislature did not intend that these houses, licensed on the 1st May 1869, should be disfranchised by the wrongful act of an individual. The certificate was refused to Rose because he failed to produce evidence of good character, but that was no ground for refusing to grant a certificate to the appellant.

MELLOR, J.—I think that Mr. McMahon has succeeded in showing that the appellant was a new

tenant of the house within the meaning of 9 Geo. 4, c. 61, s. 14. Time did not admit of the appellant giving the necessary notices in order to apply at the general annual licensing meeting, and I do not think he was bound to apply at the adjourned meeting, but I am of opinion that as he succeeded a person who had yielded up possession of the house to him, and he had therefore become a new tenant, he was entitled to make his application to the special sessions for a certificate, after giving the proper notices of his intention so to do. I cannot think it necessary that there should be a space of time during which the house is actually vacant, but that the statute is equally applicable to such a case as the present, where possession of the premises has been yielded up to a new occupier with the landlord's assent, and the incomer occupies the house, and carries on the business at the time he applies for the certificate. Moreover, it is to be observed that the certificate for a licence which he obtains at the special sessions, is merely available until the next general meeting. There was no objection to the character of the appellant, and under the circumstances, therefore, he was entitled to a certificate. Nor is that inconsistent with the general legislation on the subject referred to in argument, for the requirements of sect. 19 of the Wine and Beerhouse Act 1869 are fulfilled. Where a house is an old one, and has been previously licensed, it is therefore of such a character as to be suitable for the sale of beer by retail therein. There is neither inconsistency nor is there any hardship in enacting that in such case the objections to be made at licensing sessions shall be confined to the personal character of the applicant. I think, therefore, that the appellant was entitled to a certificate for a licence.

HANNEN, J.—To my mind, the chief difficulty in this case was the fact that Rose made an application to the general licensing meeting. Now at first I did not fully appreciate the effect of that circumstance, but I come to the conclusion that it did not affect Parsons at all, who was not shown to have been a party to it. The application might have been made by Rose for his own purposes, and on his own account. Putting that matter out of the question, the case stands thus: Rose being licensed, removed from and yielded up possession of his house to Parsons under an arrangement which he (Rose) had made with the landlord. Parsons therefore became the new tenant and occupier, to whom the privilege is given by sect. 14 of applying to special sessions in order to obtain a licence. Mr. Poland has said that he was affected by what was done at the general meeting, but I do not think that he was so affected. Could he have applied at the general meeting? It is admitted that he could not. It is said that he might apply at the adjourned meeting; but I do not think that he was bound to do so, and it made very little difference, for the matter would be brought before the justices at some time in any case. I think, therefore, there was nothing to prevent him availing himself of the provisional facilities given by the 14th section, and that therefore this rule should be made absolute.

Rule absolute.

Attorneys: *J. P. Murrough*; *Scadding* and *Son*.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Feb. 15, 22, *and March* 8, 1871.

(Before the LORD CHANCELLOR (Hatherley), and the LORDS JUSTICES.)

THE MERCHANT TAYLORS' COMPANY *v.* THE ATTORNEY-GENERAL.

Charitable devise—Whether on trust or condition—Surplus income—Application—Resulting trust—Cy près—Where reparation to be executed.

A testator in 1570 *devised certain lands, tenements, and gardens in the city of London to the plaintiffs' company, "to this intent, and upon this condition," that they should yearly, "of and with the rents and profits of the said lands, tenements, and gardens," provide and give to twelve poor men and twelve poor women of the parish of St. Botolph, Without Bishopsgate, certain articles of clothing mentioned in the will, the materials of which were to be of the respective cost or value therein stated; and to the intent that such garments might be the better seen, performed, and delivered, according to his mind and the condition in that behalf appointed for ever, he required and prayed the Chamberlain and Town Clerk of the city of London yearly to call upon and put in mind the plaintiffs' company, and look that the said garments should be justly and truly bestowed. And he gave to the Chamberlain and Town Clerk for their labour and pains to be taken in that behalf* 10*s. apiece yearly for ever, to be received at the hands of the company out of the same issues, rents, and profits, "and so that the whole residue of the said rents and profits they should maintain and gather yearly into an whole stock, and therewith keep the reparations of the tenements to them devised, and, if need were, new build the same, as to their discretion need should appear as the same stock would fall out." And in case the company should be remiss in performing and delivering the garments acording to the meaning in his testament declared, then he willed that the parson, churchwardens, and parishioners of St. Michael's, Cornhill, should enter upon the devised hereditaments, and the same should hold to the like intent and upon the like condition.*

The cost of the materials was 13*l.* 8*s., and at the death of the testator the yearly value of the property was* 26*l. only. But this value increased very largely, and for many years the company retained the surplus after making the payments directed and maintaining the houses in repair:*

Held (affirming the decision of the Master of the Rolls), that the company were not entitled to such surplus, but that the whole rents were devoted to charitable purposes, and must be applied cy près.

The Attorney-General *v.* The Mayor of Bristol (2 *J. & W.* 219), *and* The Attorney-General *v.* The Wax Chandlers' Company (*L. Rep.* 5 *Ch. App.* 503, *and* 23 *L. T. Rep. N. S.* 173), *considered.*

The dictum of Turner, L.J., in The Attorney-General *v.* The Corporation of Beverley (6 *De G. M. & G., at* 265), *that "if a portion of rents, &c., not given to a charity be wholly dedicated to the exoneration of the portion of rents which is so given from burthens which would otherwise fall upon it," the charity is entitled to the benefit of the whole, questioned and dissented from.*

Per James, L.J.: In cases of gifts to a city company upon express trusts exhausting the whole income, there is no rule of law that, if one of such trusts is for the repair and rebuilding of the property devised, any surplus that may not be required for the purposes expressed is given to the company for its own use and benefit.

THIS was an appeal of the plaintiffs' company from a decision of the Master of the Rolls, which is reported in 23 L. T. Rep. N. S. 480, where the will of the testator, devising lands for charitable purposes, and all other circumstances are sufficiently stated. The bill was filed for the purpose of establishing an absolute right claimed by the plaintiffs to all surplus of the rents and profits, after satisfying the purposes expressly mentioned in the will; and to this bill the Attorney-General put in a demurrer, which was allowed by Lord Romilly.

Sir *Roundell Palmer*, Q.C., Sir *Richard Baggallay*, Q.C., and *Cookson* supported the appeal.

Jessel, Q.C. and *Wickens* for his Lordship's order.

The authorities referred to were

The Attorney-General v. *The Wax Chandlers' Company*, L. Rep. 8 Eq. 452; 22 L. T. Rep. N. S. 255; L. Rep. 5 Ch. App. 503; 23 L. T. Rep. N. S. 173;
The Attorney-General v. *The Mayor of Bristol* 3 Mad. 319; 2 J. & W. 294;
The Mayor of Southmolton v. *The Attorney-General*, 5 H. L. Cas. 1;
The Attorney-General v. *The Coopers' Company*, 3 Beav. 29;
The Attorney-General v. *The Corporation of Beverley*, 6 De G. M. & G. 256; 6 H. L. Cas. 310;
The Attorney-General v. *The Dean and Canons of Windsor*, 8 H. L. Cas. 369; 2 L. T. Rep. N. S. 579;
The Attorney-General v. *The Corporation of Rochester*, 5 De G. M. & G. 797;
The Attorney-General v. *Christ's Hospital*, 4 Beav. 73;
The Attorney-General v. *Brasenose College, Oxford*, 2 Cl. & Fin. 295;
The Attorney-General v. *The Mayor of Coventry*, 2 Vern. 397;
The Attorney-General v. *The Skinners' Company*, 2 Russ. 407;
The Thetford School Case, 8 Co. 130*b*;
Magdalen College, Oxford v. *The Attorney-General*, 6 H. L. Cas. 189.

Sir *Roundell Palmer*, Q.C. having been heard in reply, judgment was reserved until the 8th March, when

The LORD CHANCELLOR said:—This case is an appeal from a judgment of the Master of the Rolls, which has in effect declared that the property which was given by the will of one Robert Donkyn to the Merchant Taylors' Company in the year 1570 is wholly applicable to charitable purposes; and the decree thus appealed from is questioned on the ground that, according to the authority of *The Attorney-General* v. *The Wax Chandlers' Company*, and the class of cases which that authority professed, at all events, to follow, the property here is given to the Merchant Taylors' Company, subject indeed to a charge on behalf of the objects which are mentioned in the bequest, but subject to that charge only, and that the remainder is given to the company absolutely for their own use.

I confess that the case has appeared to me to be one of very considerable difficulty. I believe that it does not so appear to the Lords Justices; but I feel that, regard being had to the previous authorities, and especially to the very important *dicta of Lord Eldon in The Attorney-General* v. *The Mayor of Bristol*, sanctioned and expanded as these *dicta* have been by Lord St. Leonards in the case of the *Southmolton Charity*, it has become a matter of considerable difficulty to know where the precise line is to be drawn with reference to bequests of the character of that which we now have before us, made at the epoch at which this bequest was made. The real point to be ascertained is easy enough to be defined, but the application of any definition which may be given to the particular case before the court is always the great point of difficulty.

Now I apprehend that the rule is a very simple and plain one, applicable alike to charitable and other bequests, and that there is a distinction between a charge and a trust; that if you are satisfied that by the instrument, whatever it be, whether a deed or a will, an out-and-out gift is made to the persons who are the immediate objects of the gift, subject only to a charge for certain specified objects who are to be entitled to receive the amount of that charge, and to have a valid remedy against the land for the purpose of enforcing that charge, then the devise stands good, and the charge only has to be carried into effect. On the other hand, if you find that the will implies trust, and that trust, and trust only, is the object of the testator, then, whether there be a positive gift to the particular objects who are mentioned in the will as having to receive a benefit out of the property so devised, or whether there be simply a direction generally as to trusts, and trusts are declared which do not exhaust the whole estate, still the trust remains; and there is then one of these two things—either a resulting trust to the devisor or grantor, who has not expressed the whole of his views upon the subject, but has expressed sufficiently his will that those who take are not to take beneficially; or, if there be not a resulting trust, then the question arises under the general rule whether the charities are not entitled to have the augmented fund, or the fund not specifically disposed of, for the purpose of promoting the general objects of the charity, whose benefit is supposed to form in that case the testator's paramount intention.

Now, with regard to cases which are not cases of charity, *King* v. *Denison* (1 V. & B. 260) and *Dawson* v. *Clarke* (18 Ves. 247) are well-known instances. It has been found that there are cases of extreme difficulty bordering on the line, as of course in cases of charity there are cases of like difficulty. In *Dawson* v. *Clarke* the case was very remarkable, because the property was chargeable on a trust, and it was held ultimately to be a case not on trust. In *King* v. *Denison* I think the reverse took place, and the trust was declared to have effect.

With regard to charities a rule has been established; it was laid down by Lord Eldon in *The Attorney-General* v. *The Mayor of Bristol*, and somewhat expanded by Lord St. Leonards in the *Southmolton* case. Lord Eldon, after saying that he had made himself as well acquainted as he could with cases of this description—which means, no doubt, that he had read everything upon the subject with which he was not previously acquainted—refers to the *Thetford School* case, and, after referring to the reasons given for that decision, he says: "And then the following passage occurs, and with reference to many public bodies it is one of great consequence: 'And the Lord Coke said that this resolution did concern all the colleges in the

Universities and elsewhere; for when the lands were first given for their maintenance, and that every scholar should have a penny halfpenny a day, this was then a competent allowance for a scholar in respect of the price of victuals then and yearly value of the land; and now the price of victuals being increased, the first maintenance for scholars is not competent for them, and as the value of the lands increase, so ought the allowance for the scholars to increase.'" Upon which passage Lord Eldon's comment is: "If the text is to be understood thus, that where property has been given for the foundation of a college, and a distribution has been at the same time made of all the rents to given members of that college, there must be an increase, as the times require, for all these purposes; of that there can be no doubt. But, unless I am mistaken, there are many cases to be found in both the Universities where land has been given of a greater value than the amount of the charges (which have been for scholars, exhibitioners, and so on) upon that land, and where, in point of fact, the enjoyment has been thus—the charges have been made good from time to time, and the surplus has been taken by the college itself; and I believe, if this were considered an improper application of the funds, it would have the effect of disturbing the distribution of the revenues of many of the colleges in both Universities."

Lord St. Leonards bears out that doctrine in the *Southmolton* case, and adds his judgment that where there is *de facto* a surplus, and nothing whatever has been said about residue or surplus or anything of that kind, where the gift is to a corporate body (as he there expresses it), that corporate body takes the gift, and takes it subject only to the charges to be paid out of that gift; and that when these charges have so been satisfied, then, though nothing is said about what remains, it remains simply for the benefit of the corporate body, or, in other words, is not a resulting trust for the donor.

Now in the *Wax Chandlers'* case there were certainly features of material difference in two or three respects from the case which we have here before us. In the first place there was what I think may be called an absolute charge upon the property irrespective of the payment of rents, which itself would go far towards the conferring of the fee-simple. There was further in that case, in the event of a breach of duty on the part of the first takers, a gift over to a person individually there named, who evidently was intended, subject to the charge, to take for his own benefit; and therefore there was an inference more readily afforded that the interest, subject to the charge, was a beneficial interest in the first takers from whom it was to go over; and, further than that, in addition to a direction that the particular sums there mentioned should be paid out of the rents, there was a direction to pay the residue of the rents (*simpliciter* in these words, I think) towards repairs, it being perfectly clear in that case that the testator could have no conception whatever of what the residue of the rents would be, because we find the rents a hundred years afterwards rising. The circumstances in that case pointed to its being a charge instead of a trust imposed upon the parties taking. What I then held, and what I still hold, is, that where there is *simpliciter* a direction to apply the rest of the fund in repairs, the case is *entirely distinguishable*. In substance it is to say, "I give so much to these objects, and no more; I give the property out and out to you; out of the rents you will pay these objects, and the residue of the rents you will employ in repairs;" and it is as if the testator had said, "The residue of the rents will suffice for repairs," or, "You will have the residue in hand for repairs." I apprehend that there is no substantial distinction, and that what was meant was that the company should take the property, and that it should not be allowed to go out of repair, because if it were allowed to out of repair the persons who were to have the benefit which was specified would thereby lose that benefit, but that, subject to what was necessary for repair, the company would take the property. It seemed, in fact, ludicrous to suppose that the testator intended to impose the necessity of repairing the houses, and laying out for those repairs all the surplus, even though that surplus should be ten or twenty times what was wanted for the particular purpose. The question we have always to ask ourselves is—Did the testator give it to the particular objects of the charity?

Now, it was said there was no difference between the repairs directed to be made out of the rents with reference to an almshouse, in which people were to live, and the repairs directed to be made of houses, subject to a charge of the kind which we have here. It seems to me that there is the widest difference. The almshouse itself is given to the inmates, the payments are to be made to them, the property is to be occupied by them; it is to be for them, and the whole property is given to them. Whereas it seemed to me in the *Wax Chandlers'* case, as I said upon that occasion, that it was begging the question to say that the whole property was given to the charity, when but a definite sum was given to the charity, and all that was said about the rest was that the residue would go to repairs. I was, I think, pressed then, as we have been pressed upon the present occasion, with a dictum of Turner, L. J., in *The Attorney-General* v. *The Corporation of Beverley*, in which he said that he believed, although he knew of no authority to that effect, that if a property were devoted to the payment of burthens which a charity would otherwise have to bear, that property was given to the charity. I cannot thoroughly agree with him that such a property would be given to the charity. As far as it is given, of course it is so; but if it be meant to say that the whole property is given to the charity because it is to be applied in satisfaction of a charge, I humbly venture to differ from him, and to say that it is varying the whole distinction which has heretofore been made between charity and trust; and if it be only a charge upon a certain amount of lands to pay off certain other charges upon the charity, I apprehend that, where these other charges have been paid, that gift, whatever it is, would be a resulting trust.

Having said so much, I think that I have quite explained the reason for my very great doubt and hesitation in this particular case. I think that it is one of very great nicety, but upon the whole I am not inclined, nor am I strongly enough pressed by the contrary construction—regard being had not only to the decision of the Master of the Rolls, but to the views of both my learned colleagues—to say that that decision is erroneous. The differences between the present case and the Wax

Chandlers' case are not to my mind so clear and satisfactory, as, having to decide the case upon a difficult will, I should wish them to be. We must do the best we can upon the testator's expressions, and the matter would not have come here if they had been easy to construe.

In this particular case the property is described by the testator as being within a certain district of London, St. Botolph's, "rented yearly at 26*l.* or thereabouts." Then out of that he gives a certain property which we need not pursue, a property of 4*l.* a year to "the parson and churchwardens of the parish church of St. Michael, in Cornhill, in London, for the time being, and to their successors, parsons and churchwardens of the said parish church, for ever, to this intent, that they shall with the profits thereof give every week" a certain quantity of bread. By the custom of London he, in fact, gave the property to these persons as a corporation; they were a corporation by the custom of London, and they were a corporation for the general purposes of the parish, subject to this particular charge which he had here imposed upon them; and there can be no doubt, regard being had to the nature of that body, that the whole would go in charity, though I apprehend that even then it would be difficult, if it stood there alone, to say that the quantity of bread would have to be augmented because, the value of his property being 26*l.* or thereabouts, it is found that at the date of his will there would be a surplus of somewhat between 4*l.* and 5*l.*, and not more. I do not think that that has very much to do with the case, but such is the fact if it be of importance. It is not as if the testator distinctly described the value of the property; he says "26*l.* or thereabouts," and there is nothing to indicate, as in the cases of apportionment, that he intends a direct and definite sum to be apportioned.

But then, the testator having done this, the part of the will which to my mind creates the principal difficulty and distinction between this case and the *Wax Chandlers'* case is the following. I should, however, first observe that in the devise of the house to St. Michael's he gives a very curious direction to the parson and churchwardens and their successors. The words which he then uses, are: "And the whole rest of the rent I will shall be reserved to the maintenance of the said house." But no direction is given there with reference to the rebuilding, and there is no gift over, as there is in the devise which we have immediately to construe.

[His Lordship then read the devise to the plaintiffs' company, and the gift over to St. Michael's, the whole of which will be found in the earlier report, and continued:] That is to say, they are to expend the money upon the gifts to the poor people, 20*s.* a year to the Chamberlain and Town Clerk for their trouble in jogging their memory, and "upon the reparations of the same tenements and gardens."

Now the two things here which certainly make a difference are these:—It is not merely said in an off-hand way, as in the *Wax Chandlers'* case, "The residue of the rents shall go towards repairs," but here undoubtedly is a very definite trust (which the Attorney-General could at any time have enforced) to accumulate the property; anything over *and above what is* wanted for the immediate repairs *is not to be spent, but it is* to form a fund for the *purposes of repairs,* and of rebuilding these premises "as to their discretion need shall appear," for the purpose of this trust which has been here created. And further than that, if the Merchant Taylors' Company do not do what is here required, there is a gift over, not, as in the former case, to a person who was to take beneficially, subject to the performance of the particular trust, but to persons who are only to take for a distinct and separate and charitable purpose. I quite allow the force of Sir Roundell Palmer's argument upon that part of the case in which he said that the fact of the property being given over to another corporation does not show that there was any intention to give any more to the people (who were to have the gowns and the cassocks and the shirts), or to augment their number; but at the same time the whole question upon the will is this, Did the testator intend a resulting trust? That, I think, he clearly did not. Did he intend an out-and-out gift to the persons who were to take, subject only to a charge? That is the main question to be decided, and I confess that I have arrived at a conclusion with considerable hesitation—a hesitation somewhat, in truth, augmented by the direction to the Chamberlain and the Town Clerk of the city of London, who are never directed to jog the company's memory to give more gowns and other articles than a certain amount to particular individuals, but simply to give these articles, and as to whom nothing at all is said about reparations. I say that all these matters create considerable doubt in my mind as to what the intent and purpose was; but at the same time, looking to the right which the Attorney-General would have had to have kept this fund accumulated, and to have said, "You shall not touch one farthing of the rents and profits; I do not know what may happen" (the system of fire insurance did not then exist); "a fire may happen any day; this fund must be appropriated for keeping up these houses, in order that the gift to the twelve poor men and twelve poor women may not fail;" and looking to the gift over in case the poor men and poor women were not provided for, I come with considerable hesitation to the conclusion that there is enough upon this will, though it is a very difficult one to construe, to show that the testator did not intend a benefit to the company; and if he did not intend a benefit to the company, I certainly think that there is no question that he did not intend a resulting trust, and therefore the only alternative is that all the property should be given to charity.

Lord Justice JAMES said.—I am also of opinion that the decision of the Master of the Rolls ought to be affirmed.

It is possible that, during the many years in which I acted as counsel for the Attorney-General in charity cases, and had to advise on such documents as the one before us and to consider the authorities bearing on their construction, I may unconsciously have acquired a bias in favour of the claims of charity. But, making every allowance for that possible bias, I feel that I should have been exceedingly startled if the decision of his Lordship had been other than it is.

To my mind, the only thing which we have to deal with is the meaning of the testator's words in this particular instrument; and it is to me clear that the plain, natural, ordinary, grammatical construction of these words is so free from all ambiguity and doubt as not to require, and not to admit of, any assistance or control from the authority of cases

decided on the construction of any other will or instrument.

As a general rule of law, it is clear that where there is a gift to trustees of property merely as trustees, they cannot take any benefit from the fact that the expressed trusts do not, whether originally or from any subsequent event, exhaust the whole estate. In ordinary trusts the result is that there is an implied trust for the donor's representatives; in short, in cases of gifts for charitable purposes, there is an implied trust for charity. But there is a class of cases, not confined or peculiar, as it seems to me, to gifts to colleges, municipal corporations, or city guilds, in which it is a fairly moot question whether in a gift of property to trustees they take merely as trustees solely for the purposes of the trust, or whether they take the property subject only to the due execution of the specified trusts. And in considering that question, where it fairly arises, all the surrounding circumstances, the character and position of the donor and donee, the more or less probability of one intention or another, and the current of authorities in similar or nearly similar cases, are matters which the court of construction not only may, but must, look to for aid and guidance.

But where the testator or donor has in express words devoted the whole of the property, or the whole of the rents and profits, to purposes which exclude all beneficial interest in the donee, and those words are not controlled or interpreted by plain implication arising from other parts of the same instrument, there is, in my judgment, no legitimate power in any court of construction to resort to surrounding circumstances, or the character or position of the parties, or the probability of intention, or the current of authority, or to do anything but give effect to the very words. This is, in my opinion, the case with the present will. The gift is of a large number of small houses in the City, upon trust out of the rents and profits to make certain specified gifts to certain charitable objects, and proceeding thus, "and so that the whole residue" shall be gathered into one fund, and so on. I need not repeat the words. It seems to me that, if ever there was a plain gift to trustees solely for the purpose of the trust, and in terms excluding any beneficial interest in the trustees, this is such a gift.

It was contended, but I am afraid I was unable rightly to apprehend the argument, that, independently of those words, omitting those words, there would have been a gift to the company, subject only to the performance of the charitable obligations; and that, starting with that, those words are idle and superfluous, as they merely direct an owner in fee simple of house property to provide a fund for the proper reparation and maintenance of his own estate. You may do anything with any instrument in that way—omit certain words, then arrive at the conclusion, and then deal with the omitted words, being bound by the conclusion which you have arrived at by their omission. But can it be with any reason contended that the testator's intention was by these words to give such idle and superfluous direction? Did he, or did he not, so far as intention goes, intend an obligation which it was incumbent on his devisees to perform, to accumulate the surplus, the whole surplus? I cannot doubt that he did so intend; and if there was an obligation intended by the testator and expressed by *him as extending to the whole surplus*, then the obligation and the trust extended at the first, and from the first, to the whole rents and profits of the property, so as to exclude any beneficial interest in the devisees. And for whose benefit was that obligation as to the surplus intended? Plainly, as it seems to me, for the benefit of the charity. The property being house property, cottage property in fact, bringing in a rental of about 30*s.*, a house and garden, or the equivalent of fifteen pairs of poor men's shoes, it is reasonably certain that the property would require considerable repairs, and was liable to the then not uncommon peril of fire at a time when insurance against fire was unknown; and the direction to accumulate the whole surplus into a stock for the purposes of reparation and rebuilding, as occasion should require, was obviously a provision to secure against all contingencies to the charitable objects the bounty intended for them, and was, therefore, a devotion of the whole surplus for the benefit of those charitable objects. It was simply what in commercial companies is known as a depreciation and reserve fund. I cannot myself doubt that if, upon or after a testator's death, in any similar gift at this day the devisee were to spend the surplus instead of accumulating it, the Attorney-General would obtain from this court on behalf of the charity a proper decree for the execution of the trust, whether the devisee were an individual, a municipal corporation, or a city company.

It was said, indeed, that it could never have been intended by the testator that any surplus, however large, was to be expended in unnecessarily expensive repairs or reconstruction. The answer to that is, that the testator never supposed that there would be any large surplus. To him house property producing 26*l.* a year represented 26*l.* a year. He no more dreamt, on the one hand, of the change in the value of money and the value of houses and land in London, than he dreamt of the whole property being swallowed up by an earthquake, or the corporation itself destroyed by some revolutionary measure. Historically we know that from the time of Edward III. to the time of Elizabeth the value of money had been stationary, and there is no reason to suppose that there had been any change in the value of house property in the metropolis. The testator was making a moderate and reasonable provision for the security of his charities, by devoting the surplus, and the whole surplus, to a reserve fund. The fact that the surplus, centuries after his death, has grown to its present amount, no more entitles the company to it, than, in the converse case of there being a clear gift to the company of a surplus supposed by him to be small, it would have deprived them of any portion of such surplus. It is the very case to which the doctrine of *cy pres* applies.

In the view which I therefore take of this case, it is not necessary that I should refer in detail to the authorities which have been cited. I think that I may, however, properly refer to two, viz., the *Bristol* case and the *Wax Chandlers'* case, both of which cases I take to be authorities in favour of the decision of the Master of the Rolls. In the *Bristol* case the Master of the Rolls came to the conclusion that he might imply the words found in this will, and proceeded to decide accordingly in favour of the charity; and it is reasonably probable, I think, that, if there had been such express words, Lord Eldon's subsequent elaborate examination of every clause and word in the instrument,

would not have induced him to depart from the decision of the Master of the Rolls. In that case there were introductory words, "and for no other end, intent, or purpose," which, it was contended, threw such a difficulty in the way of the construction ultimately arrived at as to show what length this court has gone in favour of corporation devisees. Now the danger forcibly pointed out by Mr. Jessel, of making the decision on one instrument into a canon of construction for the interpretation of another, is strikingly illustrated by those words and the argument deduced from them; for to me those words are about the strongest thing in the whole document in favour of the Bristol corporation. The donor said: I give you the property; there are certain trusts which you are to perform, and I have no other trust, intent, or purpose whatever in view. There is to be no implied trust, no resulting trust; and if you do the things which I have told you to do, and nothing more, you will fulfil every obligation which I mean to impose on you. As to the *Wax Chandlers'* case, it is enough to say that the learned judge who first decided that case also decided the case under appeal, and he has told us that he decided it on the very special context and very special circumstances in that case; that his *ratio decidendi* was in fact on the things which constitute the differences between that will and the present, and I do not think that there was any substantial distinction between the two judgments in that case. The court was enabled or compelled, by the context and the surrounding circumstances, to put what I humbly conceive to be a somewhat strained and non-natural meaning on the residuary clause in that will. If, in the total absence of any such context or of any surrounding circumstances, the court were to extend that construction to the will under consideration, it would be in my judgment to lay down, not a canon of construction, but a positive rule of law, that in cases of gifts to city companies upon expressed trusts exhausting the whole income, if one of such expressed trusts is of the surplus for the reparation and rebuilding of the property, such trust shall, in all cases be read as if it were a gift of the surplus to such companies for their own use and benefit. In my judgment it is beyond the province of a court of construction to lay down any such rule of law.

Lord Justice MELLISH said:—This case appears to me entirely to depend upon the question whether, according to the true construction of the will of Robert Donkyn, his lands, tenements, and gardens in the parish of St. Botolph are devised to the Merchant Taylors' Company beneficially, subject to the charge of having to fulfil certain charitable objects, and repairing and from time to time rebuilding the premises, in which case the surplus profits would belong entirely to them; or whether the premises are devised upon trust to apply the whole of the existing net profits of the lands to charitable purposes, in which case, according to the well-known rule established by the *Thetford School* case, the whole of the surplus rents will belong to the charity.

Now, I am of opinion, after considering the whole of the testator's will, that he intended to devote all the property devised by it to charitable purposes. The property principally consisted of houses, and it was obvious that a portion of the rents must be reserved for repairs and rebuilding, and the testator seems to me to have calculated how much of the rents he could safely devote to charitable purposes, so as to have a sufficient residue for repairs and rebuilding. The language of each of the devises seems to me directly to negative any intention on the part of the testator to leave any residue for the benefit of his trustees. In the first devise of a house to the parson and churchwardens of the parish of St. Michael, in Cornhill, the words are, "and the whole rest of the rent I will shall be reserved to the maintenance of the said house." In the devise in question the words are, "and so that the whole residue of the said rents and profits of the said lands, tenements, and gardens, they do maintain and gather yearly into an whole stock, and therewith do and keep the reparations of the said tenements to them devised, and, if need be, new build the same as to their discretion need shall appear, as the same stock will fall out." And in the gift over of the same property to the parson, churchwardens, and parishioners of St. Michael, Cornhill, the gift is expressed to be made "to this intent and upon condition that they, the said churchwardens, shall bestow the yearly rents and profits" (which must mean the whole of the rents and profits) "of the said lands, tenements, and gardens, in and upon" the charitable purposes specified, "and the reparations of the same tenements and gardens."

The real question seems to be, did the testator really mean what he has said, that the whole residue of the rents should be gathered into a common fund and applied to the repairing and rebuilding of the premises devised, and that, therefore, no part of it should go to the Merchant Taylor's Company? or is that construction so absurd that the testator could not have meant that the whole residue should go into a repairing and rebuilding fund, and be applied to repairs and rebuilding, but that he must have meant what he has certainly not said, that so much only of the residue as was wanted for repairs and rebuilding should be applied for that purpose, and that the rest should belong to the Merchant Taylors' Company.

I cannot see that any such absurdity is involved in giving its natural construction to the language of the testator as to justify the court departing from it. There is nothing to prove that at the time when the will was made the surplus rents, after providing for the charitable objects, formed more than a sufficient fund for the repairs and rebuilding; and the *Thetford School* case, and numerous other cases, prove that founders of charities about the time when this will was made acted upon the assumption that rents would remain at the same amount at which they were in their time; indeed, the present testator seems to have thought that a penny would always buy a loaf of the same size as it did in his time; that Welsh frieze would always be of the price of 1*s.* 6*d.* the yard, and poor men's shoes at twelvepence the pair. Perhaps indeed the testator thought it enough to provide a scheme for carrying out his charitable objects as long as prices and rents remained the same, and supposed that, if prices and rents altered, his trustees would have power to alter the details of his scheme, so as to carry out his general object. But, however this may be, I am of opinion that, according to the true construction of the will, no benefit was given to, and no burthen imposed upon, the Merchant Taylors' Company by the de-

vise in question, and that, therefore, the judgment of the Master of the Rolls ought to be affirmed.

Appeal dismissed. Costs of all parties out of the charitable fund.

Solicitors for the plaintiffs appealing, *Fisher* and *Fisher*.

Solicitors for the Attorney-General, *Raven* and *Bradley*.

May 31 *and June* 1, 1871.

(Before the LORD CHANCELLOR (Hatherley).

CROOK *v.* CORPORATION OF SEAFORD.

Corporation—Agreement not under seal—Standing by—Acquiescence—Specific performance.

The Corporation of Seaford passed a resolution in Jan. 1860, agreeing to let land to C. for 300 years, to be stumped out by a committee and himself at his expense. The corporation did not stump out the land, and C. afterwards stumped out the land himself, took possession of it, erected a terrace on the land, and paid rent to the corporation:

Held (affirming the decision of Stuart, V.C.), that C. was entitled to a decree for specific performance, the corporation having acquiesced in all that he had done.

Held further, that the right of the corporation to grant such a lease could not be disputed in this suit.

The boundary of the land was, however, ascertainable from the agreement, and was not what the plaintiff had contended for. In that respect the decree must be varied.

THIS was an appeal by the defendants from a decree of Stuart, V.C., under the following circumstances:—The corporation of Seaford was created by charter in the reign of King Henry VIII. by the title of "The bailiff and commonalty of the town, parish, and borough of Seaford," and it was not included within the provisions of the Municipal Corporations Act 1835. The defendants, the corporation, were the owners of lands situate at Seaford, now vested in the other defendants as feoffees in trust for the corporation. The plaintiff was also the owner in fee of lands in Seaford. Dr. Tyler Smith was also the owner of lands in the borough of Seaford. The plaintiff and Dr. Tyler Smith were desirous for the improvement of their properties, and they handed to the corporation for their consideration a plan of an intended terrace to be made by them, and suggested that the corporation should demise the lands, at that time waste, for a term of 300 years, at a nominal rent. On the 5th Jan. 1860 a general court of assembly of the corporation was holden, and the following are the minutes extracted from the books of the corporation:—

Proposed lease to Mr. Thomas Crook. A resolution was then proposed: "That this corporation will agree to let on the following terms, viz. 1. The frontage of West Gun Field, in Seaford (the plaintiff's land) with the flat part of the beach opposite (to be stumped out at the expense of Mr. Crook), but the coach or main highroad between to be preserved at its present width at the least; also part of the West Lane at the back of the said field, to be stumped out at the expense of Mr. Crook. 2. Mr. Crook to make and build a neat concrete terrace in front of his field (as shown in his plan), at his own expense, the said terrace to be completed by ——, and to be left open as a public walk for the use of foot passengers at all times. 3. The corporation to grant a lease for 300 years to Mr. Crook at 10*s.* per annum; *Mr. Crook to pay the whole* expense and all legal charges and costs whatever for the said lease and plan for the same, and also for the counterpart for the corporation, and every expense attending the execution thereof. 4. The town clerk to prepare the lease on application of Mr. Crook. 5. The hiring to commence from the 14th Feb. 1860. 6. No building (except the said public terrace), to be erected on the land or flat of the beach. These terms are offered without prejudice, and upon condition that the consent of the feoffees in trust can be obtained; but if the feoffees in trust or any of them, shall refuse to concur in this arrangement, any expense occasioned by such refusal shall be wholly borne by the proposed lessee. That the following persons (who were named) be appointed a committee to arrange the stumping with Mr. Crook, and to settle any minor details."

A copy of these minutes was sent to the plaintiff, and he accepted the terms offered. The plaintiff stumped out the pieces of corporation land, and after the same were so stumped out he entered into possession of them; and, from the 14th Feb. 1860, to 1865, in pursuance of the agreement, duly paid the rent of 10*s.* per annum to the corporation, and received receipts in respect thereof.

Upon the faith of the above agreement, the plaintiff erected a sea wall about 700ft. long, and in Feb. 1861 completed a concrete terrace in accordance with the plan submitted to the corporation and referred to in the minutes. The terrace had been left open as a public walk, as stipulated for by the minutes, and the public had enjoyed the same. During the progress of the works the bailiff and other members of the corporation visited the same in the presence of the plaintiff, who then and there pointed out and explained to them the nature of the works; and the plaintiff was allowed by the corporation to complete the works without any objection on their part. On the 30th July 1864 the plaintiff received from the bailiff, on behalf of the corporation, a notice to quit and deliver up to him the possession of the frontage land which he held as tenant to the corporation. On the 7th Sept. 1864 the solicitors of the plaintiff requested the town clerk to send a draft of the proposed lease for perusal. On the 31st Jan. 1865 the town clerk, in a letter, stated to the solicitors of the plaintiff that he had not adhered to the terms upon which it was originally proposed that the corporation should grant a lease; that the corporation had resolved that he was not entitled to such a lease, and that they would not consent to his having one. The town clerk also stated that he was authorised to say that the corporation was open to a negotiation with Mr. Crook with a view to allowing him to retain the land in question upon such terms as might be considered fair and equitable. Considerable correspondence passed between the solicitors of the parties, repeated applications for a lease in accordance with the terms of the minutes being refused. On the 25th Oct. 1869, the corporation issued a summons in ejectment from the Sussex County Court, returnable on the 7th Dec. following.

On the 10th Nov. 1869 this bill was filed, praying that the several provisions contained in the minutes of the 5th Jan. 1860 might be ordered to be specifically performed by the corporation, and that the corporation and all other necessary parties might be ordered to execute to the plaintiff a proper lease in accordance with the minutes; and for an injunction to restrain the proceedings in ejectment; and that if for any reason the specific performance should be refused, the defendants, the corporation, might be decreed to pay to the plaintiff

such damages, to be assessed in such manner as the court should direct, and for costs.

On the part of the defendants the evidence was to the effect that at the meeting of the committee to stump out the land the plaintiff insisted that he was entitled to take the whole of the land of which he stated he had now taken possession; that that was objected to as not being included in the agreement; that the committee did not, in consequence of such objection, stump out the land, and that the plaintiff had encroached on the corporation land. In the court below the Vice-Chancellor said: The argument on the part of the defendants that the minutes which constitute the agreement were not under the seal of the corporation, and are therefore not binding, seems to me to be wholly untenable. This case depends upon the acts and conduct of the parties. It has been contended that the agreement is in its terms not sufficiently certain to justify the court in decreeing specific performance. But when coupled with the plan which was exhibited when the agreement was come to, it seems to me that the agreement is sufficiently certain. It has also been contended that it was of the essence of the agreement that the land should be stumped out by the defendants. The process of stumping out was to be performed by the defendants, at the expense of the plaintiff; and if, after the question arose between the committee which was appointed to arrange the stumping out, and the plaintiff, who was dissatisfied with the proceedings, the defendants had taken proceedings against the plaintiff in reference to his stumping out the land himself, a very different case might have been made. But all these things were done and completed in 1860, for it is admitted that the plaintiff took possession of the land, and arranged the stumping out in his own way, the defendants knowing what was done, and the terrace was completed in February 1861. During all the time that the plaintiff was going on with his works the defendants took no proceedings, but, on the contrary, they acquiesced in what the plaintiff was doing, and in part for the benefit of the public. The plaintiff, by the course which he took, made the agreement perfectly certain, and I cannot, in 1870, in reference to what the plaintiff did in 1860 with the knowledge of the defendants, say that they shall be at liberty to eject him, and that he is to forfeit all the money which he has expended upon the land and terrace. The argument in reference to the length of time before the plaintiff came to this court seems to me to establish his case, and in my opinion he is entitled to a decree for specific performance. As to the question whether the corporation can grant a lease for so long a period, that, in my opinion, cannot be raised in this suit.

On the appeal,

Greene, Q.C. and *Waller*, for the defendants, contended that no corporation could be bound but by a contract under its seal, and therefore in this case the corporation was not bound by these minutes. There never was a completed contract which that court could order to be performed, and therefore the suit was misconceived, being founded upon an imperfect and uncertain contract. Further, Seaford was a borough within the provisions of the statute 5 & 6 Will. 4, c. 76; and by sect. 93 the corporation was prevented from demising land for a longer period than twenty-one years. It was submitted that, having regard to the fact that the plaintiff had included within his stumping out, land which was intended for the public use; andalso to the lapse of time since the minutes were entered in the corporation books, and no proceedings taken on the part of the plaintiff, the bill ought to be dismissed with costs. They referred to

Eads v. *Williams*, 4 De G. M. & G. 674, 691;
Fry on Specific Performance, 325.

Dickinson, Q.C. and *Pontifex* for the plaintiff.

The LORD CHANCELLOR (Hatherley).—I confess when this case was first opened I felt great difficulty in the form of the decree, which, I agree with Mr. Waller, is one I do not remember before to have seen. The form of the decree is this: it is a decree for specific performance, and either of the parties are to be at liberty to apply to the judge at chambers for any further directions as to the performance of the agreement. I apprehend that it is clearly the duty of the court to ascertain whether there is or is not an agreement and not make it afterwards at chambers; and that if there is not an agreement made, the only alternative is to dismiss the bill. [His Lordship considered the terms of the agreement, and held that it referred to all land between the frontage of the plaintiff and the beach proper, within two lines drawn vertically down towards the sea. After referring to the works done by the plaintiff his Lordship proceeded:] I have no hesitation in saying that if a bill had been then filed by this plaintiff, the bill would have been dismissed, and most properly dismissed unless he chose to adopt the construction given by the corporation. I am quite clear he was wrong in the view he took, and that he could not have sustained a bill for specific performance. But unfortunately, matters do not rest here, for he is allowed to build this wall, and it is in evidence that it cost him 700*l*. This occurred in 1860, and he is allowed to remain in possession of that he has improperly taken. No doubt it did nobody any harm at the time, unless it interfered with Dr. Tyler Smith in making arrangements of his own. It interfered with nothing. He could not build anything on it but the wall, and so far as the corporation of Seaford was concerned, the greater length of the wall did them good rather than harm. They took no notice of it and he paid his rent until 1863 without the slightest disturbance or question being raised about his being right or wrong. In 1863 Dr. Smith makes a certain proposal of his own to the corporation, which they are disposed to listen to, and then they begin to think they will question the propriety of this gentleman's line of conduct, and will decline to grant him any lease; and some intimation to that effect is made in the same year, but in 1864 they again receive his rent, and so on, until May 1865. Then they take up a new point of view, and it is the point on which it is difficult to decide what is right and just to be done, principally with reference to the cost of the litigation. They say: "You have not confirmed your agreement in any respect; you have not only taken too much ground, but you have built a wall which is of no use to the inhabitants, and we will not grant you any lease at all." That is said in 1865. There he remains, and no steps are taken to remove him. They behaved very civilly to him, as, of course, it was quite right to do; but certainly he had no reason to suppose that they were going to take the extreme measures which they ultimately took. He does not answer

letter until 1866, and that is in part ated for by saying that he was ill, and the ration, kindly enough, did not take any steps id not wish to trouble him while he was in a of bad health. There is a very reasonable sition on the part of the corporation which I they had adhered to all through, namely, of ıg all disputed matters between the parties bitration. The plaintiff makes an equally ıable answer when he says that he is per- ready to refer every everything to arbitra- ɔut would wish to be informed of what are sputed matters. It is quite reasonable to ask ɔecause it certainly appears that there was stion as to that. Nothing had been done the stumping, but they have raised other ions now about the non-sufficiency of the and the non-completion of the agreement. laintiff did, at one time, raise a wrong con- n, but he was afterwards willing to submit atter to arbitration, and then this course was of bringing an action of ejectment. When s get to controversy they raise every point an. Two or three things are raised as points ; one that this is a corporation, and the that they could not grant so long a lease. I opinion that they are not within the Muni- Corporations Act, and that they are not pro- d from granting a 300 years' lease. Mr. e, however, put it in a different form, and was an improvident lease altogether. I do ıink it was, because they got a wall built and which was of no use, and they encouraged to build houses; and it does not appear he evidence that there was anything better lone with the land. Then it is said that the nent was not under seal. It is quite sufficient r to that to say that the corporation, like bodies, although they have not eyes, yet they gents who have eyes to see for them, and if llow a wall to be built and money to be led, they must be answerable certainly for erformance of the contract which has been rly entered in their books by a formal reso- on the faith of which an expenditure has nade. Then it is said one of the terms was ıis was not to be done without the concurrence feoffees, and that Mr. Crook was to pay the ses of that concurrence. That he must pay. feoffees had really any duties to perform— is admitted that they are dry trustees of the ration, and have nothing else to do but to obey rporation—it would have been necessary to their consent. If there were any question of might have been necessary for Mr. Crook e a bill. The feoffees might have said point is too doubtful for us; we do now whether this is a lease which we l have been right in executing under all rcumstances." But if the court holds, as I at the agreement is a proper agreement to formed, they have nothing to do but to per- it. The difficulty I feel is as to the costs. the costs, I shall make an alteration in respect. I shall strike out the reference ambers to settle the decree, and substitute laration as to the meaning of the agree- That will save the appellants the costs of peal. As regards the costs of the original I do not think the court has been in error recting them to be *paid by the defendants, se the course taken of bringing an action of* ejectment in the County Court in such a matter as this, where the thing might have been so easily adjusted, is one, in my opinion, which was not justified. I think they cannot be saved from the costs, because in one stage of the controversy this gentleman raised a contention which he was not right in raising. The plaintiff said he would submit to arbitration if they would tell him the points. He said in an early affidavit before the hearing that he would make no difficulty in giving up the lawn he had taken, and yet the case still went on. I do not think, under all those circumstances, I can say the court below has been wrong in directing the costs of the suit to be paid by the parties to the litigation. That includes the feoffees, who will be indemnified by the *cestui que trusts*. The feoffees brought the action. It is necessary to bring them here as parties, and if they bring that action on behalf of their *cestui que trusts*, they can only look to their *cestui que trusts* for indemnification. The total result is this, that I propose to vary the decree of the court below by prefacing it in this way: Let the decree be varied, by declaring that, according to the true construction of the resolution of the defendants, the corporation of Seaford, of the 5th Jan. 1860, the corporation agree to demise to the plaintiff such portion of their property as forms the frontage of the plaintiff's field called the West Gun Field, and also the flat part of the beach comprised between two lines drawn from each extremity of such field perpendicularly towards the sea, such lines being continued until they reach high water mark. Then the declaration will go on as it stands in the decree, and the court orders that there shall be specific performance subject to that, and orders and decrees the same accordingly. It will also order that the defendants should make out and execute to the plaintiff a lease of the premises, subject to the above declaration, mentioned and described in the said resolution. I will put the words "subject as therein mentioned" at the end of my declaration, for one of the points in the case was that there was no road to be made. The conveyance will be settled at chambers if the parties differ. I think that is all that is necessary. There will be no costs of the appeal.

Solicitors: Messrs. *Palmer*, *Palmer*, and *Bull*, 24, Bedford-row, agents for Messrs. *Gell* and *Woolley*, Leeds.

Solicitor: *George Brown*, 21, Finsbury-place.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barristers-at-Law.

Saturday, July 29, 1871.

Re THE DURHAM COUNTY INVESTMENT AND BUILDING SOCIETY; DAVIS'S CASE.

Benefit building society—Power to borrow—Certificate of barrister—Lien on deeds of depositors—6 & 7 Will. 4, *c.* 32.

The trustees of a benefit building society, having no power to borrow, were, by an alteration of its rules, adopted at a meeting, and certified by Mr. Tidd Pratt as being in conformity to the provisions of 6 *& 7 Will.* 4, *c.* 32, *empowered to borrow for the purposes of the society. The trustees borrowed very large sums of money, and spent them in assisting other societies and in the purchase of land. Subsequently the society*

was ordered to be wound-up. The trustees had, amongst others, borrowed 100l. from D., for which they had given him a deposit note, and he now claimed to recover this 100l. from the official liquidator. They had also borrowed 200l. from W., and they had given him a deposit note, and also had handed to him certain deeds of depositors as collateral security, and the liquidator now claimed to have these deeds handed to him without payment of the money for which they were deposited as security.

Held, as to D., that the society having no power to borrow, and having spent the money for purposes not beneficial to the society, he could not recover; but as to W., it was held that the court had no authority to compel him to give up the deeds without payment of the money.

THE above named society was constituted in the year 1862, on the permanent principle, for the following purposes—namely, to raise a fund for the purpose of enabling the members to purchase freehold land or other real or leasehold estate on which to erect suitable cottages and dwelling houses; to provide the means for profitable investment of small savings; and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death.

The 57th rule of the society defined the powers and duties of the directors, but did not give them any power to borrow money.

At a special general meeting of the society, held at their offices on the 15th Aug. 1867, certain alterations and additions to the rules were considered and resolved on, and (*inter alia*) the following alterations in the 57th rule, namely, "To omit clause 4, and to substitute the following: The directors shall have power from time to time to borrow for the purposes of the society such sums and at such rates of interest, and under such terms and conditions as they may think proper and expedient."

The said alterations were certified as being in conformity to law and within the provisions of the Act 6 & 7 Will. 4, c. 32, by John Tidd Pratt, the barrister appointed to certify the rules of the savings banks on the 28th Aug. 1867.

Previously to the winding-up order the society had borrowed largely from depositors, bankers, and others, and most of the money so borrowed had been either lent to other societies or spent in the purchase of a freehold estate at Middlesborough.

On the 29th Jan. 1868, Mr. Davis deposited 200*l.* with the society, but 100*l.* of this was returned on the 1st of Feb. 1870.

On the 15th Feb. 1871, the court ordered the society to be wound-up, and Mr. Davis at once gave notice of his claim to the official liquidator for the balance of the money due to him. This claim was disputed by the official liquidator, and Mr. Davis made an application, which was adjourned into court, and now came on for hearing, "that his claim in respect of 100*l.* balance of the sum of 200*l.* deposited with the society," with interest thereon might be allowed and paid by the official liquidator.

Eddis, Q.C. appeared for Mr. Davis, and contended that the money was in reality borrowed for the purposes of the society, and that it was for the benefit of the society that it was invested *in the lands at* Middlesborough, and further, that a building society is entitled to invest its funds in the purchase of real estate. He referred to—

National Provincial Society, ex parte Williamson, L. Rep. 5 Ch. 309;
Hill's case, L. Rep. 9 Eq. 605;
Laing v. *Reed*, 21 L. T. Rep. N. S. 773; L. Rep. 5 Ch. 4.

And that as the society were in possession of an estate which they had purchased with money lent by Mr. Davis, therefore Mr. Davis was entitled to follow the money, and to stand in the position of a vendor of land, and claim a lien upon it:

Grimes v. *Harrison*, 26 Beav. 435;
German Mining Company, 4 De G. M. & G. 19;
Re Cork and Youghal Railway Company, 21 L. T. Rep. N. S. 47; and L. Rep. 4 Ch. 748.

Fry, Q. C., and *N. Higgins* for the official liquidator, were not called upon.

The VICE-CHANCELLOR said that the question whether the society had power to borrow money was one depending entirely on the authority granted to it under the statutory enactments in that behalf. In his opinion the objects of the society were to allow the members to lay out their money and savings, and so far the objects were beneficial, but he thought it was clear that it was out of their power to borrow money. In any case he considered that, even if the alteration in the rules had given the power it purported to do, they had transgressed the rules as so altered, and had borrowed money for purposes which it was evident were not conducive to the benefit of the society. The cases cited did now show that Mr. Davis was entitled to follow his money, and that for that purpose he had an interest in the land, and he was of opinion that on neither of the grounds relied upon could the claim be maintained. The summons would be dismissed, but as this was a representative case he thought it right that the costs of both parties should come out of the estate.

WILSON'S CASE.

THIS was another representative case in the same winding-up matter as the above. It came on for hearing on an application of the official liquidator that the Rev. William Wilson might be directed, within seven days, and without payment of any sum of money, to hand over to the official liquidator the deeds deposited with him in July 1862, as a security for the loan of 200*l.*

The position of the lender was, however, materially altered. In this case deeds of depositors with the society, which had been left in the hands of the trustees in trust for such depositors, were handed over to him as a collateral security for the amount lent by him. The memorandum of deposit given to Mr. Wilson with the deeds was as follows:

Memorandum.—We, William Henry Hills, bookseller, Thomas Scott Turnbull, draper, Anthony M'Donald, grocer, and Joseph Ridley, builder, all of the borough of Sunderland, and trustees of the Durham County Permanent Benefit Building Society, established within the said borough, and who, and their successors, are hereinafter called the trustees, have borrowed of the Rev. William Wilson, of Ryhope, in the said county, clerk, the sum of 200*l.*, in trust for the said society, at interest on security of the promissory note of the said A. McDonald and Joseph Ridley, trustees as aforesaid, and we have deposited with the said Wm. Wilson the mortgage deeds mentioned in the schedule hereunder written, and the several other deeds and writings relating to the premises mentioned and set forth in the said schedule as a collateral security for the payment of the said sum of 200*l.*, with interest after the rate of 5*l.* per cent. per annum, payable half-yearly, clear of all deductions whatsoever: Provided that, if any member of the said society shall at any time be

of paying off and satisfying any security or s given by him to the trustees which shall be in session of the said Wm. Wilson, he, the said ilson, doth hereby agree that he will, on receiving of adequate value, redeliver to the trustees all rtgage and other deeds and writings relative to erty or properties intended to be discharged from urity or securities as aforesaid.

the schedule contained a list of the deeds to Mr. Wilson. The question, in addition power of borrowing, was whether the direc- d the power to deposit the members' secu- n order to secure an advance of money to iety.

scott, for Mr. Wilson, contended that though ng society had no right to borrow money ; an express power to do so, still a creditor h a lien on the deeds that he was entitled them till he was repaid his money. Mr. carried in no claim, he rested on his r.

Q. C., and *N. Higgins*, for the official liqui- contended that the society received no from the money lent by Mr. Wilson; also, e deeds were placed in the hands of the trus- the benefit of the depositors, and that, as re improperly handed over by such trustees, on of detinue could have been properly t for their recovery. Further, that the position rtgaging member of a building society and are of the contract shown in the mortgage ould prevent any depositor of such mort- lding it as a security for a debt, so long as nber paid his contributions and conformed ules.

e v. *Sparrow*, 18 W. R. 400.

VICE-CHANCELLOR said that the official or could not claim more than the society, t it was quite clear he could not compel lson to return these deeds to the society the money for which he held them as was returned to him. He considered that no authority to order Mr. Wilson to give leeds, and that the summons must there- dismissed, but without costs.

tors for Davis, *Mercer* and *Mercer*.

tors for Wilson, *Davidson* and *Co.*

tors for the official liquidator, *Lewis*, and *Longden*.

OURT OF QUEEN'S BENCH.

orted by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-law.

SECOND DIVISION OF THE COURT.

April 22, *May* 3 *and* 27, 1871.

fore MELLOR, LUSH, and HANNEN, JJ.)

NICHOLSON (app.) *v.* WILLIAMS (resp.)

owers of the Board of Trade to declare the of—Taking ballast or shingle from— o. 3, *c.* 159, *s.* 14.

ers of the Board of Trade under the 16 *&* 17 *c.* 107 (*Customs Consolidation Act* 1853), *he* 25 *&* 26 *Vict. c.* 69, *s.* 17 (*the Harbours ter Act* 1862) *to appoint ports and declare nits thereof, are not limited to revenue pur- only; nor are such powers confined to n in their merely geographical sense. Where, re, by an order of the Board of Trade, the of the port of Hull were extended and de- and the sea between Flamborough Head and Spurn Point was placed within them, and persons were prohibited from taking ballast or shingle from certain parts of the shore so extended as the port of Hull:*

Held, that a person so taking ballast or shingle from such parts was guilty of an offence within the meaning of sect. 14 *of the* 54 *Geo.* 3, *c.* 159.

THIS was a case stated under the 20 & 21 Vict. c. 43, by the stipendiary magistrate of Hull, upon a conviction by him of the appellant, under the 54 Geo. 3, c. 159, s. 14, for taking shingle from the shores of the port of Kingston-upon-Hull. The case stated, among other things, as follows :—

The information against the appellant in this case was laid by the collector of customs at Hull, by direction of the Board of Trade, and charges that the appellant did on the 11th April 1870, at the parish of Owthorn in the county of York, unlawfully take shingle from the shores or banks, or from a portion of the shores or banks of the port of Kingston-upon-Hull, whereby the said port was, and is, in danger of being damaged contrary to the 54 Geo. 3, c. 159, thereby incurring a penalty of 10*l*.

The offence thus brought under consideration, was committed on the seashore at Withernsea, in the parish of Owthorn, and county of York, Withernsea being a village about fifteen miles to the north of the Spurn Point, and several miles south of Flamborough Head, and lying also between Spurn and a village called Hornsea. On the 1st Aug. 1868, the Board of Trade issued an order which prohibited the removal of shingle from the shore or banks or any portion of the shore or banks at Spurn Point, from the low lighthouse southward to the extreme of the point at low water, and northward two and a half statute miles on both sides of the Spurn Point. In July 1869 proceedings were taken by the board against several parties for infractions of this order at a place called Kilnsea, two miles from Spurn Point, and they pleaded guilty, no professional gentleman having appeared for them; the result being, that the practice of taking shingle within the limits defined by the order was stopped.

After the proceeding in July 1869, the Board of Trade issued a second order, bearing date the 6th Sept. 1869, prohibiting the removal of shingle or ballast from the shores and banks of the port of Kingston-upon-Hull, and the works thereof between the northernmost boundary of the parish of Hornsea, and the limits north of Spurn Point, defined by the said order of the 1st Aug. 1868.

The prohibition contained in this second order of the Board of Trade seems to have been the means of stopping the removal of shingle within the extended limits up to the 11th April last; but on that day the appellant, by the direction of Sir Clifford Constable, removed shingle from the shore near Withernsea, a previous intimation that he would do so having been sent to the Board of Trade by Sir Clifford Constable's solicitor.

The removal of the shingle is admitted, and it was not only admitted, but proved before me by the evidence of Mr. Code, Captain Carter, Mr. Oldham, and others, that such removal, if unrestricted from Hornsea to Kilnsea, must, by endangering the lighthouse at Spurn and the navigation and harbourage in the Humber, in the Hank roads, and under Sunk Island, to be injurious to the last degree to the port of Hull, assuming that such port

(as alleged on the part of the Board of Trade) should be found to extend from Trent Fall to Flamborough Head.

Mr. O'Dowd (who appeared for the Board of Trade), after quoting various authorities, proceeded to the Acts, Orders, &c., of more modern date, which authorise the Board of Trade to proceed against parties removing shingle from the coast at Withernsea, and he submitted the mode under which a port can now be created, and the only mode is under the provisions of an Act, commonly called the Customs Consolidation Act 1853 (16 & 17 Vict. c. 107), but the full title of which is an Act to Amend and Consolidate the Law relating to the Customs of the United Kingdom and of the Isle of Man, and certain Laws relating to Trade and Navigation and the British Possessions. Under that Act the Treasury may by their warrant appoint any port or sub-port in the United Kingdom, and declare the limit thereof, and appoint proper places within the same to be legal quays for the lading and unlading of goods, and declare the bounds and extent of any such quays, or annul the limits of any port, sub-port, haven, creek, or legal quay already appointed, or to be hereafter set out and appointed, and declare the same to be no longer a port, sub-port, haven, creek, or legal quay, ... or alter and vary the names, bounds, and limits thereof, &c. Mr. O'Dowd then contended that under the powers of this Act Hull was appointed a port by the Treasury, as appears by the *Gazette* of 17th March 1848 (No. 20,837), hereto annexed, and that such port commences at the confluence of the Trent and Ouse, and extends to Spurn Point at the entrance of the Humber, and from thence northerly along the coast of Yorkshire to Flamborough Head. The 54 Geo. 3, c. 159 (which creates the offence alleged to have been committed by appellant) enacts that, in order to prevent damage being done to the shores or banks of the ports, harbours, or havens of the kingdom, no person shall take ballast or shingle from the shores or banks, or any portion of the shores or banks, of any port, harbour, or haven of the kingdom from which the Commissioners for executing the office of Lord High Admiral shall find it necessary, for the protection of such port, harbour, or haven, or the works thereof, by order published in the *Gazette*, to prohibit the taking or removing of such shingle or ballast upon pain of forfeiting ten pounds for every such offence.

By the Harbours Transfer Act 1862 (25 & 26 Vict. c. 69, s. 17) it is enacted that from and after the 31st Dec. 1862, sects. 14 and 16 of the 54th Geo. 3, c. 159, and all provisions relative thereto shall be read and construed as if the Board of Trade were named in the said section instead of the Admiralty.

In pursuance of the powers thus conferred upon them, the Board of Trade issued the two orders already referred to, A and B, and for the breach of the observance of the second of those orders the proceedings against appellant have been taken.

In reply to the case for the prosecution, Mr. Kemplay admitted that if the Board of Trade have power to make an order that will include Withernsea, the defendant must be convicted, but contended that the port of Hull, alleged by the prosecution to extend from Trent Falls to Flamborough Head, and thus or otherwise to include Withernsea, is only a port for Customs purposes, and not a port within the meaning of the 14th section of 54 Geo. 3, c. 159, and that that statute applies only to ports as defined by Lord Hale.

The only case referred to by Mr. Kemplay in support of this argument was the *Hull Dock Company* v. *Browne* (2 Barn. & Adol. 43), and I find that it was noticed in a subsequent case, *Beilby* v. *Raper* (3 Barn. & Adol. 284); but upon examining those cases they do not appear to me to lead to the conclusions Mr. Kemplay was contending for. I failed to satisfy myself, having regard to the mode of creating ports in ancient and more modern times, and to the various authorities on the subject of ports, to which reference has been made, that it would be safe for me to coincide in the conclusion that the port of Hull can only be said to include the coast near Withernsea for Customs purposes, so as to exclude that part of the coast from the protection of the 54 Geo. 3, c. 159, s. 14.

I can find nothing in the title or object of the Act of 1853 that indicates any intention to circumscribe the ports created under its provisions to merely revenue purposes, or in any manner whatsoever, but on the contrary, the ports referred to would seem to be capable of limitation only in accordance with the terms of the order creating them, nor do I find in the order of 1848 any words circumscribing the creation of the port of Hull, so as to limit its provisions to merely revenue purposes, nor is it a fact that the duties of the Customs in reference to the port of Hull, using that term in the extended sense contended for by the Board of Trade, are limited to revenue purposes, as I find that the Customs have jurisdiction over the port of Hull as thus extended for various purposes wholly independent of revenue, such as cases of stranding, registry of vessels, &c., being the ordinary agents of the Board of Trade in matters not belonging to the Customs as a revenue department. It has not been suggested by the appellant that there is any other mode of creating a port in the present day than that adopted as to the port of Hull under the order of 1848, and it has not been shown by evidence or otherwise that there is or ever was a port of Hull in accordance with the definition of Lord Hale, though it would seem from the case referred to by Mr. Kemplay that there was formerly a port of Sayer Creek, which was sometimes called the port of Hull. No reasons were adduced by the appellant when before me for contracting materially the benefits to be derived from the 54 Geo. 3, c. 159, s. 14, though such a result must follow if that Act is confined to such ports only as come literally within the definitions contained in Lord Hale's work.

On a review of the various legal authorities adduced before me, I decided in favour of the view taken by the Board of Trade, and held that, according to the proper construction of the authorities referred to of the 16 & 17 Vict. c. 107, the 54 Geo. 3, c. 159, s. 14, and of the Prohibitory Orders of the Board of Trade, an offence had been committed by the appellant as charged against him in the information before me, and I found him guilty accordingly.

The only question of law that I propose to submit on the above statement for the opinion of this court is, whether the orders of the Board of Trade, having date the 1st Aug. 1868 and the 6th Sept. 1869, are valid in point of law?

If the court should be of opinion that the said

orders are valid, then the said conviction was legally and properly made, and the appellant is liable as aforesaid, and the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

Attached to the case were an extract from the *London Gazette* of the 17th March 1848 (No. 20,837), purporting to be an order of the Lords of the Treasury, annulling the limits of the port of Bridlington, and defining the limits of the port of Hull; also an order prohibiting the taking of ballast or shingle from the shores or banks of the said port. Reference to these will be found sufficiently made in the statement of the case, and in the judgment of the court.

Sir *John Karslake*, Q. C. (*Kemplay* with him) appeared for the appellant, and in the course of his argument cited the following statutes and authorities:—

54 Geo. 3, c. 159, ss. 2, 3, 4, 6, 7, 8, 11, 12, 14, 16;
19 Geo. 2, c. 22, s. 7;
6 Geo. 4, c. 107, s. 135;
9 & 10 Vict. c. 102, ss. 13, 14, 15, 16, 17;
16 & 17 Vict. c. 107, ss. 9, 10, 15, 18, 31, 37, 236, 335;
The General Steam Navigation Company v. *The British and Colonial Steam Navigation Company*. L. Rep. 3 Ex. 330; 37 L. J. 194, Ex.; 19 L. T. Rep. N. S. 357;
Callis on Sewers, 58, 72;
The Mayor of Exeter v. *Warren*, 5 Q. B. 773;
Dock Company of Kingston-upon-Hull v. *Browne*, 2 B. & Ad. 43;
Hale de Portibus Maris, 46, 47, 50.

The *Attorney-General* (*Beasley* with him) appeared for the respondent, and in addition to the above authorities quoted,

Hammill's Laws of the Customs, 77.

The arguments of counsel are so fully adverted to in the following elaborate judgment, that it is unnecessary further to refer to them.

Cur. adv. vult.

May 27.—LUSH, J.—The question submitted to us by the case is, whether two orders of the Board of Trade, dated the 1st of Aug. 1868, and the 6th Sept. 1869, are valid in point of law. The first of these orders, after reciting that the board had found it necessary for the protection of the harbour or haven of the river Humber, and of the shores and banks thereof, and of the works thereof, to prohibit the taking or removing of any shingle or ballast from the shore or bank thereinafter specified, prohibited all persons from taking or removing any description of shingle or ballast from the shore or banks, or from any portion of the shore or banks, at Spurn Point, from the Low Lighthouse southward to the extreme of the point at low water, and northward two and a-half statute miles on both sides of the Spurn Point. The second order, after reciting the first, and that for the further protection of the said harbour, haven, or port, and also for the protection of the shores and banks of the port of Kingston-upon-Hull, and of the works thereof, the Board of Trade had found it necessary to extend the limits mentioned therein, went on to prohibit the taking of shingle or ballast from the shore or banks, or from any portion of the shore or banks of the said harbour or haven, or from the shores and banks of the port of Kingston-upon-Hull, and the works thereof, between the northernmost boundary of the parish of Hornsea and the limits north of Spurn Point, defined by the order of the 1st Aug. 1868. These orders were *professedly founded on the statute* 54 Geo. 3, c. 159, s. 14, by which it is enacted that, in order to prevent damage being done to the shores or banks of the ports, harbours, or havens in this kingdom, no person or persons shall take any ballast or shingle from the shores or banks or any portion of the shores or banks of any port, harbour, or haven of this kingdom from which the Commissioners for executing the office of Lord Highe Admiral of the United Kingdom for the time being shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order under their hands, &c., to prohibit the taking or removing of such shingle or ballast, upon pain of forfeiting for every such offence the sum of 10*l*. By the 25 & 26 Vict. c. 69, s. 16, the powers vested in the Commissioners of the Admiralty by this section were transferred to the Board of Trade. The place where the shingle was taken by the defendant, and for which taking he was convicted, is not upon any portion of the shore or banks of that which is popularly known or which would be geographically described as the harbour or haven of the Humber, or the port of Kingston-upon-Hull, but upon a part of the coast fifteen miles to the north of Spurn Point, and lying between Spurn and a village called Hornsea. This was not in any sense part of the port of Kingston-upon-Hull, or of the haven of the Humber at the time of passing the 54 Geo. 3; but it was, at the date of the offence, within the limits of the port of Kingston-upon-Hull, as those limits were appointed and defined by an order of the Commissioners of Customs made in 1848, and published in the *London Gazette* on the 17th March in that year. By that order, made under the 9 & 10 Vict. c. 102, the coast from Spurn Point to Flamborough Head, which in the fourth year of Geo. 2 had been assigned to the port of Bridlington, and which, at the passing of the 54 Geo. 3, was within the limits of that port, were transferred to and directed to form part of the port of Hull. On behalf of the appellant it was contended that the powers of the Board of Trade under the 53 Geo. 3, c. 159, s. 14, are confined to what is geographically within part of the port or haven which is popularly known as such, or at all events, as regards this case, to so much of the shore as formed part of the port of Hull at the time when the Act passed. The title of the Act is, "An Act for the better Regulation of the several Ports, Harbours, Roadsteads, Sounds, Channels, Bays, and Navigable Rivers in the United Kingdom, and of His Majesty's Docks, Dockyard, Arsenals, Wharfs, Moorings, &c.," and it contains various enactments, some of which apply to the whole coasts of the kingdom, others only to places frequented by ships for the purpose of loading and discharging. The two sections immediately preceding the 14th belong to the former class. They prohibit the unlading on any part of the shore, except at a wharf constructed for the purpose, of any ballast, stone, gravel, &c., except at or within two hours before, or two hours after, high water, and the depositing of such matters at any time below low water mark at neap tides, &c. The 14th section belongs to the latter class, and applies only to ports, harbours, or havens, its object being to prevent disturbance of the shore of these places or resort for shipping which might result in injury to the navigation and consequent detriment to commerce. It is therefore clear that the jurisdiction of the Board of Trade to prohibit the taking of shingle extends not over the whole of the coast of the kingdom,

but only over such portions thereof as are within the ambit of a port, harbour or haven. Whatever is done beyond those limits is left to be dealt with at common law, but within those limits the jurisdiction of the board to prohibit the public from taking shingle or ballast is absolute and without appeal. What may be the meaning and operation of the saving clause, the 28th section, it is unnecessary to consider, because the defendant did not bring himself within its provisions. On the other hand, it is equally clear that their jurisdiction is not limited to ports or havens for which regulations have been made under the earlier sections of the Act. The enactment applies, as the object and purpose of it require that it should apply, to "any" and every port, harbour, and haven in the kingdom. Ports and havens are not mere geographical expressions. They are places appointed by the Crown for persons and merchandises to pass into and out of the realm, and at such places only is it lawful for ships to load and discharge cargo. The assignment of such places to be "the" inlets and gates of the realm is and always has been a branch of the prerogative, resting, as Blackstone remarks (vol. 1, p. 264), partly upon a fiscal foundation, in order to secure the king's marine revenue. Their limit and bounds are necessarily defined by the authority which creates them, and the area embraced within those limits constitute the port. Having once granted the franchise, the king had not at common law the power of resumption or of narrowing and confining their limits when once established, but any person had a right to load and discharge his merchandise in any part of the haven, whereby, as observed by Blackstone in the same volume, "the revenue of the Customs was much impaired and diminished by fraudulent loadings in obscure corners." This occasioned the statutes of 1 Eliz. c. 11, and 13 & 14 Car. 2, c. 11. The latter statute (sect. 14) enables the Crown by commission to appoint all such further places, ports, havens, and creeks (except the town of Hull) as shall be lawful for loading or discharging, lading or shipping of any goods, wares, or merchandizes within the Kingdom of England, and to set down and appoint the extents and limits of every port, haven, or creek within the kingdom, whereby the extents, limits, and privileges of every port, haven, or creek may be ascertained and known. The town of Hull, which was a legal port time out of mind, having been excepted out of the operation of this Act, a private Act was passed in the 14 Geo. 3 (c. 56), whereby his Majesty was empowered to assign necessary places and quays at Kingston-upon-Hull, and to settle the extents and limits of the same; and by the 45 Geo. 3 (private), the rights and privileges which then belonged to the port of Kingston-upon-Hull were extended to new docks and basins then made, which were deemed and held to be part of the port: (see *Hull Dock Company* v. *Brown*, 2 Barn. & Ald. 43.) The Act of Charles II. remained in force down to the year 1825, when it was repealed, together with a large number of other statutes relating to the Customs, and a new Act passed (6 Geo. 4, c. 108, s. 135), whereby a similar power was given to appoint by commission out of the Court of Exchequer any port, haven, or creek in the United Kingdom, and to set out the limits thereof; but this section contained a proviso *in* affirmance of the common law, that all ports, havens, and creeks, and the respective limits thereof, and all legal quays appointed and set out and existing as such at the commencement of the Act under any law till then in force shall continue to be such ports, havens, creeks, limits, and legal quays respectively as if the same had been appointed under the Act. This provision was re-enacted in the subsequent Consolidation Acts (the 3 & 4 Will. 4, c. 52, and 8 & 9 Vict. c. 86), and each contained the saving in favour of existing ports and quays. But the 9 & 10 Vict. c. 102, which dispensed with the commission out of the Exchequer, and vested the appointment of ports, sub-ports, and quays in the Commissioners of Customs, abrogated the right which existed at common law which had been preserved by all the previous Acts. Sect. 15 empowers the commissioners to annul the limits of any port-sub-port, haven, creek, or legal quay, or to alter or vary the names, bounds, or limits of any such port, sub-port, haven, creek, or quay. Sect. 16 requires the appointment, annulment, or alteration to be published in the *London Gazette*. It was under this statute that the order was made in 1848, annulling the port of Bridlington, and assigning the limits formerly of that port to the port of Hull. From these considerations it appears to us to be beyond a doubt that the word "port" in 54 Geo. 3 is used not in a geographical, but in its legal and proper sense, as denoting a place to which ships were or should be authorised to resort for loading and discharging. Its object and purpose being the preservation and protection of these places from injury for the sake of shipping and commerce, it cannot have been meant to refer to places where ships are not allowed to resort, nor can it refer to the mere geographical limits of such places. Ports and havens are not bounded by such limits, but by limits arbitrarily defined by the authority by which the port is constituted. Bridlington, which was created a port under the statute of Car. 2 extended along this very line of coast at the time the 54 Geo. 3 was passed. Can it be said that this spot was not at that time a part of the shore or bank of the port of Bridlington? It had as a port no other limits than those which were assigned to it when it was created a port. But it was further argued that as Hull is an ancient port, and the power to vary its limits was given for Customs purposes only, the limits of the port remained for all other purposes as they were at the time the 54 Geo. 3 passed, and that the 14th section must be read as applying to the port as it existed at that time. We cannot accede to this argument. It was for Customs purposes that ports were at first instituted, and it is for such purposes they are allowed to retain their franchise, and although at common law the Crown could not revoke an appointment once made, it is clear that under the 9 & 10 Vict. c. 102 the Crown now has the power to annul and take away the franchise from any port, whether it be an ancient port like Hull, or a comparatively modern one like Bridlington. When this, however, is done, the place ceases to be a port, and the 54 Geo. 3 no longer applies to it. If, instead of annulling the port, the commissioners were to contract its ancient limits, the port would consist of the area embraced in those new limits and the coast outside, though formerly subject to, would no longer be within, the jurisdiction of the Board of Trade; so if instead of annulling or contracting,

the commissioners extend the limits of the port, the parts newly taken in become as much a part of the port as was the part originally within it. If the question were whether a right to anchorage or other dues claimable in the port as it existed before the order of 1848, is by virtue of that order extended over the new area, the case would be widely different. The answer that the enlargement was made for Customs purposes and not to benefit the grantee of the dues, would be conclusive; but that has no bearing on the question we have to decide, which is, whether the extended limits form part of the port within the meaning of the 54 Geo. 3, c. 159. For the reasons given we are of opinion that they do, and that the port intended by that Act is the port as it is constituted for the time being by the orders of the Commissioners of Customs. We therefore affirm the conviction. *Conviction affirmed.*

Attorneys: *Brooksbank* and *Galland; The Solicitors to the Board of Trade.*

Wednesday, May 3, 1871.

BECK (app.) *v.* STRINGER (resp.).

25 & 26 *Vict. c.* 66; 31 & 32 *Vict. c.* 56 (*The Petroleum Acts* 1862—68)—"*Petroleum*"—*Mode of testing—Storage.*

25 & 26 *Vict. c.* 66 (*the Petroleum Act* 1862), *s.* 1, *enacts that* "'*petroleum,*' *for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than* 100*deg. of Fahrenheit's thermometer.*" 31 & 32 *Vict. c.* 56 (*the Petroleum Act* 1868), *s.* 6, *empowers inspectors to test petroleum kept for sale contrary to the provisions of the Acts, and provides "that if the person in whose possession such petroleum shall be found shall claim to have a further test made, a public analyst shall be called in who shall test it."*

The schedule prescribes the mode of testing, directing that outer and inner vessels shall be used, the latter being 2*in. deep; that the inner vessel shall be filled with the petroleum, and the outer with cold water. A small flame shall be applied to the bottom of the outer vessel, and a thermometer with a bulb,* 1½*in. in diameter, inserted into the oil, so that the bulb shall be immersed about* 1½*in. beneath the surface; and when heat has been applied to the water until the thermometer has risen to about* 90*deg. Fahrenheit, a very small flame shall be quickly passed across the surface of the oil until a flash is produced.*

An inspector in making this test, allowed the bulb of the thermometer to rest on the bottom of the inner vessel, and passed a "very small flame" across the oil, but a still smaller one might have been employed. The petroleum gave off an inflammable vapour at a temperature of less than 100*deg. Fahr., and the owner was summoned for keeping such petroleum within fifty yards of a dwelling-house or building where the goods were stored.*

He objected to the mode of testing; but the justices thought that the test was properly applied, and they ruled that the only way in which he could displace the test was by calling in a "public analyst." He declined to do so, and was convicted.

On a case stated, the Court

Held, that it did not appear that there had been such a substantial departure from the mode of testing prescribed by the statute as to lead to the conclusion that the decision of the justices was wrong.

CASE stated by justices of Kent under 20 & 21 Vict. c. 43.

The respondent laid an information against the appellant under sect. 6 of the Petroleum Act 1868, charging that the respondent, being inspector of weights and measures for the district, on the 8th Nov. 1870, at the parish of Tunbridge, did enter a certain building within his jurisdiction, wherein petroleum was then kept, offered or exposed for sale; and that he did inspect and test all the petroleum there; and that the building was occupied or used by the appellant; and that upon such inspection and test it appeared that certain of the petroleum gave off an inflammable vapour at a temperature of less than 100deg. of Fahrenheit thermometer, the said building being within fifty yards of a dwelling-house or building in which goods were stored, the appellant not not having a licence by the local authority, contrary to the statute. The appellant was convicted of the said offence, and adjudged to pay a penalty of 10*s.* (*a*)

(*a*) 25 & 26 Vict. c. 66 (The Petroleum Act 1862), s. 1, declares that "'Petroleum' for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100deg. of Fahrenheit's thermometer."

Sect. 4 provides for the granting of licences to keep petroleum.

31 & 32 Vict. c. 56 (the Petroleum Act 1868) enacts that . . . . "no petroleum shall be kept otherwise than for private use within 50yds. of a dwelling-house or of a building in which goods are stored, except in pursuance of a licence given in accordance with the Petroleum Act 1862."

Sect. 6 enacts that it shall be lawful for any inspectors of weights and measures . . . . to inspect and test all petroleum kept, offered, or exposed for sale; and, if upon such inspection and test, any description of petroleum shall be found, kept, offered, or exposed for sale as aforesaid, contrary to the provisions of this Act, or of the Petroleum Act 1862, the same shall be liable to be seized, and upon conviction forfeited, and such person so examining the same shall retain a sample thereof, and the person or persons so offending shall be liable for any such offence to any penalty not exceeding 5*l.*, provided always that if the person . . . . in whose possession such petroleum shall be found as aforesaid, shall claim to have a further test made on their behalf, the magistrate before whom complaint of the said offence may be laid, shall call before him the public analyst provided by the 2nd section of 23 & 24 Vict. c. 84, or if no such analyst has been provided some other person having competent chemical knowledge, who shall test a portion of the sample so retained as aforesaid, in the manner hereinafter provided, and shall give evidence of the result of such test."

Sect. 8 enacts "The temperature at which petroleum gives off an inflammable vapour shall, for the purposes of the Petroleum Acts, be tested in the manner set forth in the schedule hereto."

Schedule. Directions for applying the flashing test to samples of petroleum oil.

The vessel which is to hold the oil shall be of thin sheet iron; it shall be 2in. deep and 2in. wide at the opening, tapering slightly towards the bottom; it shall have a flat rim with a raised edge ¼in. high round the top; it shall be supported by this rim in a tin vessel 4½in. deep and 4½in. in diameter; it shall also have a thin wire stretched across the opening, which wire shall be so fixed to the edge of the vessel that it shall be a ¼in. above the surface of the flat rim. The thermometer to be used shall have a round bulb about ½in. in diameter, and is to be graduated upon the scale of Fahrenheit, every 10deg. occupying not less than ¼in. upon the scale.

The inner vessel shall be filled with the petroleum to be tested, but care must be taken that the liquid does not cover the flat rim. The outer vessel shall be filled with cold or nearly cold water: a small flame shall be applied

Upon the hearing of the above information, at a petty sessions at Tunbridge Wells, it was proved, on the part of the respondent, that on the 8th Nov. 1870 he had visited the appellant's shop, and had there found a certain oil, which he had tested for the purpose of ascertaining whether it was petroleum within the meaning of the Act, that is to say, whether it gave off an inflammable vapour at a temperature of less than 100deg. of Fahrenheit's thermometer, and found that, according to the test used by him, the oil did give off an inflammable vapour at a temperature of less than 100deg. Upon cross-examination by the attorney for the appellant, the respondent produced the apparatus by means of which he had made the test, and it appeared that such apparatus was not provided with any means by which the thermometer could be suspended in the oil, so that the respondent, in making the test, was obliged to, and did in fact, rest the bulb of the thermometer upon the bottom of the inner vessel containing the petroleum, whereby the bulb of the thermometer was inserted in the petroleum to the full depth of the inner vessel, which was 2in. deep, as required by the schedule of the Act. Whereupon the attorney for the appellant objected that the test had not been made in a legal manner—that is to say in the manner required by the schedule; and in support of such objection he called as a witness B. Redwood, Esq., a Fellow of the Chemical Society, and a person experienced in the testing of petroleum, as an expert, who deposed that the apparatus of the respondent was not in a complete state, for want of a standard with fastening screws, which ought to be attached thereto for the purpose of holding the thermometer inserted in the petroleum at the depth required by the Act, viz., about 1½in.; and he pointed out to the justices a screw hole attached to the brim of the apparatus, which, he explained, was intended for the purpose of attaching a standard for suspending the thermometer. The same witness also deposed that the insertion of the bulb of the thermometer to the very bottom of the oil vessel might, in his judgment, fail to give an accurate result, for that, when oil is heated quickly, the heated particles rise to the surface, and until the whole of the oil contained in the inner vessel is heated equally throughout, the lower part thereof is of a lower temperature than the surface which gives off an inflammable vapour, and that a thermometer inserted in such lower part would indicate such lower temperature, instead of the higher temperature of the surface at the time the flashing point was reached; but he admitted on cross-examination that he was unable to state whether the placing of the bulb at the bottom of the oil vessel would cause any different result in the test, as he had never tried the experiment. Upon this point the justices decided that the requirements of the Act had been complied with, because, although the schedule prescribes that the thermometer shall be inserted in the oil, so that the bulb shall be immersed about one and a half inches beneath the surface, yet that exact depth is not required; and because the time stated to have been occupied by the respondent in heating the oil appeared to the justices to be sufficient to insure the equal heating of the oil throughout.

It further appeared, upon the evidence of the respondent, that for the purpose of passing a very small flame quickly across the surface of the oil, in order to ascertain the flashing point as required by the schedule, he had used a small lamp containing spirits of wine, with a cotton wick inserted in such spirits of wine, and drawn out therefrom through a small tube, and the portion of the wick which protruded from the mouth of the tube was ignited, in order to supply the very small flame required; and upon cross-examination the respondent stated that such lamp had not been furnished to him by the philosophical instrument mak r who had supplied the rest of the apparatus, but that he had subsequently procured the same elsewhere. Whereupon the same witness for the appellant deposed that in his opinion such means of producing the very small flame required by the Act was improper, inasmuch as the size of the flame produced by the spirit lamp would vary according to the extent to which the cotton wick might be pulled out from the tube, so that it was almost impossible the flame would ever be of the same size in any two instances of testing. Also that the flame of the lamp would be apt to vary, as the spirit would flow down the tube more or less freely, so that the inclination at which the lamp might happen to be held would make a difference in the result. Also, that the spirit flame produced by the lamp was but indistinctly visible in daylight, so that the real size thereof could not be clearly discerned; also that the heat of a flame from spirits of wine was very much greater than that of most other flames, and too great for the purpose in question; and that in passing such a flame over the petroleum, it would, if passed too slowly, communicate its own heat to the surface, and thus raise the temperature of the surface to a higher degree than that of the body of petroleum heated only by the hot water in the outer vessel. On the other hand the witness stated that the proper mode, in his opinion, of producing the very small flame required, was by a piece of very fine waxed twine, the flame from which was necessarily uniform in size and brilliancy, and could not vary at the pleasure or by the mistake of the operator, and that the heat thereof was very trifling, so that it could not impart an exceptional temperature to the surface of the petroleum under test. Also that the waxed twine was the means actually in use by Dr. Letheby and other eminent analysts; and he supposed that the reason why philosophical instrument makers did not supply with the apparatus any lamp or other means of producing the very small flame in question, was because it was well understood that such flame was to be produced by such fine waxed twine. The witness exhibited a piece of such fine waxed twine ignited in compari-

to the bottom of the outer vessel, and the thermometer shall be inserted into the oil so that the bulb shall be immersed about 1½in. beneath the surface.

A screen of pasteboard or wood shall be placed round the apparatus, and shall be of such dimensions as to surround it about two-thirds, and to reach several inches above the level of the vessels. When heat has been applied to the water until the thermometer has risen to about 90deg. Fahrenheit, a very small flame shall be quickly passed across the surface of the oil on a level with the wire. If no pale blue flicker or flash is produced, the application of the flame is to be repeated for every rise of 2deg. or 3deg. on the thermometer. When the flashing point has been noted the test shall be repeated with a fresh sample of the oil, using cold or nearly cold, water as before, withdrawing the source of heat from the outer vessel when the temperature approaches that noted in the first experiment, and applying the flame test at every rise of 2deg. in the thermometer.

son with the flame from the respondent's spirit lamp. The justices find as a fact that both the flames so produced were very small flames, although that from the waxed twine was the smaller of the two.

The attorney for the appellant then contended that the Act not having defined the flame required otherwise than as a very small flame, and not having prescribed the mode of producing it, it was competent to the appellant to show by evidence what was the proper size of flame, and the proper mode of producing it; and called upon the justices to declare, upon the evidence before stated, that the flashing of the petroleum by the respondent, by means of a flame produced by a spirit lamp, was not in accordance with the Act and the schedule thereto.

The justices, however, decided that as the Act did not prescribe the manner in which this testing flame shall be produced, the respondent was at liberty to use any means by which a very small flame could be produced. And as the justices found on the evidence that he had in making his test used such a flame, they held that on this point he had satisfied the requirements of the Act.

The attorney for the appellant then called witnesses for the defence, by whom it was sworn that the appellant had purchased the petroleum from a wholesale dealer, who had received with the oil a certificate that it had been tested, and that its flashing point was 104deg. of Fahrenheit's thermometer; and also that a portion of the appellant's petroleum had since been carefully tested by another competent person, who had used fine waxed twine to produce the very small flame required for flashing the oil, and that upon such subsequent test the oil did not give off an inflammable vapour at less temperature than 100deg. of Fahrenheit's thermometer. And also that other parts of similar petroleum, part of the same consignment, and bought of the same wholesale dealer under the same certified test, had been tested by the respondent himself upon the premises of two other retail dealers in Tunbridge Wells, and had been passed by him as not giving off an inflammable vapour at less temperature than 100deg.

The justices having heard the evidence were of opinion that the respondent's test had been made legally in accordance with the statute; and decided that the only way in which the appellant could displace such a test was by claiming to have a further test made by a public analyst or competent chemist, as mentioned in the proviso to sect. 6; and they inquired of the appellant if he claimed to have such further test, whereupon the attorney for the appellant answered that he could not do so without admitting the legality of the test made by the respondent, which he disputed, and that he preferred to rely on the evidence already given for the defence, or proof of the oil not being petroleum within the meaning of the statute, than to refer that question to an unknown person, by whose decision the appellant would have to be bound, without having the right to be present while such further test was made, or the opportunity of cross-examining the person who should make it, as to the means and manner of performing the same. It was contended by the appellant, first, that the insertion of the thermometer in the petroleum to the full depth of the inner vessel in the manner stated in the case was not a compliance with the mode of testing required by the Act, but was a material variation therefrom, such as was shown by the evidence might affect the result of such test, and that not being therefore in conformity with the statute no convictions would take place founded on such test. On the other hand, respondent contended that as the statute prescribes the depth of the immersion of the bulb of the thermometer to be "about one and a half inches," without defining the exact depth, the insertion of the thermometer in the manner stated in the case was not a departure from the requirements of the statute, and therefore the test so made was valid in law. Secondly, the appellant contended that the statute not having defined with precision the size of the very small flame required for flashing petroleum, or the proper means of producing it, the justices were bound to consider the evidence tendered on the part of the appellant on those points, and that such evidence, having shown that the flame used by the respondent in making his test was not produced in the same way as that said to be ordinarily used by eminent analysts, nor such as is required and intended by the statute, the justices should have dismissed the information on the ground that the mode of testing required by the Act had not been complied with. On the other hand, the respondent contended that the Act having left the exact size of the "very small flame" in question and the mode of producing it undefined, the justices were at liberty to disregard the evidence offered by the appellant on the point, and to decide whether the flame used by the respondent was in fact a very small flame, and that therefore that the test made by the respondent was in that respect valid in law so as to ground a conviction. Thirdly, the appellant contended that the two justices should have taken into consideration the evidence given in the defence for the purpose of showing that the oil in question was not, in fact (if properly tested), petroleum within the meaning of the Petroleum Act 1868, and that the appellant was not bound to claim, under the proviso contained in the 6th section, that a further test should be made by a public analyst or other competent chemist, as the only means of displacing the test made by the respondent. On the other hand, the respondent contends that the justices were right to refuse to take such evidence for the defence into consideration, and alleges that there is no other way of avoiding a conviction (if the test by the inspector has been legally made) than by the defendant claiming such further test to be made, and that the result of such further test when made, and that only, would be conclusive for the purpose of acquittal or conviction. If the court should be of opinion that upon the facts before stated, the justices were right in deciding that the test made by the respondent was made according to law, both upon the first and second points, and that they were therefore bound to convict the appellant unless he claimed to have a further test made pursuant to sect. 6, then the conviction was to stand, otherwise the information was to be dismissed.

Grantham for the appellant argued the objections aforesaid.

Anderson, for the respondent, was not called upon to argue.

COCKBURN, C. J.—The justices having heard the evidence (and I think they were quite right to hear the testimony offered on the part of the

appellant for the purpose of satisfying them that the test under the Act of Parliament had not been properly applied), came to the conclusion that the provisions of the statute had been substantially complied with; and I confess that I cannot see that there had been such a substantial departure from the mode of testing prescribed by the enactment as to lead us to the conclusion that the magistrates were wrong. That being so, the only kind of appeal given by the Act in case the parties are dissatisfied with the test, is the one afforded by the proviso in sect. 6, directing if the person shall claim a further test that an analytical chemist shall be called in to apply the test again—at all events to use his skill to ascertain whether the petroleum is of such a character as to come within the terms of the statute. In this case not only did the applicant not claim to have a public analyst called in, but on being offered that he declined it. I think the magistrates were quite right in saying that when once they had arrived at the conclusion that there had been a proper test, that was the only course for the appellant to pursue, and that they were not bound to adopt the view of his witnesses that the test had not been properly applied; and unless we could see our way very clearly to think they were wrong, we ought not to interfere with their decision.

BLACKBURN, J.—I am of the same opinion. The first Petroleum Act 1862 (25 & 26 Vict. c. 66, s. 1), provides that "'petroleum,' for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100deg. of Fahrenheit's thermometer." Whether or no the product gave off an inflammable vapour at that temperature had to be proved as it best might be, for there were no provisions in the Act for testing it. That was found inconvenient, and therefore the Amendment Act (31 & 32 Vict. c. 56, s. 6), says that, "It shall be lawful for any inspector of weights and measures . . . at all reasonable times, to inspect and test all petroleum kept, offered, or exposed for sale; and if upon such inspection and test any description of petroleum shall be found kept, or offered, or exposed for sale as aforesaid, contrary to the provisions of this Act, or of the Petroleum Act 1862, the same shall be liable to be seized, and, upon conviction, forfeited." I can only understand from that, that the authorised officer is to go and test, and if upon his test petroleum is found contrary to the Act of Parliament, *primâ facie*, it would be forfeited. Then the same section provides that, if, when before the magistrate, the person in whose possession such petroleum shall be found shall claim to have a further test made, "the magistrate shall call before him the public analyst, provided by the 2nd section of the Act 23 & 24 Vict. c. 84, or if no such analyst has been provided, some other person having competent chemical knowledge, who shall test a portion of the sample . . . and shall give evidence of the result of such test"; thereby providing very well for the case of a dispute as to the former test. Then sect. 8 directs that "the temperature at which petroleum gives off an inflammable vapour shall, for the purposes of the Petroleum Acts, be tested in manner set forth in the schedule hereto." Then follows the schedule directing how it shall be done. Next comes the question whether the proper officer to test has tested in the proper manner as described in the schedule. The justices have said that he has. He really applied the test, and the only objection here is, that whereas the Act says "a small flame" shall be applied, a smaller one was used, and whereas the Act says, "The thermometer shall be inserted into the oil, so that the bulb shall be immersed about 1½in. beneath the surface," the person inserting the thermometer did so in such a manner that it quite touched the bottom of the vessel. I cannot think that was deviating from the prescribed mode of testing in such a substantial point as to warrant the conclusion that the inspector was not properly applying the test. If it was so, and an analytical chemist had been called in, the magistrates would have quashed the conviction. I cannot think the magistrates were wrong in coming to the conclusion that the test was properly applied, and I am therefore of opinion that the conviction was right.

LUSH, J.—I am of the same opinion.

Judgment for the respondent.

Attorneys for the appellant, *S. F. Langham* and *Son*, agents for *J. G. Langham*, Uckfield.

Attorneys for the respondent, *Stone, Wall*, and *Simpson*, Tunbridge Wells.

Saturday, June 3, 1871.

BOWDITCH (app.) *v.* THE WAKEFIELD LOCAL BOARD OF HEALTH (resps.)

Public Health Act 1848—*Assessment of owner for works done under sect.* 69—*Charity school*—*Trustee*—*Owner.*

A charity school was established in Wakefield on premises granted under the provisions of the 4 & 5 *Vict. c.* 38 (*an Act to afford Facilities for the Conveyance and Endowment of Sites for Schools*), *of which the appellant was a trustee, receiving no rent, and deriving no profit therefrom. The Local Board of Health of Wakefield, acting under sect.* 69 *of the* 11 & 12 *Vict. c.* 63 *Public Health Act* 1848), *gave proper notice that certain works therein mentioned should be done in a street upon which the school abutted, which works not being effected the board themselves did them, and charged the expenses to the appellant as "owner," as described by the* 2*nd section* (*interpretation clause*) *of the said Public Health Act* 1848:

Held, that they were justified in so doing.

THIS was a case stated by the justices of the borough of Wakefield, under the 20 & 21 Vict. c. 43, upon an order made by them upon the appellant to pay the sum of 44*l.* 6s. It appeared that complaint had been made against the appellant for the nonpayment of the foregoing sum, which the respondents claimed as due in respect of expenses incurred by them in the execution of works under sect. 69 of The Public Health Act, 1848 (11 & 12 Vict. c. 63), in connection with certain premises in the occupation of the appellant. The premises alleged to have been in the occupation of the appellant consisted of a building erected for and used as elementary schools for the education of the poor in the district of St. Andrew, in the parish and borough of Wakefield, and of two dwellings erected for the teachers of the schools abutting upon the street, in respect of which the expenses were incurred. The appellant was one of three trustees, and he held the premises subject to the trusts of a deed which vested the property in the Bishop of

ese of Ripon, the Archdeacon of Craven and as incumbent of the ecclesiastical district Andrews, Wakefield, and their successors, for the purposes of the 4 & 5 Vict. c. 38, s. 10, rust to permit the premises and all build- e erected thereon, to be for ever appropriated d as a school for the education of poor per- and in the district of St. Andrews, and for dence of the schoolmaster or schoolmistress aid school, and for no other purpose what- the school to be always in union with the l society for promoting the education of the the principles of the established church, herance of its ends and designs, and to be he direction, &c., of a committee. The hich was dated the 10th November 1845, was i pursuance of the 4 & 5 Vict. c. 38. The it and the other trustees derived no rent or enefit from the property, nor would they any, having no power to let the pre- a tenant, and the premises being incapable let to a tenant.

ct. 69 of the Public Health Act 1848 it is that in case any present or future street, art thereof, be not sewered, levelled, paved, he satisfaction of the local board of health, ard may by notice to the respective owners iers of the premises fronting, adjoining, or upon such parts thereof as may require wered, &c., require them to sewer, &c., the thin a time to be specified in such notice, uch notice be not complied with the said rd may execute the works, and the expenses by them in so doing are to be paid by the in default, according to the frontage of spective premises, &c., and such expenses recovered from the last-mentioned owners mary manner, &c.

2 of the same statute, which is the inter- n clause, says: "The word 'lands' and d 'premises' shall include messuages, s, lands, and hereditaments of any tenure." e word 'owner' shall mean the person for being receiving the rack rent of the lands ises in connection with which the said word whether on his own account or as agent ee for any other person, or who would so he same if such lands or premises were rack rent."

e 4 & 5 Vict. c. 38 (an Act to Afford Facilities for the Conveyance and Endow- Sites for Schools) it is enacted by sect. 2 person being seised in fee simple , . . . any manor or lands of freehold, copyhold, mary tenure, and having the beneficial therein . . . . may grant, convey, or en- . . . . any quantity not exceeding one uch land as a site for a school for the edu- poor persons or for the residence of the aster, or schoolmistress, or otherwise for the of education of such poor persons in and useful knowledge . . . . Provided t upon the said land so granted as afore- any part thereof, ceasing to be used for oses in this Act mentioned, the same shall n immediately revert to, and become a f the said estate held in fee simple or other- of any manor or land as aforesaid, as fully tents and purposes as if this Act had not

y appeared for the appellant.—The appel- t liable to be assessed to these charges, as he is neither the owner nor the occupier of them; the premises are, in fact, a charity school, producing no rent, and incapable of producing any. [COCKBURN, C. J.—Do you mean that the school *qua* school is exempt, or that some one else is liable?] No one, under existing circumstances, is liable. The appellant is not "owner" within the meaning of the interpretation clause, nor does he come within the last part of the description as a person "who would receive the same" (rent) "if such lands or premises were let at a rack rent," since the premises could not be so let. The appellant receives no rent, and cannot possibly receive any, and he has therefore nothing out of which he can pay this demand; if the premises are applied to any other purpose, they revert to the grantor. [LUSH, J.—If you look at the amending Act, the 21 & 22 Vict. c. 98, there is a clause, the 38th, which expressly exempts the minister of any church or chapel or place appropriated to public worship from this liability; and as schools are not mentioned, it is a strong argument that they were not intended to be exempted.] Here there is no income out of which this payment can be made. He is neither the owner in the receipt of rent nor capable of being one. Can it with propriety be said that the appellant is in any sense an owner of these premises? [BLACKBURN, J.—As a trustee, he necessarily incurs some liability, and must have some means of recouping himself.] The term "owner" has hitherto always been applied to some one who can receive a rent or derive a benefit for the premises. He referred to

Edleston v. *Francis*, 7 C. B., N. S., 568, 581, 587;

and to

Angell v. *Paddington*, L. Rep. 3 Q. B. 714.

Milward, Q.C. (*Wills* with him.)—The appellant, as trustee, is the legal owner of the premises which, unless they are expressly exempted, are liable to these expenses. It is quite immaterial that they produce no rent in fact. Suppose the application were to be for a poor-rate it would be made to the trustee. [COCKBURN, C.J.—There is certainly some difficulty in saying that this gentleman comes within the definition of an "owner."] As the property is not exempt, there must be some one liable to pay.

Hannay was heard in reply.

BLACKBURN, J. (*a*). — I think that our judgment must be for the respondent. The burthen of making these works is cast upon the owners of the property having the frontage. The property here consists of premises fronting the street, and the appellant is the trustee, or, in a popular sense, the owner. Now, the interpretation clause says that the word "owner" shall mean the person for the time being, receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent. The clause does not say that the word "owner" shall include such persons, but that it shall mean such persons. Now, it is true that the school cannot be let, yet, if any benefit could arise from it, it would attach to the owner. Therefore, I think the appellant is within the words of the section, and there is no reason why the premises should not bear the bur-

(*a*) Cockburn, C.J. had left the court.

then. And as to the payment falling upon the trustee, he must get recouped out of the funds, whatever they may be.

MELLOR, J.—I am of the same opinion. The owners of premises fronting the street are to pay the expenses, and there is no exception of property. In the subsequent Act there is a specific exception from liability in certain cases which does not include the present one. I cannot read the Act without thinking that the appellant comes within the description of "owner."

LUSH, J.—The statute upon which the case of *Angell* v. *The Paddington Vestry* was decided, was very different to this. The appellant here is undoubtedly an owner within the meaning of the Act, and it is no answer for him to say that he has accepted an office which forbids him from letting the premises.

Judgment for the respondents.

Attorney for the appellant, *H. A. Maude.*

Attorney for the respondents, *C. Barrett*, Wakefield.

Wednesday, June 7, 1871.

FLIGHT (app.) *v.* THE VESTRY OF ST. GEORGE THE MARTYR, SOUTHWARK (resps.)

Artizans' and Labourers' Dwellings Act 1868—*Reports of medical officer of health and the surveyor—Including a row of houses in one report—Particulars of defects.*

By the 31 *&* 32 *Vict. c.* 130 (*The Artizans' and Labourers' Dwellings Act* 1868) *ss.* 5 *&* 6, *if the officer of health finds that any premises are in a condition or state dangerous to health, so as to be unfit for human habitation, he is to report the same to the local authority, and the local authority are to refer such report to a surveyor or engineer, who is thereupon to consider such report, and to report to the local authority what is the cause of the evil and the remedy, and if such evil is occasioned by defects in any premises, whether the same can be remedied by structural alterations and improvements, or otherwise, or whether such premises or any and what part thereof ought to be demolished.*

A medical officer of health reported that certain premises in Marsh's-court, in the parish of St. George the Martyr, Nos. 1 *to* 12 *and* 13, *were in a condition or state injurious to health, so as to be unfit for human habitation; and upon this report the surveyor reported that he had surveyed the said premises, and was of opinion that the causes of the evil were structural defects in the said premises, and that such defects cannot be remedied by structural alterations or improvements, or otherwise, but such premises ought to be demolished. The whole of the said premises belonged to the appellant. The vestry subsequently made an order that the said premises should be totally demolished.*

Held, first, that it was not necessary that there should be a report, and an order in respect of each house, but that one report and one order were, under the circumstances, sufficient; secondly, that as the report of the surveyor stated that the structural defects could not be remedied, but that the premises ought to be demolished, it was unnecessary to specify in detail in what the structural defects consisted.

THIS was an appeal against an order of the respondents under the provisions of the Artisans' and Labourers' Dwellings Act 1868 for the demolition of certain houses the property of the appellant, situate in the parish of St. George the Martyr, Southwark, in the county of Surrey, and known as Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, Marsh's-court.

The appeal was tried at the Midsummer Quarter Sessions for the county of Surrey, and upon the hearing it was proved by the respondents that upon the 16th Nov. 1869 Henry Bateson, doctor of medicine, medical officer of health to the respondents' parish, made in writing and delivered to the clerk to the respondents a report in the words and figures following:

Artizans' and Labourers' Dwelling Act 1868.

To the Vestry of St. George the Martyr, Southwark.

I have to report that I find the premises situate in Marsh's-court, in the parish of St. George the Martyr, Southwark, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 are in a condition or state dangerous to health so as to be unfit for "human habitation."

HENRY BATESON, M.D.,
16th Nov. 1869. Medical Officer of Health.

Which report was referred by the respondents to William Berriman, of Buckland House, Wilson-road, Camberwell, surveyor, who thereupon considered the said report, and did on the 13th Dec. report to the respondents as follows—namely:

Having considered the report made to you the said vestry, as the local authority, by Dr. Bateson, in the following terms: [sets out the report] which report was referred to me on the 16th Nov. last, I have to report to you, the said vestry, that I have surveyed the said premises, situate and being Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, Marsh's-court aforesaid, and I am of opinion, and report accordingly, that the causes of the evil so reported on by Dr. Bateson are structural defects in the said premises, and that such defects cannot be remedied by structural alterations, or improvements, or otherwise, but such premises ought to be wholly demolished.

That upon the 8th March 1870 the respondents made the following order the subject of appeal:—

In the matter of the Artizans' and Labourers' Dwelling Act 1868, and in the matter of premises situate and being Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 Marsh's-court, in the parish of St. George the Martyr, Southwark, in the county of Surrey.

Whereas in pursuance of the above-named Act, Henry Bateson, doctor of medicine, medical officer of health for the above-named parish of St. George the Martyr, Southwark, on the 16th Nov. 1869, made and delivered to the undersigned, Daniel Birt, the clerk to the vestry of the said parish, a report in writing as follows, namely: [sets out the report.]

And whereas on the 16th Nov. 1869, the said vestry referred the said report to William Berriman, of Buckland House, Wilson-road, Camberwell, in the said county of Surrey, surveyor. And whereas the said William Berriman, having considered the said report of the medical officer of health, did on the 13th Dec. 1869, report to the vestry as follows, viz.: [sets out the report referred to.]

And whereas upon receipt of the report of the said William Berriman, the vestry caused copies of both the said reports to be given to John Etherington Welch Rolls, of the Hendree, in the county of Monmouth, Esquire; Joseph Cleaver, of Guildhall-chambers, Basinghall-street, London, surveyor; and Thomas Flight, of Bond-court, Walbrook, London, Esquire, as the owners or owner of the above-named premises, with notice that [after reciting appointments and postponements] the vestry had appointed Tuesday the 1st March, 1870, at seven o'clock in the evening at the Vestry Hall, Borough-road, Southwark aforesaid, for the consideration of the said two reports. And whereas at the time and place last aforesaid, the said John Etherington Welch Rolls, and Joseph Cleaver did not attend, but the said Thomas Flight attended by his solicitor and agent and stated the following objections to the said two reports, namely, first, that Mr. Flight has never received a copy of the report of a surveyor and of an engineer; secondly, that the report of the surveyor is not sufficient inasmuch as it does not state sufficiently explicitly the cause of the evil reported on

and the remedy thereof; thirdly, that the premises are not in a condition or state dangerous to health so as to be unfit for human habitation; fourthly, that there are no structural defects upon the said premises; fifthly, that there are no defects upon the premises that cannot be remedied by structural alterations and improvements, or otherwise; and thereupon the vestry having considered the said two reports, and the above-mentioned objections thereto resolved as follows, namely, that the defects in the said premises cannot be remedied by structural alterations or improvements or otherwise, and the said premises require, therefore, to be totally demolished, and the vestry clerk is hereby directed to draw up an order accordingly, to be made by the vestry, and signed by the clerk at the next meeting. Now, therefore, in pursuance of the authority conferred on them by the said above-mentioned Act, the said vestry do by this their order in writing, signed by their clerk, hereby order and direct that the said premises, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, Marsh's-court, in the parish of St. George the Martyr, Southwark, in the country of Surrey, be totally demolished. Dated this 8th March 1870.

DANIEL BIRT,
Clerk to the Vestry of the Parish of St. George the Martyr, Southwark, Surrey.

It was further proved by the respondents that the said premises were unfit for human habitation, by reason of structural defects therein, causing unhealthy and defective ventilation, and from the smallness of the rooms.

It was thereupon contended, on behalf of the appellant, that the order of the respondents appealed against was made upon an insufficient and incomplete report of the officer of health, and upon an insufficient and incomplete report of the surveyor, to whom the report of the officer of health was referred, and is bad in law.

The court overruled these objections.

It was then proved by the appellant that the said premises could be rendered fit for human habitation by structural alterations, according to a plan marked C., produced by the appellant and attached to the order of this court.

The court, therefore, made an order that the appellant should carry out the said alterations as set forth in the said plan, and that each party in the appeal should pay his own costs.

The counsel for the appellant requested the court to state the facts specially for the opinion of the Court of Queen's Bench, and the order of the court was made subject to the opinion of the Court of Queen's Bench upon the validity of the respondent's order of the 8th March 1870.

If the court should be of opinion that the respondent's order was good in law, then the order of the Court of Quarter Sessions aforesaid shall stand confirmed; but if the court shall be of a contrary opinion, then the said order shall be quashed, and judgment upon the appeal be given for the appellant, and the order of the respondents be quashed.

By The Artisans' and Labourers' Dwellings Act 1868 (31 & 32 Vict. c. 130) it is enacted, by sect. 5, that:

If in any place to which this Act applies the officers of health find that any premises therein are in a condition or state dangerous to health, so as to be unfit for human habitation, he shall report the same in manner hereinafter provided to the local authority.

Sect. 6 enacts that:

Every report made under this Act by the officer of health shall be in writing and delivered to the clerk of the local authority, and the local authority shall refer such report to a surveyor or engineer, who shall thereupon consider the report so furnished to him, and report to the local authority what *is the cause of the evil so reported on and the remedy thereof, and if such evil is occasioned* by defects in any premises, whether the same can be remedied by structural alterations and improvements or otherwise, or whether such premises, or any, and what part thereof ought to be demolished.

By the interpretation clause (sect. 3) the word "premises" means any dwelling house, house, or inhabited building, and the site thereof with the yard, garden, outhouses, and appurtenances belonging thereto or enjoyed therewith.

Robinson, Serjt., and *Hurrell*, appeared for the respondents in support of the order.—The order of the quarter sessions is good. The sessions had jurisdiction to make a fresh order, and they have in fact altered the order of the board. It is contended on the other side that there should have been a separate order in respect of each house, but there is no reason why this should be so, especially as all the houses are in a row and belong to one owner. [LUSH, J.—I observe that in the 3rd schedule to the Act the order mentions "one or more house or houses, or buildings."]

E. Clarke for the appellant.—There should have been an order in respect of each house, since it might be that it is not every house that is dangerous to health and each house therefore should be pointed out. The interpretation clause states that the word "premises" is to mean any dwelling-house. [LUSH, J.—It does not say "only one house."] It must mean only one house. The officer of health does not say that each house is defective. [MELLOR, J.—He says that all are. This is not a question of special demurrer; we must look at the facts stated in a comprehensive point of view.] The quarter sessions have found differently to the officer of health and the surveyor. The owner has a right to know what is required for each house. [MELLOR, J.—If you are right, Mr. Flight would have required twelve notices. There could have been no use in this, and it would have been a great inconvenience.] He would then at all events have been enabled to have ascertained what repairs each house required. The report moreover is bad, as being too general; it does not state what are the structural defects. The defects themselves ought to be pointed out.

COCKBURN, C. J.—I think the report was quite sufficient. If you find a lot of houses together, all of which are not in the same condition, and the report is intended to apply to some of them only, it should specify which. But in the present case the surveyor intended that his report should apply to all the houses, and he was right, therefore, in so applying it. Then, as regards the objection that the report has not gone sufficiently into detail—that depends upon what he intended to report. If he meant that the whole were equally bad, it would be sufficient to include them in this way. If the surveyor thought that the whole of the premises required demolition, he was quite right in including all in one general report.

MELLOR, J.—I am of the same opinion. I agree with one observation of the counsel for the appellant, that the report of the officer of health is in the nature of an accusation which is referred to the surveyor, who examines into the cause, and according to his judgment he finds that nothing will remedy the defects but their demolition. If he had reported that some particular alterations were requisite he should have stated the nature of those alterations. But as there was, in his judgment, nothing that could be improved, he could have no particulars to state, and he was therefore right.

in reporting generally. Then as to the objection that there should have been a separate report in respect of each house, we should not interpose unnecessary obstacles in carrying out this statute, but should construe it in a liberal manner, and I cannot but think that it would be very unnecessary that there should be separate notices and orders in such a case.

LUSH, J. concurred.

Order of sessions affirmed.

Attorney for the respondents, *D. Birt.*

Attorneys for the appellant, *Batt* and *Son.*

Thursday, June 22, 1871.

GRIFFITHS v. LONDON AND ELDERSFIELD DRAINAGE BOARD.

24 & 25 *Vict.* c. 133 (*Land Drainage Act* 1861) *ss.* 29, 31, 38—*Abortive scheme—Expenses of plans—Rate on occupiers.*

The defendants a drainage board, having, under 24 & 25 *Vict.* c. 133, *the powers of commissioners of sewers within their district, contemplated executing some drainage works.*

Sect. 29 *of the above-mentioned statute enacts, that previously to commencing any improvements in existing works, or any new works which involve an expenditure of more than* 1000*l.*, *the commissioners shall cause plans of the proposed works, and an estimate of the expense thereof, and of the area of land to be rated for such expense, to be made, and shall publish their intention to execute such works two months before commencing the same.*

By sect. 31, *if within such period the proprietors of one half of the area of land declare by notice in writing that they are unwilling that such work should be executed, the commissioners shall take no further steps therein.*

By sect. 38, "*rates may be levied by commissioners of sewers for defraying all costs, charges, and expenses incurred or to be incurred by them . . .*" *and* "*a rate . . . for the purposes of defraying the expense of any improvements in existing works, or any new works, when such improvements or new works involve an expenditure of more than* 1000*l.*, *shall be deemed to be a tax on the owners of property; but, except such special rate, rates leviable by the commissioners shall be payable by the same persons, in respect of the same property, and in the same manner as they are now by law payable.*"

The defendants caused plans to be prepared, and duly published their intention of making certain new works. The proprietors of one-half the area gave notice that they were unwilling that such work should be executed. The plans, consequently, proved useless, and the expense of preparing them was charged in a general rate on the occupiers, of whom the plaintiff was one. He, being assessed in respect of a house and land, objected to the rate, on the grounds that it should have been an acreage rate on land only, and laid upon the owners:

Held, that as the owners had negatived the proposed scheme, they were not chargeable with the preliminary expenses, which must, therefore, fall on the occupiers, and that the rate was rightly made.

THIS was an action of replevin for taking the plaintiff's horse. The defendants denied the taking, and justified it as a distress, first for a land drainage rate, and, secondly, for a sewers tax. The plaintiff joined issue thereon. The cause which had been removed from the County Court of Gloucestershire into this court was entered for trial at the Spring Assizes 1870, for the County of Gloucester, where by consent the record was withdrawn upon the terms that the questions between the parties should be raised by the following

CASE.

1. The plaintiff is a farmer living at and occupying a house and land (of part of which land, namely, 1 rood 30 perches, as appears in the rate hereinafter set forth, he is the owner) in Elderfield in the County of Worcester. The defendants are a drainage board, incorporated under the provisions of the Land Drainage Act 1861 (24 & 25 Vict. c. 133), (a) for a separate drainage district comprising lands in several parishes, including the parishes of Longdon and Elderfield in the said counties of Gloucester and Worcester.

2. Previous to 1863, costs, charges, and expenses were incurred by the board in and about the setting out, and surveying, and mapping the land to be included in their drainage district (such survey, plans, &c., were made by Mr. Swinburne), and costs, charges, and expenses were incurred by the Inclosure Commissioners in relation to the issue of the provisional order constituting the drainage board, dated Jan. 28 1863, and obtaining the said local Act confirming same, and there were also other necessary costs, charges, and expenses incurred by the board. The total of such costs,

(a) 24 & 25 Vict. c. 133 (the Land Drainage Act 1861), s. 29, enacts that: "Previously to commencing any improvements in existing works, or any new works where such improvements or new works involve an expenditure of more than 1000*l.* the commissioners shall cause plans of the proposed work, and an estimate of the expense thereof, and of the area within which a rate will require to be levied to meet such expense, to be made, together with a list of the names and addresses of the persons reputed to be proprietors of the land within such last-mentioned area, with the addition of the number of acres of which each person is reputed to be the proprietor, and shall publish their intention to execute such works two months before commencing the same in manner" therein described.

Sect. 31. "If within such period of two months the proprietors of one-half of the area of land within which a rate is, according to the notice, proposed to be levied declare in writing to the commissioners, by notice left at their office, that they are unwilling that such work should be executed, the commissioners shall take no further steps therein; but if no such declaration of dissent is made, the commissioners may, at the expiration of such period of two months, commence the proposed work and repay out of the rates to be levied by them within the area all expenses incurred, not exceeding the estimate published in the notice."

Sect. 38. "The following regulations shall be observed with respect to rates leviable by commissioners of sewers, that is to say, first, as to the purposes of the rate: Rates may be levied by the commissioners of sewers for defraying all costs, charges, and expenses incurred or to be incurred by them under the authority of any Act of Parliament, law, or custom; secondly, as to the incidence of the rates: (1.) A rate levied by commissioners for the purposes of defraying the expense of any improvements in existing works or any new works, where such improvements or new works involve an expenditure of more than 1000*l.*, shall be deemed to be a special rate, and shall be deemed to be a tax on the owner of property; but, except such special rate, rates leviable by the commissioners shall be payable by the same persons, in respect of the same property, and in the same manner as they are now by law payable."

charges, and expenses so incurred did not amount to 450*l*. In 1863 (after incurring such expenses as aforesaid), the defendants employed Mr. J. Bailey Denton, C. E., to survey the lands within their district, and to prepare working maps, plans, specifications, and a report for the purpose of making works for the improvement of the existing drainage works of all the lands within their district, and for providing a general outfall for all such drainage, according to the provisions of the said Acts. Mr. Denton used Mr. Swinburne's survey and completed his own plans, specifications, and report in March 1864, for which the defendants paid him 112*l*., and as the plans, &c., of the improvements contemplated had then caused an expenditure of more than 1000*l*., and the completion of the improvements contemplated in accordance with such plans, &c., would cause an expenditure of about 10,000*l*., the defendants endeavoured to obtain the necessary assent required by the Land Drainage Act 1861 to the cost then incurred, and to such improvements being completed, but within the necessary time the proprietors of more than one-half of the area of land within the said district and within which a rate was proposed to be made, declared in writing in due form to the said defendants, that they were unwilling that such works should be completed in the manner proposed by Mr. Denton and everything happened which was necessary to happen to require that the defendants should take no further steps therein. The defendants necessarily incurred costs, charges, and expenses for, and incident to the matters aforesaid amounting to 2253*l*. 4*s*. 6*d*. in the whole (including the sum paid to Mr. Denton). In the year 1867 the said survey and plans prepared by Mr. Swinburne, and the plans, &c., prepared by Mr. Denton were submitted by the defendants to Mr. Curley, C.E., for the purpose of preparing a scheme of drainage for the said district. Mr. Curley used Mr. Swinburne's survey, and saw Mr. Denton's plans, but made his own plans and prepared a different and much less expensive system of drainage works, which was duly assented to by the requisite number of land owners in the district, and such drainage works have since been executed.

3. In order to provide money to meet the said costs, charges, and expenses so amounting to 2253*l*. 4*s*. 6*d*., as aforesaid, the defendants caused a valuation of the houses, buildings, and lands in the said district to be made, and, on such valuation, made a rate upon all the occupiers of the houses, buildings, and lands in the said district, according to their annual value, at 9*d*. in the pound.

The said rate, which was made on the 25th Feb. 1866, had the following heading:

Longdon and Eldersfield Drainage District, to wit.

A rate and assessment made on all occupiers of lands in the Longdon and Elderesfield drainage district, in the county of Gloucester, according to the quantities and qualities of the estates, for the costs, charges, and expenses incurred by the Longdon and Elderesfield Drainage Board, under the authority of the Land Drainage Act 1861, and the several other Acts of Parliament incorporated therewith, incurred in causing plans and estimates to be prepared of works proposed to be done under, and by virtue of the said Act, and otherwise complying with the said Act with respect to the said works.

Dated this 25th Feb. 1866.

5. The plaintiff, who was only an occupier (and not an owner) of a house and a certain quantity of land, was assessed thereon as occupier, to the said rate at the sum of 8*l*. 6*s*. 11*d*., being at the rate of 9*d*. in the pound on the said valuation of the said house and land according to their annual value, in the following form: [Copy assessment set out. It was in the common tabular form, showing the name of the occupier assessed, the owner, description of property, acreage or extent, annual value, rateable value, sum assessed at 9*d*. in the pound. The plaintiff was therein assessed as "occupier" in the above sum of 8*l*. 6*s*. 11*d*., made up of an item of 4*l*. 1*s*. 5*d*. for house, garden, and orchard, 3*l*. 3*s*. 8*d*. for one meadow, 1*l*. 1*s*. 10*d*. for another, and 5*s*. 10*d*. for a stone quarry.]

6. The plaintiff objected to pay the said rate upon the ground (among others) that it should have been an acreage rate made on land alone, and on the owners, not on the occupiers of land.

7. The plaintiff attended a meeting of the defendants on the 10th April 1866, and then objected to the validity of the rate, and refused to pay the same on the above grounds (among others), but the defendants decided against such objection.

8. The plaintiff, still refusing to pay the rate, was summoned by the defendants who afterwards, on the 15th Oct. 1868, distrained the said horse for the said rate of 8*l*. 12*s*. 9*d*.

9. The plaintiff thereupon replevied the horse. The questions for the opinion of the court were: First, whether the rate should have been an acreage rate? secondly, whether it should have been made upon lands only? thirdly, whether it should have been made upon the owners and not the occupiers of the lands.

Lord, for the plaintiff.—These expenses, being preliminary to improvements which would have cost more than 1000*l*., were such as should have been defrayed by means of a special rate on the owners, and should not fall on the general rates, 24 & 25 Vict. c. 133, s. 38. The rate, moreover, should not have been a valuation, but an acreage rate, and should not have included houses. 23 Hen. 8, c. 5, s. 3, provides that the persons to be taxed for sewers shall be assessed "after the quantity of their lands, tenements, and rents by the number of acres and perches, after the rate of every person's portion, tenure, or profit, or after the quantity of their common of pasture, or profit of fishing or other commodities there." In Com. Dig. "Sewers," E. 2, it is stated that "an order to levy ninepence per acre to be paid to the clerk, to be applied towards defraying charges in and about the execution of the commission, is good: *Level of Hull's case* (2 Str. 1127.) So in the case of the *Isle of Ely* (10 Co. 143a), it was resolved that the tax "ought to be according to the quantity of their lands, tenements, and rents, and by the number of acres and perches." There too is express mention of acreage seeming to point to land apart from houses. "And upon this" (Com. Dig. "Sewers," E. 2) "the regular course is, that the jury present the particular quantity of land, or other profit that every one, who may have benefit by the repair or prejudice by the non-repair, has within the level, and thereupon the commissioners make a decree for the assessment of every person in proportion: Cal. 82, 10 Co. 143a."

Reg. v. *Head and the Metropolitan Board of Works*, 7 L. T. Rep. N. S. 708; 31 L. J. 115, M. C.; *Level of Hulle Case*, 2 Str. 1127.

Denderswell for the defendants.—This expense

was incurred for plans which never were available, as the suggested improvements were not even commenced. The surveyor, whose scheme was entertained by the commissioner, never made use of these plans, but prepared new ones entirely different. The statute clearly shows that no obligation is to be imposed on the owners where improvements are of greater cost than 1000*l.* without their consent. Here they did not consent, and therefore are not to be charged with the cost of these abortive and expensive plans.

BLACKBURN, J.—In this case we think our judgment should be for the defendant. The point raised is as to the right of the plaintiff, who has brought an action of replevin, to recover his horse, taken under a distress for nonpayment of a rate. The question to determine is whether that rate is void or not. If void, of course the distress was not good, and the plaintiff is entitled to recover his costs of the replevin. If, on the other hand, the rate is good and not void, however much it might possibly have been reduced in amount on appeal, we must give judgment that the distress was right, although it was for a quantum which, being too great, might have been set right as I say. We have to look at what the rate was for. On its face it is stated to be—"A rate and assessment made on all the occupiers of lands in the Longdon and Eldersfield Drainage district, in the county of Gloucester, according to the quantities and qualities of the estates, for the costs, charges, and expenses incurred by the Longdon and Eldersfield Drainage Board under the authority of the Land Drainage Act 1861, and the several other Acts of Parliament incorporated therewith, incurred in causing plans and estimates of works proposed to be done under and by virtue of the said Act, and otherwise complying with the said Act with respect to the said works." And then the rate itself gives the names of the occupiers assessed, the owners, the description of property, acreage, annual value, rateable value, and the sum assessed at 9*d.* in the pound, the payment of which sum is imposed on the occupiers. One or two objections made in the course of argument may be at once disposed of. It is said that if made under the Lands Clauses Act, the rate ought to be an acreage rate, and ought only to be on the land, and not on the house; but that seems to me to be quite untenable, for the Sewers' Act of Henry VIII. appears from the earliest times to have received the construction that the rate was to be an equal rate on the persons liable according to the benefit they derived from the sewers; and Lord Tenterden, in *Rex* v. *The Commissioners of Sewers for the Tower Hamlets* (9 B. & C. 520), speaks of an equal poundage rate. It would be monstrous if the Act had been construed so that the persons should be assessed according to the superficial area of the land drained, but not according to their present value. The present statute directs that the assessment shall be on the rateable value according to that fixed for the poor rates, thereby plainly having regard to the rateable value of the land. Then comes the real question to be determined: What is the rate laid for? For works proposed to be done for improvements in drainage. Now, under the Act the drainage board have the same power to drain as the sewers commissioners had. That brings us back to the powers of the commissioners of sewers, and we see *7 sect.* 38 that "rates may be levied by the commissioners of sewers for the purpose of defraying all costs, charges, and expenses incurred or to be incurred by them under the authority of any Act of Parliament, law, or custom; secondly, as to the incidence of the rates, a rate levied by the commissioners for the purposes of defraying the expense of any improvements or new works where such improvements or new works involve an expenditure of more than 1000*l.* shall be deemed to be a special rate, and shall be deemed to be a tax on the owners of property; but, except such special rate, rates leviable by the commissioners shall be payable by the same persons in respect of the same property, and in the same manner as they are now by law payable." That clause enacts plainly enough that where the purposes are such that the rate would come within the definition of a special rate, it shall be "deemed to be a tax on the owners of property." The present rate expresses itself to be in respect of expenditure incurred in causing plans, &c., to be made for works proposed to be done, and the real question is whether those expenses ought to be defrayed by a special rate on the owners of land, or whether they were incurred for the general purposes of the Act, and ought therefore to be defrayed by a general rate on occupiers, in which latter case this rate is good on the face of it, and although the amount of it seems excessive and on appeal the auditors might have disallowed a great part of it as extravagant, at present we can only see whether this expense, whatever it may be, is a matter which ought to fall on the occupiers as a general tax, or on the owners as a special rate. Now it is tolerably clear that if the sum expended cannot be properly levied as a special rate, it must be recoverable as a general rate to fall on the occupiers. Therefore, it was requisite for the plaintiff's argument to show that the expenses were such as would fall on a special rate; and the difficulty presenting itself is, that the Legislature has used language which is not very explicit, and leads me to the conclusion that they were not thinking of this particular thing when they used it. In sect. 29 it is enacted that "Previously to commencing any improvements in existing works, or any new works where such improvements or new works involve an expenditure of more than 1000*l.*, the commissioners shall cause plans of the proposed work, and an estimate of the expense thereof, and of the area within which a rate will be required to be levied to meet such expense, to be made, together with a list of the names and addresses of the persons reputed to be the proprietors of the land within such last mentioned area, with the addition of the number of acres of which each person is reputed to be the proprietor, and shall publish their intention to execute such works two months before commencing the same in manner following." It is plain that there the Legislature directed that the local board of drainage—(the commissioners—as the board was then constituted)—before commencing works, shall make plans of the proposed works and an estimate of the expenses thereof, and it would almost follow that before commencing such works they should sit down and calculate the cost. But this Act most clearly says it is a part of their duty. They are to do this and to publish their intention to execute such works; then by sect. 31, "If within . . . two months the proprietors of one half of the area of land within

which a rate is according to the notice proposed to be levied declare in writing to the commissioners . . . that they are unwilling that such work should be executed, the commissioners shall take no further steps therein." That was the event which happened here. Then the section proceeds: "But if no such declaration of dissent is made the commissioners may at the expiration of such period of two months commence the proposed work, and repay out of the rates to be levied by them within the area all expenses incurred, not exceeding the estimate published in the notice." Now had the majority of proprietors not intimated their dissent the board would have gone on to execute the work, and then would have been clearly entitled to recover the expenses incurred which did not exceed the estimates. It is not now necessary ot decide whether all the matters in the statement could have been included in the expenditure—speaking for myself only, I should say that most of the works were necessary. But these preliminary expenses were absolutely necessary for the execution of the proposed works, and might have been charged on the rate. We need not, however, inquire into that, as machinery is provided by sect. 31 for the payment of preliminary expenses where there has been no dissent, and the scheme has been carried out; there is an express statement that they are to be repaid out of the rates to be levied within the area. Then comes the question what is to be done with respect to abortive preliminary expenses. I cannot but consider that where the work is done the expenses fall on the owners, but where the owners do not come in and concur in the work being done those expenses are to fall on the ordinary rate, subject to auditors looking into the matter, or to any extravagant expenditure being disallowed on appeal when those by whom it was incurred must defray it themselves. But in this case whatever might be done by auditors or quarter sessions does not come into question in the present proceedings. The matter for us to determine is whether the expenses of preparing plans for works proposed, but not carried out were such as the board could charge in a general rate, or in a special rate on the owners only. For the reasons above given I think such expenses must be defrayed by a general rate, and therefore that the rate in question is good on the face of it, and that the defendants had jurisdiction to make it.

LUSH, J.—I am of the same opinion. It is unnecessary to decide whether, if the works had been done, the preliminary expenses might have been added and made a charge on the owners, or whether the expense of these plans must be considered part of the prescribed 1000*l.*, for I come to the conclusion that where the works are not done, as here, these preliminary expenses are not chargeable upon the owners of the lands. Now general expenses are chargeable on the occupiers. These, however, were preliminary expenses for laying a scheme before the owners; and it is only where they exceed 1000*l.* that the commissioners are to charge the owners at all. Then by the 31st section, before the owners are chargeable they must be consenting parties to the execution of the works, because after the scheme is laid before them, "if within the period of two months, the proprietors of one half of the area of land within which a rate is, according to the notice, proposed to be levied, declare in writing to the commissioners, by notice left at their office, that they are unwilling that such work should be executed, the commissioners shall take no further steps therein." There the evident intention of the Legislature is that the owners shall not be chargeable except in cases where the works involve an expenditure of more than 1000*l.*, and then only if half the number of proprietors assent to the work being done, but they are not to be chargeable without their consent. In all other cases the expense must be defrayed by a rate on the occupiers. Therefore, I come to the conclusion, that as this expenditure was incurred in respect of works which were not done, the owners having dissented, that the owners are not chargeable with the preliminary expenses, which must consequently be paid by a rate on the occupiers.

HANNEN, J.—I am also of the same opinion. I think it was in the highest degree improbable that such a state of things as is now under our consideration was not contemplated by the Legislature, for when the second division of sect. 38 is looked at, it seems clear that the only contingencies justifying the making of a special rate is when the improvements or new works themselves involve an expenditure of more than 1000*l.*, and therefore until there has been an execution of the works themselves the cause of imposing a special rate has not arisen; and consequently, as the case is not brought within the particular words of the second division of sect. 38, it must be within the first part of it, and the commissioners must be provided with funds to defray this particular expenditure by means of a general, as distinguished from a special, rate.

Judgment for defendants.

Attorneys for the plaintiff, *Clerke, Son,* and *Rawlins.*

Attorney for the defendants, *T. G. Norcutt.*

BAIL COURT.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

June 10 *and* 12, 1871.

REG. *v.* THE JUSTICES OF DERBYSHIRE.

Order of removal — Appeal — "Next practicable sessions"—Appellant's delay—Reg. *v.* The Justices of Sussex (11 L. T. Rep. N. S. 740).

It is for the justices at quarter sessions to decide on the facts, in the first instance, whether an appeal against an order of removal has, or has not been brought at the next practicable sessions after notice of the order has been received by the appellants; and mere proof that there has been some delay on the part of the appellants in taking steps to avoid the order does not preclude the justices from exercising their discretion in the matter, nor compel them to dismiss the appeal.

Reg. *v* The Justices of Sussex (11 *L. T. Rep. N. S.* 740), *cited and considered.*

RULE calling on the justices of Derbyshire to show cause why a writ of *mandamus* should not issue commanding them to enter continuances and hear an appeal against an order of removal.

The order was made on the 6th and received by the appellants on the 8th Dec. 1870. Upon the 24th of the same month they applied for a copy of the depositions, which they obtained on the 28th.

Upon the 7th Jan. 1871 they gave notice of appeal for the Easter Sessions, to be holden on the

following 4th April, and on the 18th March served their grounds of appeal.

At the hearing of the appeal the respondent contended that according to the case of *Reg* v. *Justices of Sussex*, the Epiphany Sessions, which had been held on the 3rd Jan. 1871, were the next practicable sessions, and that the appeal should have been entered and respited, or tried at those sessions.

The court were of that opinion, and dismissed the appeal. The counsel for the appellants thereupon indorsed his brief thus: "The Court decide that the case of *Reg* v. *Sussex* precludes them from exercising any discretion as to hearing the appeal, and deciding whether these are the next practicable sessions;" and the chairman of quarter sessions expressed his approval of that indorsement as correctly conveying the ground upon which the refusal was based. A letter of the clerk of the peace from which it also appeared that the justices declined to hear the appeal on the above ground, was by consent read as evidence, during the following arguments:

11 & 12 Vict. c. 31, s. 7, enacts that "no appeal shall be allowed against any order of removal, if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days, a copy of the depositions shall have been applied for as aforesaid by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal." . . .

By 4 & 5 Will. 4, c. 91, s. 81, the grounds of appeal must be served fourteen days at least before the first day of the sessions.

Henry James, Q.C., and *J. W. Mellor* showed cause.—The appeal might have been tried at the Epiphany sessions, and ought at least to have been entered and respited at those sessions, which were the next practicable sessions after the service of the notice of chargeability and statement of the grounds of removal. In *Reg.* v. *The Justices of Sussex* (11 L. T. Rep. N. S. 740; 34 L. J. 69, M. C.), it was held that the appellants have not by 11 & 12 Vict. c. 31, s. 9, twenty-one days, plus the fourteen days after the delivery of the depositions, for giving notice of appeal absolutely, so as to entitle them as of right to have the appeal entered and respited, if after those days have expired, there does not remain enough time before the sessions to deliver an effective notice of appeal according to the practice of the sessions, and the sessions may, in their discretion, refuse to respite if they deem that the appellants have been guilty of unreasonable delay in giving their notice of appeal. Here there was certainly unreasonable delay in allowing sixteen days to elapse before applying for a copy of the depositions and in giving notice of appeal. This court may review the decision of the justices, as in the *Liverpool United Gas Light Company* v. *The Overseers of Everton* (23 L. T. Rep. N. S. 813; 40 L. J. 104, M. C.), and should it is submitted, decide that under the circumstances the appeal ought to have been entered at the Epiphany sessions, and was in fact brought too late.

Adams, Q. C. and *Buszard*, in support of the rule.—The justices were in error when they supposed that all discretion was taken from them by *Reg* v. *The Justices of Sussex*. That case did not prescribe an inflexible rule, but left the justices free to decide upon the facts what were the next practicable sessions whereat the appeal might be heard. The facts then show clearly that there was not the full period allowed by statute between the notice of removal and the Epiphany sessions, and therefore, the appellants had a right to go to the next practicable sessions, viz., Easter.

Cur. adv. vult.

June 11.—HANNEN, J.—I have looked at the case of *Reg* v. *The Justices of Sussex*, cited and relied on for the respondent, and I have arrived at the conclusion that this rule must be made absolute. The justices evidently proceeded on the assumption that they were bound by the decision in *Reg.* v. *Justices of Sussex*, and were thereby precluded from entering upon the consideration as to whether the Epiphany sessions were, in fact, the next practicable sessions or otherwise. That is shown by the note upon the brief of the counsel who represented the appellants, and by the letter of the clerk of the peace. But the justices were mistaken in their view. It was for them to decide whether the Epiphany sessions were the next sessions practicable for the trial of the appeal, and the above-mentioned case in no way prevented them from determining that question. If I could plainly see that the Epiphany were the next practicable sessions, I should not let the *mandamus* go, but I am unable to satisfy myself upon that point, It depends on matters of which the justices are the proper judges, but which were not gone into. By making this rule absolute the whole question will arise before the justices again, when they can inquire into the present question.

Attorneys for the appellants, *Young, Maples, Teesdale, Nelson*, and *Co.*, for *Shaw*, Tamworth.

Attorney for the respondents, *R. N. Wilkins*, for *Henry Goodger*, Burton-on-Trent.

MIDDLESEX SESSIONS.

Tuesday, Aug. 22, 1871.

(Before Mr. Serjeant Cox.)

REG. *v.* TAYLOR AND SMITH.

Conspiracy—Evidence.

Prisoners were indicted for conspiring to commit larceny. A second count charged an attempt to commit a larceny.

The evidence was that the two prisoners, with another boy, were seen by a policeman to sit together on some doorsteps near a crowd, and when a well-dressed person came up to see what was going on, one of the prisoners made a sign to the others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, and to place a hand against the dress of a woman but no actual attempt to insert the hand into the pocket was observed. Then they returned to the door-step and resumed their seats. They repeated this two or three times. There was no proof of any preconcert, other than this proceeding:

Held, not to be sufficient evidence of a conspiracy.

also, not to be evidence of an attempt to steal.
prisoners were indicted for conspiring to- to commit larceny from the persons of Her ty's subjects.
ther count in the indictment charged an pt to commit a larceny.
dy for the prosecution.
vas proved by two detective officers that a was collected in the streets; that the pri-, with another boy, were sitting on a door- that when a well-dressed man or woman o look into the crowd one of the prisoners d the others, whereupon two of them rose llowed that person. In the case of a man, vere seen to lift his coat-tail, as if to ascer- there was anything in his pocket; but they t attempt to insert a hand in the pocket. case of a woman, they went and stood by de; the hand of one of the prisoners was o be against her gown, but it was not seen mpted to be thrust into her pocket, nor was mplaint made by these persons of any such pt.

Serjt. Cox.—There is no evidence either nspiracy or of an attempt to steal. To con- an attempt, some act must be done towards nplete offence. Feeling a coat-tail to ascer- there is anything in the pocket is not an pt to do the act of picking a pocket, for it may nothing was found to be in it, and therefore d not proceed to the commission of the act and if there was nothing in the pocket, even g the hand into it has been held not to be mpt to steal. But here there is not any hat the pocket either of the man or woman ied anything, or indeed that they had any g at all.

dy.—But the count for conspiracy meets this on. It charges them with conspiring r to commit larceny, which is an indictable , and it will be for the jury to say if being r and acting together in the manner de- is not evidence that they had concocted a of robbery.

Serjt. Cox.—To sustain a charge of con- there must be evidence of concert to do the act. In cases of treason, where the law of acy has been most frequently applied, some e has usually been given of something said g by the defendants previously to the com- or attempted commission of the act for they have conspired, from which the con- may be inferred. The peculiarity of this that the only evidence of conspiracy is the elf, and the manner in which it was done. n, according to the view which I have just f the act itself, it was not illegal, because it amount to an attempt to pick pockets. It to me to be impossible to say that the doing t not illegal is evidence of a conspiracy to do al act, there being no other evidence of the acy than the act so done. I cannot allow g to go to the jury. The point is a very ue, and, I think, quite new; but I am so of opinion that, whatever may be the sus- as to the intentions of the prisoners, there fficient evidence to justify their conviction, annot reserve it.

Not guilty.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 14 *and* 15, 1870, *and Feb.* 11, 1871.

(Present: the Right Hon. the ARCHBISHOP OF CANTERBURY, the LORD CHANCELLOR, Lord CHELMSFORD, and Sir R. PHILLIMORE.)

NOBLE *v.* VOYSEY (Clerk).

Heresy—Atonement—Incarnation — Justification—Divinity of Christ—Revelation—Authority of the Bible — Sentence — Canons of construction — Opinions of divines.

In proceeding against the appellant, a clergyman of the Church of England,

Held, heresy to have maintained in a book written and published by him: First, that Christ did not make a reconciliation for sin; that he was not made a sacrifice to reconcile God to men; and that there was no need for any such sacrifice, nor any place for such in the purpose of God; secondly, that Christ did not bear the punishment due to men's sins, nor suffer in their stead; thirdly, that men are not by nature children of God's wrath; that men are not under a curse; that there is no curse to be removed by the shedding of the innocent blood of Christ; that the doctrine of the fall of man is contrary to the teaching of Christ; fourthly, that mankind needs no justification, or that salvation is not through justification; and that justification by faith is contrary to the teaching of Christ; fifthly, that Christ is no more Very God of Very God, begotten not made, than men are; that the worship of Christ is idolatry; that the idea of the incarnation of Christ takes its rise in unbelief; that the expected return of Christ to judge the world is an unreasonable belief; that the worship of the Father, Son, and Holy Ghost is the worship of three Gods; and that the belief in the Godhead of the Son and the Holy Ghost as expressed in the Nicene Creed weakens and disguises the belief in one God, the Father; sixthly, that revelation of a knowledge of God by means of any book is impossible, and that the only true revelation is through the heart of man; that in the Holy Scriptures there are many irreconcileable contradictions; that the authority of the Gospel according to St. John is doubtful, and ought not to be applied to establish any doctrine; and that the said Gospel represents Christ as speaking words which he never spoke, and which, if spoken, could not have been believed.

These charges having been proved, the Judicial Committee pronounced sentence of deprivation, with an opportunity to the defendant to retract his errors within a week.

The canons of construction, applicable in charges of heresy, as laid down in decided cases, while they allow to the party accused a fair and reasonable latitude of opinion with reference to conformity of the defendant's language with the Articles and Formularies of the Church, afford no sanction to the suggestion that unless the defendant use language in contradiction totidem verbis of the Articles, he may express opinions repugnant to or inconsistent with the clear construction of the Articles.

Quotations from divines may be used for the purpose of showing that the doctrine in question has been

held without offence, but not for the purpose of showing that other heretical doctrines, not the subject of charge, have been maintained by divines, against whom no proceedings for heresy have been taken.

THIS was an appeal from a judgment of the Chancery Court of York (reported in 23 L. T. Rep. N. S. 169) in a cause of heresy promoted by the respondent against the appellant.

The Judicial Committee having admitted the articles to proof, retained the cause at the request of both parties (23 L. T. Rep. N. S. 822), and proceeded to hear the case on the merits.

Sir *J. D. Coleridge*, Q.C. (Solicitor-General), Sir *R. Palmer*, Q.C., *Archibald* and *Cowie*, for the promoter, cited:

The Gorham Case, Brod. & F. 96;
Bishop of Salisbury v. *Williams*, and *Fendal* v. *Wilson*, 2 Moo. P. C., N. S. 375; 6 L. T. Rep. N. S. 727, 9 Id. 787;
Heath v. *Burder*, 15 Moo. P. C. 1; 6 L. T. Rep. N. S. 563;
R. v. *Carlile*, 3 B. & Ald. 161;
R. v. *Williams*, 26 St. Tr. 654;
Godolphin's Ecclesiastical Law, 562.

The defendant (the Rev. Charles Voysey), in person, contended that he had not exceeded the limits of that liberty of belief which previous decisions had established. Further, on all the doctrines alleged to have been impugned by himself, eminent divines of unimpeached orthodoxy had departed from the sense and spirit, and in some instances contradicted the words, of the Articles and Creeds. The fact that these divines had not been prosecuted for heresy was at least evidence of the practice of the Church in favour of freedom of opinion. The appellant proceeded to cite various passages from the works of the Archbishop of York, Dean Stanley, Rev. F. D. Maurice, Archbishop Whately, Canon Liddon, Canon Kingsley, Dr. Pusey, Rev. J. Ll. Davies and other modern divines. In the course of these citations,

Lord CHELMSFORD observed that he understood these opinions to be quoted merely to show the freedom with which other clergymen had dealt with the Articles and Formularies, and that the defendant therefore claimed for himself a like latitude.

The Defendant: That is precisely my object.

Sir R. PHILLIMORE: The course we usually allow is that opinions similar to those of the defendant are quoted. But it would be unfair to accept the citation of opinions of divines on other points than those the subject of the charge.

The LORD CHANCELLOR: In *Burder* v. *Heath* (*ubi sup.*) quotations were allowed with the view of showing that "the doctrine in question had been held without offence by other divines of the Church." But when the issue to be tried is the alleged violation of certain specified Articles of Religion, the quotation of passages to show that other persons had advanced views inconsistent with other and distinct Articles of Religion serves no useful purpose, and could only launch the court on a wide inquiry, leading to no result. It would be impossible to try the case of all these persons behind their backs.

The *Solicitor-General* replied, after an intimation from the Lord Chancellor that the opinions cited were beside the issue, and that he might confine his reply to the question whether the defendant had contravened the Articles of Religion in the *passages set out* in the articles of charge.

Feb. 11.—Judgment was delivered by the LORD CHANCELLOR (who, after stating the previous proceedings, and the substance of the articles of charge, proceeded): — The charges, therefore, against the appellant are thirteen in number, which may be arranged under the following classes: 1. Alleged errors concerning the reconciliation of God to man by the sacrifice or propitiation of Our Lord Jesus Christ, and as to the necessity of such reconciliation. 2. Alleged errors as to the Incarnate Godhead of Our Lord, and the doctrine of the Holy Trinity. 3. Alleged errors as to the authority of the Scriptures or Holy Writ. Before examining the charges and comparing the proofs adduced from the appellant's publications with the charges founded thereon, and with the Articles and Formularies of the Church alleged to have been contravened, it will be well to enunciate briefly the rules of judicial exposition with reference to the Articles and Formularies of the Church. In this respect we have the guidance of previous and recent decisions of this tribunal expressed in clear and definite language. In the cases arising on the work called Essays and Reviews (*Williams* v. *Bishop of Salisbury*, and *Wilson* v. *Fendall*, 2 Moo. P. C., N. S., 425; 6 L. T. Rep. N. S, 727; 9 Id. 787), Lord Westbury, in delivering the opinion of the committee said, "Our province is, on the one hand, to ascertain the true construction of those Articles of Religion and Formularies referred to in each charge according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church ascertained in the manner we have described." But it is to be observed, that in inquiries of the nature now before us, the committee is not compelled, as in cases affecting the right to property, to affix a definite meaning to any given Article of Religion the construction of which is fairly open to doubt, even should the committee itself be of opinion (on argument) that a particular construction was supported by the greater weight of reasoning. Thus, Lord Stowell, in the case of *Her Majesty's Procurator* v. *Stone* (1 Consist. 428), thus expresses himself: "I think myself bound, at the same time, to declare that it is not the duty or inclination of this court to be minute and rigid in applying proceedings of this nature, and that if any Article is really a subject of dubious interpretation it would be highly improper that this court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them." We have thought it right to refer to the canons of construction thus judicially expressed, because on the one hand they allow to the party accused a fair and reasonable latitude of opinion with reference to his conformity to the Articles and Formularies of the Church, and on the other they afford no sanction whatever to the contention of Mr. Voysey, that unless there be found in the publication complained of a contradiction *totidem verbis*, of some passage in the Articles, he is at liberty to hold, or rather to publish, opinions repugnant to or inconsistent with their clear construction. As regards those Articles

of Religion as to the construction of which a reasonable doubt exists, the question may arise how far opinions of a similar character to those charged to be heretical have been held by eminent divines without challenge or molestation, because the proof of their having been so held may tend to show the *bona fides* of the doubt. In this respect also we have ample guidance from authority: and it will be found that where the Article in question is subject to reasonable doubt, and eminent divines have held opinions similar to those impugned in the case before the court, that circumstance alone has been held to be of great weight in inducing the court to allow a similar latitude of construction to the party accused, without itself deciding upon the construction of the Articles. Thus, in the case of *Williams* v. *The Bishop of Salisbury* (*ubi sup.*), the judgment of the committee contains this passage: "It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion; there may be matters of religious belief on which the requisition of the Church may be less than Scripture may seem to warrant; there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all. On matters on which the Church has prescribed no rule there is so far freedom of opinion that they may be discussed without penal consequences. Nor in a proceeding like the present are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in or to be collected from that which is written." To proceed, then, to the particular offences charged to have been committed by Mr. Voysey. In the passages cited from his publication called The Sling and the Stone, in the 7th, 8th, and 9th articles of charge, he is alleged to have maintained the following positions: —1. That Christ has not made an atonement or reconciliation for sin, and has not been made a sacrifice to reconcile the Father to us: (10th art. of charge.) 2. That there is no need of any atonement or sacrifice, nor any place for such in the purpose of God: (11th art. of charge.) 3. That Christ did not bear the punishment due to our sins, nor suffer in our stead, and that to think that he did, or that it was necessary that he should suffer, is the most revolting of all the popular beliefs: (12th art. of charge). The 13th article of charge we have rejected. Now, the 2nd Article of Religion expressly asserts that Christ "truly suffered, was crucified, dead, and buried to reconcile His Father to us, and to be a sacrifice, not only for original guilt, but also for all actual sins of men." The 15th Article of Religion declares that Christ "came to be the Lamb without spot, who, by sacrifice of Himself once made, should take away the sins of the world." And the 31st Article of Religion declares that "The offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual, and that there is none other satisfaction for sin but that alone." We cannot doubt that these lastly-mentioned Articles of Religion assert in plain language that Christ was crucified to reconcile His Father to us (that is, to mankind), and was a sacrifice, and that He came by the sacrifice of Himself to take away the sins of the world—that the offering of Himself once made, is a perfect "propitiation and satisfaction for the sins of the whole world"—and that there is none other satisfaction for sin but that alone. Neither can we doubt that it is plainly inconsistent with such statements to say that Christ has not made a reconciliation for sin, or has not been made a sacrifice to reconcile His Father to us; or that there is no need for any sacrifice, nor any place for such in the purpose of God. It will only remain, then, to inquire as to the first two charges against Mr. Voysey, whether he has in the passages of his work cited in that behalf, asserted the propositions therein charged. Before doing so it may be well, however, to observe that when the Articles of Religion speak of sacrifice and of oblation, and speak also of Christ being the Lamb without spot, and of His offering of Himself being a perfect satisfaction, and further allege that there is none other satisfaction for sin but that alone,—it is impossible to construe the word "sacrifice" in any other sense than that in which it is ordinarily used, viz., as an offering to God—and that as such offering Christ's sacrifice is alleged to be a satisfaction, and the only satisfaction, for the sins of the world. Let us consider, then, the following passages in the appellant's publication, as cited in the articles of charge:— "He" (meaning the Saviour) "never hinted at such a doctrine as that of the Fall of Man, or the Atonement by sacrifice, or Justification by Faith. He never taught that men needed to be accounted righteous before God, or needed any mediator to propitiate his wrath, or to draw them to Himself. All these notions were Jewish, and Christ never gave any sanction or encouragement to them that I have been able to discover." And, again "Sincere sorrow for sin is, or ought to be, enough to make a man quite reconciled and at peace with God; at least so our Lord teaches. We do not, therefore, need any atonement or justification We need no atonement, for God requires none. We do not want to be justified, we do not want to be accounted righteous at all when we are not righteous; we only desire to be made righteous in God's good time. We seek reconciliation with God as a sorrowful and guilty son seeks reconciliation with a father: 'I will arise and go to my Father,' &c. The Father in heaven receives and embraces us, only with a compassion more tender, and a love more divine and inexhaustible. So we leave these Pauline doctrines for those who need them, thanking our heavenly Father that through His Son Jesus Christ we have learnt a better and surer way to that peace of God which passeth all understanding. . . . . The majority of Christians, though fast tending to a change in their views, still maintain, like the Christianised Jews of the first century, a belief in a God who requires sacrifice—actual bloodshedding—mediation instead of personal communion with the sinner, and is the God only of a chosen people; who loves the few that shall be saved, and leaves the rest to be damned, and who only loves and saves the few because Christ had died for them as their sacrifice. . . . . To us God is a Father, and we are His children; and if this be true it sweeps away the dusty cobwebs of mediation, intercession, sacramental sacrifice, and all the sacred and consecrated follies which grow out of it. We want neither altar nor sacrifice, neither victim nor priest, no sprinkling of blood, no fumes of burning incense to render our approach to the mercy-seat of God more reverent or more successful. . . . . I must own, however,

that while I thoroughly and heartily embrace the truth that Christ is our example, I cannot so readily embrace what is often understood by the statement that he is a sacrifice for sin. In one sense, Christ was indeed a sacrifice. His life was sacrificed to the bigotry and blind malice of chief priests in Judea. He was a sacrifice, too, in the sense of laying Himself open to persecution by an honest discharge of his duty, and in not trying to escape trouble by a violation of principle. Sin, too, caused His death, as it was sinful to bear malice towards one so innocent and good, and still more sinful to put Him to death for the claim which He made for Himself and for us all—that God was His Father and our Father, and we are His sons. But in what sense the death of Jesus Christ was a substitute for the punishment of your sins or mine I cannot discover. Theologians may be right, but until I can see reasonable ground for their opinion, I must keep my own. I can surely see and thankfully confess that His death has done me good, that his sacrifice has been most beneficial to the world in teaching and encouraging true heroism, true manliness, and true obedience to God's will. Had He not been martyred for the truths which He taught, those truths would probably have been far longer in making their way among men; and England, at this hour, might still have been in Pagan darknes. But then I know that this is not the common meaning of the words 'Christ suffered for us,' and I do not wish to pretend to put that meaning on them while I am using them in a totally different sense." We think that the expressions contained in these passages, and particularly in the last extract, cannot be reconciled with the teaching of the 2nd, 15th, and 31st Articles of Religion as regards Christ being crucified to reconcile the Father to us—and the necessity of a sacrifice for sin—and we hold, therefore, that the 10th and 11th articles of charge are proved against the appellant. As regards the third charge against the appellant, contained in the 12th article of charge, namely, that he has asserted "that Christ did not bear the punishment due to our sins, nor suffer in our stead and for us, and that to think that He did, or that it was necessary he should so suffer, is infinitely erroneous and dishonouring to God, and is the most revolting of all the popular beliefs,"—we may remark that the somewhat uncharitable denunciation by the appellant of all who may happen to differ from him in holding this popular belief, is not the substance of the charge. The question is, whether it be or not, consistent with the Articles of Religion to deny that Christ bore the punishment due to our sins, or suffered in our stead. We think that to deny this statement without any qualification is inconsistent with the plain meaning of the 2nd and the 15th Articles of Religion already cited; the latter of which Articles is headed, "Of the one Oblation of Christ finished on the Cross," and proceeds to describe that offering to be the perfect redemption, propitiation, and satisfaction for the sins of the whole world. In these Articles also our Lord is described as without spot, *i. e.*, sinless, and as suffering the painful death of the cross, which is styled His offering of Himself, and the result of his suffering so offered is said to be the redemption, propitiation, and satisfaction for all *the sins of the whole* world, both original and *actual. It is not consistent* with such statements *to aver without* any qualification that He did not bear the punishment due to our sins, nor suffer in our stead. The passage we have lastly cited is one in which the appellant might seem to us to admit that he contravenes the Articles of Religion, for he fairly says that the common meaning of the words "Christ suffered for us" is totally different from the sense in which he uses those words. Had the appellant spoken less explicitly, we should have been disposed to regard his denial of the doctrine in question as having reference to some exaggerated statement respecting Christ having borne in hell the punishment due to man's sin; and even as it is, we are not unwilling to give the appellant the benefit of this doubt. In considering these first three charges, as in the consideration of those that follow, we have been most anxious to arrive at a fair construction of Mr. Voysey's writings, not only by examining the context which he has referred to as bearing on the passages cited, but also by attentively considering whether any previous writer, himself in Holy Orders, has been allowed, with impunity, to assert opinions similar to those of the appellant, so as to afford reasonable ground for holding that the appellant has merely availed himself of the privilege of adopting a possible interpretation of the language of the Articles, although it may appear to us that such interpretation is not sound or correct. But we can find nothing of the kind. The appellent, indeed, constantly refers to his views as being different from generally received doctrine, and he does not in his book, nor has he in his argument, cited any authority of divines holding views corresponding with his own. He founds, indeed, his argument mainly on the denial of original sin, or any original curse occasioned thereby, which assertions form the subject of other articles of charge; and if such be not a correct view of the meaning of the Articles of Religion, it is not surprising that the consequences he has derived from this doctrine should be equally inconsistent with them. We have not, however, forgotten to observe, that a considerable portion of the appellant's arguments in his writings is directed against special views of vicarious punishment and imputed righteousness which many divines have held, and which many other divines have considered exaggerated and unreasonable. If he had confined himself to such arguments as he might think fairly adducible in explanation of the doctrine enunciated in the Articles of Religion as to Christ suffering for sin, and offering Himself as a lamb without spot for all sins original and actual of the whole world, and being crucified in order to reconcile us to His Father, then he would be entitled to claim a latitude of interpretation which has been allowed to others; but he does not profess to interpret, he simply denies the position asserted in the Articles, and asserts other doctrines inconsistent with and repugnant to them. We now proceed to consider the fourth and fifth charges made against the appellant, viz., his alleged assertion "that mankind are not by nature born in sin and the children of God's wrath, and are not separated from God by sin, and under His wrath, or under a curse, and that they are not in danger of endless suffering, nor is there any curse to remove by the shedding of the innocent blood of Christ, and that the doctrine of the fall of man is contrary to the teaching of Jesus Christ," contrary, it is contended, to the 2nd and 9th Articles of Religion (see 7th article of charge); and again, "That mankind need no

ment or justification, that salvation is not gh justification, and that the doctrine of justi- on by faith is contrary to the teaching of Jesus t," which is alleged to contravene the 2nd and Articles of Religion: (see 18th art. of charge). the 2nd Article of Religion asserts that the suffered to reconcile the Father to us and to sacrifice not only for original guilt, but also l actual sins of men;" and the 9th Article of ion in treating of "original or birth sin" says "it standeth not in the following of Adam but that it is the fault and corruption of man that naturally is engendered of the ing of Adam, whereby man is very far gone original righteousness, and therefore, in person born into the world it deserveth God's and damnation." We think that the plain ing of the 9th Article is to assert the exist- of original or birth sin, and to state that sin exists in every one descended from Adam; by it every man is very far gone from original ousness; and that this sin "deserves God's and damnation." To assert, therefore, that en are not by nature children of God's —that they are not separated from Him by or under His wrath, appears to us plainly sistent with the express language of the es of Religion. It being also expressly laid that Christ suffered to reconcile the Father , and to be a sacrifice for original sin, it rs to us to be in contradiction to such ents to say that we are not under a curse, and here is no curse to remove by the shedding e innocent blood of Christ. To assert also he doctrine of the fall of man is contrary to eaching of Jesus Christ, whereas the 9th e plainly asserts the doctrine, appears to us ntradict the Article. The question how far ial of the doctrine, that man being born in therefore an inheritor of endless suffering, y contradicts the Articles, may be open to more doubt, regard being had to the decision *leon* v. *Fendall* on the subject of assertions milar character with regard to the duration punishment of the wicked; but with this ion it appears to us to be clear, that if the charge be, in fact, established by the appel- writings, the offences therein alleged would ences against the law ecclesiastical. Do, the extracts set out in the 15th and 16th s of the charge bear out the charge? The ant in the first of these extracts says, by f censure of the opinion, "St. Paul said y that the whole human race should be set om the curse in consequence of what Christ ed—'As in Adam all die, so in Christ shall made alive;'" and in the following extract s, after citing the opinions of Augustine and ton, "And though St. Paul's doctrine is the merciful, yet it leaves the mind aghast at icture of God's cursing the whole race of nd, and only removing that curse after appeased by the shedding of innocent blood. f course, was simple Judaism, with a little genuine Gospel mixed up with it—an im- advance on the pre-existing views, but still ry far, from the sublime teaching of our himself." The following extract should also sidered: "He therefore (meaning the le St. Paul) succeeded in teaching many, Jews and Gentiles, who had superstitious sacrifice in *common, to believe that the* death of Christ was a sufficient atonement for the sins of the whole world; and that it appeased the wrath of God entirely, and cancelled the curse against mankind. The arguments used by the Apostle might satisfy the Jews, but could scarcely satisfy us; as, for instance, when he says, 'Christ hath redeemed us from the curse of the law, being made a curse for us,' and because He was crucified, he quotes from some Jewish record that 'cursed is every one that hangeth on a tree,' as if the mere outward manner of Christ's death could of itself furnish any satisfaction to the human mind that that death removed a curse from the whole race. That such an argument could be used by St. Paul discloses to us how very deep down these Jews were sunk in dogmatic unreasonableness. At all events, he satisfied them that as by Adam's disobedience men had fallen from God, so by the death of Christ the curse was removed, and by His obedience He had rendered men righteous in the sight of God. Those who were dissatisfied with the old system at once embraced St. Paul's nobler and more rational views, and thankfully owned Jesus Christ as their Redeemer and Atonement, in a sense which, I do not scruple to declare, was never taught by our Lord himself. But what could a Jew or Pagan do else? . . . They [meaning ritualists or priests] are (most falsely, as it seems to me) convinced that we are all by nature in danger of endless suffering; and that, unless we obey them in thought, word, and deed, unless they pray and sacrifice for us, and they pardon our offences, there is no hope for us beyond the grave. We do not, then, wish to be ungrateful in declining their interference and in rejecting their control. We simply say to them, 'You have made a fatal error at the very outset of your principles. You have made an entirely false assumption at the very beginning, and therefore we do not wonder that your course is altogether a foolish and mistaken one. You say we are by nature separated from God, or under His wrath—that He will not hear our prayers, or forgive our sins until we have been baptised, and have submitted ourselves to your authority.' We deny this entirely. We say that we are not separated from God nor under His wrath; that God is always with us all, and we are His children by nature, and therefore we are near and dear to Him all our lives through. With or without your help we need no redemption in the sense in which you offer it to us. You are telling us we have got no friend here while outside your temple; but we know that we are not alone, because our Father is with us, and you can offer no friend, no Saviour, no Comforter, so good and true and faithful as He. We are therefore not afraid to disobey your injunctions, to tear up your creeds, and to despise your ordinances. For all these are based upon a fundamental mistake." If in the above extracts the appellant had been simply combating the extreme views which have been adopted by some divines, either with reference to what is commonly called Calvinism on the one hand or Ritualism on the other, we conceive he would have been fully entitled so to do; and we should have been glad if we could have so reconciled his writings with the doctrine contained in the Articles and Formularies of the Church, but the extracts themselves are clearly intended to teach that in no sense are mankind naturally separated from God, or under God's wrath, which he represents to be a false assumption at the very

beginning, and as occasioning the Ritualists, on that account, to take a foolish and mistaken course. It is true that he adds, as a portion of the error taught by them, and which he assumes to be their doctrine, "God will not hear our prayers, or forgive us our sins, until we have been baptised, and have submitted ourselves to your authority," meaning the authority of the priest; and if this had been all it might have admitted of explanation consistent with the doctrine of the Church; but the appellant makes his meaning clear, not only by the previously cited extract concerning St. Paul's teaching, but by what follows the last cited words, "We say that we are not separated from God, nor under His wrath; that God is always with us all, and we are His children by nature, therefore we are near and dear to him all our lives through. We know that we are not alone, because our Father is with us, and you can offer no friend, no services, no comforter, so good, and faithful, and true as He." We cannot doubt that the appellant advisedly contravenes the doctrine of a change of man's natural condition (in which the Church represents him to be subject to God's wrath), through the sacrifice of Christ offered to reconcile His Father to us, and that the 4th charge is therefore established. As regards the 5th charge against the appellant, we think that to assert that mankind needs no justification, or that salvation is not through justification, or that justification by faith is contrary to the teaching of Jesus Christ, is so plainly opposed to the very words of the 2nd and 11th Articles of Religion, that we need hardly cite them. We have the advantage of an authoritative exposition, if any were required, of the 11th Article of Religion, in the case of *Heath* v. *Burder*, before the Privy Council (15 Moo. P. C. 82; Freem. 235; 6 L. T. Rep. N. S. 562), where Lord Cranworth, in delivering judgment, says: "The evident meaning of the 11th Article is, that man is accounted righteous, which in the Article is treated as the same thing as being justified before God, not for his own merits, but for the merits of our Saviour by faith in Him—*i.e.*, that man is admitted to the favour of God not for his own works, but for the merit of his Saviour and by faith in Him—*i.e.*, by man's faith in our Saviour, howsoever faith is to be defined." The following extracts from the appellant's book appear to us clear contradictions of these Articles of Religion: "He" (meaning the Saviour) "never even hinted at such a doctrine as that of the fall of man, or the atonement by sacrifice or justification by faith. He never taught that men needed to be accounted righteous before God, or needed any mediator to propitiate His wrath, or to draw them to Himself. All these notions were Jewish, and Christ never gave any sanction or encouragement to them that I have been able to discover." And again: "Sincere sorrow for sin is enough to make a man quite reconciled and at peace with God; at least, so our Lord teaches. We do not therefore need any atonement nor any justification. We need no atonement, for God requires none." These six heads of charge complete the first of the three classes of charge, and we will proceed to the second class—viz., those relating to alleged errors as to the Incarnation and Godhead of Christ. Five articles of charge (the 23rd to the 27th inclusive) allege *these errors*—first, that the appellant asserts (23rd *article of charge*), "That our Lord Jesus Christ is *no more Very God of Very God*, begotten, not made, than we men are, contrary to the 2nd, 4th, and 8th of the Articles of Religion." Next, that he asserts (24th article of charge), "That the worship of Christ is idolatry, and is inconsistent with the worship of the true God, and that it is an instance of holding up our hands to a strange God, and outrivals the worship of the one true God, and draws away our highest homage and affection from God to another," contrary to the 1st, 2nd, and 8th Articles of Religion. Next, that he asserts (25th article of charge), "That the very idea of the Incarnation of the Son of God takes its rise in unbelief and springs out of absolute infidelity," contrary to the 2nd and 8th Articles of Religion. Next, that he asserts (26th article of charge), "That the expected return of Christ to judge the world takes its rise in unbelief, and springs only out of absolute infidelity, and that such expectation is unreasonable, is opposed to the simplicity of the love of God as a Father, and is calculated to overthrow the moral government of God," contrary to the 4th and 8th Articles of Religion. And lastly, that he asserts (27th article of charge), "That worship of the Father, Son, and Holy Ghost is the worship of three Gods, and that the worship of the Son and of the Holy Ghost is idolatry, and that the belief in the Godhead of the Son and of the Holy Ghost, as expressed in the Nicene Creed, weakens and disguises the belief in one God the Father, and obliterates the true name of God," contrary to the 1st, 2nd, and 8th Articles of Religion. The Articles of Religion referred to in the above five articles of charge undoubtedly recognise the Godhead both of the Son and of the Holy Ghost as co-equal with that of the father, and recognises them as being with him one God (1st Article of Religion); that the Son took man's nature in the womb of the blessed Virgin of her substance, and that the Godhead of the Son and His manhood are united in Christ (2nd Article of Religion); that the Son ascended into heaven, and there sitteth until He returns to judge all men at the last day (4th Article of Religion); and the 8th Article of Religion says that the Nicene Creed, Athanasian Creed, and the Apostles' Creed are to be thoroughly received and believed. If, therefore, the last five articles of charge be proved, they are plainly repugnant to the Articles of Religion. We think it impossible to read the following passage or extract contained in the 21st article of charge without coming to the conclusion that the 6th charge against the appellant is made out: "And so God, the great unseen Creator, has wedded to Himself the great visible universe, and out of that mystical marriage has come as offspring the human family—a race of beings noble even as animals, but surpassing all we yet know of created life in being born of God—very God of very God—begotten not made, a statement as true of all of us as of Him who was called the first-born among many brethren." The extracts cited in the 21st article of charge in pp. 32 and 33 of the appendix, clearly describe the worship of Christ as idolatrous, and thus the 7th charge made in the 24th article of charge is also established. We may cite for this purpose the following, among other extracts, from pp. 33, 34: "At the time when Jesus Christ the Lord of men, appeared on earth, religious feelings towards God, in the hearts both of the Jew and Pagan, were such as to render impossible any repose in the bosom of the Creator. None could conceive of Him as even actuated by tender feelings, or as even guided

rs of justice such as were common amongst
So the Christ in His life of pity and kind-
began to be worshipped and loved as infi-
nearer and dearer to human hearts than any
whom men had ever worshipped before.
nly was this perfectly natural, but under the
nstances it was infinitely creditable to man-
that they should worship and adore such a
s Christ was, instead of the Jehovah known
Jews, and the Zeus and Jupiter known to
reeks and Romans. Since the days of some
Psalmists, their purer ideas of Jehovah had
ıe miserably corrupted, and a whole system
pitiatory sacrifices had taken the place of
sensible and manly devotion. . . . . But as
as ever the notion gained ground that Jesus
t was engaged on man's behalf, in assuaging
ivine wrath, all the love and trust of men
d in a torrent towards Him, and they were
content (as well they might be) to adore
Redeemer, and leave their Creator further off
ver. I do not wonder at this. The wonder
have been if men had not clung to Christ, if
ıad refused to worship so glorious a manifes-
of Divine love and goodness. Yet, surely,
s not what Christ would have of us. I always
ht that He came to bring us to God. What-
lse may be recorded in the Gospels, most
r it is there recorded that He said all he
say, and did all He could do, to make men
he fatherly love of God for us all, to make
n the Father in Heaven, and to win back
hted men from their ghastly dread. Jesus
t desired and pressed upon us all to worship
ather—'His Father and our Father, His God
ur God;'—and none will dare to say that He
ıtepped in between men and their Maker to
le their highest allegiance to Himself, to
the Father's face, or to close the portals of
'ather's home. Belief in all these miracles
ıing the miracles recorded in the New Testa-
), and in these angelic messages, and in these
erful births was impossible, unless there had
first in men's minds belief in an absent God
a God who was not immediately and con-
y present in the world and among men. The
idea of incarnation itself, which means Deity
ıg from heaven, and dwelling in an individual
for some years, implies a belief that God does
ıor ever did, dwell in the hearts of all men.
belief, and a belief in other miracles, are not
iar to Christianity; they are common to all
eligions of the world. The Brahmins have
nine incarnations of Vishnu, which, in their
are splendid conceptions of Divine love and
athy." As regards the charge contained in
5th article of charge, the last cited passage
reference to the incarnation is sufficient
. As regards the charge contained in the
article of charge the following extract from
will suffice:—"But the Fatherhood of God
es more deeply at the prevailing views than
The common notion about the coming of a
ınto the world once, and His expected return
dge the world, turns entirely upon the belief
ı absent God. It takes its rise in unbelief.
e notions of a God coming to dwell amongst
in human form after thousands of years'
ıce from them, then departing, after a short
n earth, and not returning for thousands of
more, only spring out of absolute infidelity.
must first be convinced that God *is away from*
them before they can adopt the idea that God has sent some one to visit them. And if that one Man who came was very God of very God in a sense in which all other men are not, His going away again after a short human lifetime, proves that absence still more painfully; and it cannot be wondered at that His return to earth should be looked for and longed for with the most passionate eagerness of the soul. If God could leave the long ages of human life deserted by Him before the coming of Christ, and then, after the little space of thirty-three years, could leave mankind again for thousands of years more in the same desolate desertion, then He is not the Father of men, and we might then question if He is even our friend." Indeed, the author in an extract contained in p. 24 (articles of charge, No. 9) candidly states, "I found that I could not hold to the true Fatherhood of God if I did not give up some of the doctrines of so-called Christianity. The doctrines of mediation, intercession, atonement, isolated incarnation, and the expected return of Jesus to earth are all, more or less, opposed to the perfect harmony and simplicity of the love of God as a Father." As regards the 10th charge contained in the 27th article of the charge against the appellant, being the last of the general class relating to the Incarnation and Godhead of Christ, we think it is proved by the following passage, "Take away" (that is from the book of Common Prayer) "what we can most heartily join in, and the greater part, as well as the most important part, of the service would be expunged. For the sake of this, then, we may well bear for a time with the blemishes, weaknesses, and minor superstitions which the Church of Rome bequeathed to us when we parted company at the last reformation. We need not hesitate at the repetition of any creed which makes us say as its first words, 'I believe in one God, the Father Almighty, Maker of Heaven and Earth, and of all things visible and invisible.' Any clause added thereto which seems to weaken or to disguise that first grand utterance may well be tolerated, considering the changing times in which we live, for the sake of the cardinal, and central and most vital principle upon which all the rest is, or is supposed to be, based." The four remaining charges against the appellant constitute the last general class of his alleged errors, viz., his depraving of scripture; and they are as follows:—That the appellant has promulgated, in derogation and depraving of Holy Scripture, the doctrine that the revelation of the knowledge of God by means of any book is impossible; that all true knowledge of God comes directly from the law of God written in men's hearts; that all knowledge of God comes only from men's own sense of what He requires them to do; and that the only true revelation possible by God to man is through the sense of God's presence, and is originated in the heart of man independently of God's written Word (31st article of charge). That he has asserted that in God's Word written, Holy Scriptures, and Holy Writ, there are found manifest, palpable, and irreconcileable contradictions, and many places which cannot be explained but so that they be repugnant to others (32nd article of charge). That he has asserted, in derogation and depraving of Holy Scripture, that the authority of the Gospel, according to St. John, is doubtful, and that the said Gospel ought not to be applied to establish any doctrine, and that whole chapters of the said Gospel are crowded

with passages which represent Jesus Christ as speaking words which He never could have spoken, and which, if spoken, would not have been believed (33rd article of charge). That he has asserted that the Gospel according to St. John contains passages which can only be expounded so that they be repugnant to each other or to other places of God's Word written, or Holy Scripture, and that the character of our Lord Jesus Christ as there set forth is quite irreconcileable with the idea of His being a Teacher sent from God, and is entirely different from the character of the Christ of the other Gospels (34th article of charge). The first, second, and fourth of the offences alleged in the last mentioned articles of charge are stated to contravene the 6th and the 20th Articles of Religion, and the 13th to contravene the 6th Article of Religion; and each of the said offences is also charged to be an assertion of doctrine inconsistent with certain portions of the Book of Common Prayer, set forth in the subsequent articles of charge. The 6th Article of Religion lays it down that there never was any doubt in the Church of the authority of the canonical books of the Old and New Testaments, and that the Church applies them to establish doctrine. Whilst the 20th Article of Religion declares "that it is not lawful for the Church to ordain anything that is contrary to God's Word written, nor may it so expound one portion of Scripture that it be repugnant to another." Now it is very important upon this head of the inquiry to consider the judgment delivered by Lord Westbury in the case of Essays and Reviews, (*Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendall* (*ubi. sup.*) In considering one of the charges against Dr. Williams, in that case the judgment states the case thus:—"The words that the Bible is 'an expression of devout reason, and, therefore, to be read with reason in freedom,' are treated in the charge as equivalent to these words:—The Bible is the composition or work of devout or pious men, and nothing more; but such a meaning ought not to be ascribed to the words of a writer who, a few lines further on, has plainly affirmed that the Holy Spirit dwelt in the sacred writers of the Bible. This context enables us to say that the words 'an expression of devout reason, and, therefore, to be read with reason in freedom,' ought not to be taken in the sense ascribed to them by the accusation. In like manner we deem it unnecessary to put any interpretation on the words 'written voice of the congregation,' inasmuch as we are satisfied that whatever may be the meaning of the passages included in this article, they do not, taken collectively, warrant the charge which has been made that Dr. Williams has maintained the Bible not to be the Word of God nor the rule of faith." The judgment, therefore, is express in saying that the ground for regarding the statements of Dr. Williams as not exceeding the just limits allowed by the Articles of Religion was, that he did not state the Bible to be the composition of devout men and nothing more. So, in considering the charge against Mr. Wilson, the following passage occurs (p. 429):—"In the 8th article of charge an extract of some length is made from Mr. Wilson's essay, and the accusation is, that in the passage extracted Mr. Wilson has declared and affirmed in effect that the Scriptures of the Old and New Testament were not written *under the inspiration* of the Holy Spirit, and that *they were not necessarily* at all, and certainly not in parts, the Word of God; and then reference is made to the 6th and 20th Articles of Religion, to part of the Nicence Creed, and to a passage in the Ordination of Priests in the Book of Common Prayer. This charge, therefore, involves the proposition, that it is a contradiction of the doctrine laid down in the 6th and 20th Articles of Religion, in the Nicene Creed, and in the Ordination Service of Priests, to affirm that any part of the canonical books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit." Guided by the judgment we have thus referred to, we do not think the 11th charge contained in the 31st article of charge is so made out by the extract given from the appellant's work as to justify us in regarding that article of charge as established. The appellant asserts, indeed, at the end of a long passage, extracted in page 41, that all knowledge of God can only come from our own deep sense of what He requires us to do; and these words are associated with much disparagement of the Bible. But it is possible to interpret these words as meaning that the Bible itself would be of no effect in imparting a knowledge of God if that deep sense of what He requires us to do were absent—a sense in which the expression would be allowable; and, following the example set by the judgment in the case of the Essays and Reviews, we think this interpretation in a *quasi*-criminal proceeding should prevail. As regards the remaining charges contained in the following articles of charge, whatever force may be given to the word "authority" in the 6th Article of Religion "as applied to the canonical books of the Old and New Testament," we are of opinion that, in order that the books (which are enumerated) should have any authority at all, it is not consistent with that Article of Religion for any private clergyman, of his own mere will, not founding himself upon any critical inquiry, but simply upon his own taste and judgment, to assert that whole passages of such canonical books are without any authority whatever, as being contrary to the teaching of Christ as contained in others of the canonical books. We think that no private clergyman can do that which the whole Church is, by the 20th Article declared to be incompetent to do, viz., expound one part of Scripture in a manner repugnant to another; and we need not go through the painful task of citing the numerous passages in the extracts where this is done by the appellant. We find whole chapters of the Gospel of St. John declared by the appellant, on his own simple assertion, to be irreconcileable with the other Gospels, not on points unconnected with "religious faith and duty," to use the words of the judgment in the case of the Essays and Reviews, but in the most essential manner connected with both; and again, whole passages declared to be spurious on no other ground than that they do not approve themselves to the appellant's taste. We can entertain no doubt then, that the charges contained in the 32nd, 33rd, and 34th articles of charges are abundantly established. We have now fulfilled the duty of examining minutely the articles of charge exhibited against the appellant. We have not been unmindful of the latitude wisely allowed by the Articles of Religion to the clergy, so as to embrace all who hold one common faith. The mysterious nature of many of the subjects associ-

ith the cardinal points of this faith, must, of ity, occasion great diversity of opinion, and not been attempted by the Articles to close all sion, or to guard against varied interpreta- f Scripture with reference even to cardinal s of faith, so that these articles are them- plainly admitted, in some sense or other, ing to a reasonable construction, or according o a doubtful, but not delusive construction. r have we omitted to notice the previous ns of the Ecclesiastical Courts, and especi- he judgments of this tribunal, by which retations of the Articles of Religion, which y reasonable allowance for the variety of opinion can be reconciled with their ge, have been held to be consistent with obedience to the laws ecclesiastical, even the interpretation in question might not be hich the tribunal itself would have assigned article. We have also had careful regard to planation given by the appellant himself in of those of his writings from which the ts contained in the articles of charge have taken, in order to see whether the extracts r to the mind the advised and definite ns of the author, or whether their meaning modified by the context in a sense more tent with the Articles of Religion, but we find any indications of such being the case. ink that the extracts deliberately exhibit the ns of the appellant, by which the Articles of on, with reference to original sin, the sacrifice ffering of Christ, the Son of God, both God an, to reconcile His Father to man, the ation and Godhead of the Son, His return ge the world, the doctrine of the Trinity, are r controverted and impugned, and the Holy ures are as plainly denied their legitimate rity, even on points essential both to faith ity, by the process of denying their genuine- not on any critical grounds, but avowedly e they contradict the appellant's private ent. We have not, in this our decision, ed to any of the Formularies of the Church than the Articles of Religion. We have mindful of the authorities, which have held ious expressions of devotion are not to be as binding declarations of doctrine. But ppellant will, we think, himself feel how sible it is that any society whatever of ippers can be held together without some mental points of agreement, or can together ip a being in whom they have no common

He himself appears to have experienced the lty in the remarkable passages extracted in 2 of the appendix, with reference to prayer name of Jesus Christ. The whole of the laries of the Church, and of its devotion, are on the faith in one God, the Father, Son, Holy Ghost. In the daily services of the h, both morning and evening, glory is ed at the end of each Psalm to this one God inity, naming each person of the Godhead tely. Prayer constantly concludes with a nce to the mediation of Jesus Christ. Direct r is addressed to Jesus Christ in the daily e, morning and evening, by the short prayer Christ have mercy upon us." In the daily ng prayer, throughout a great portion of the um, prayer is made to the Son; and, three in a week, in the Litany, there is direct r addressed both to the Son and to the Holy Ghost, as well as to the Holy Trinity. In fact, a large portion of the Litany is addressed to the Son directly. It is not surprising then, that there should be articles distinctly supporting devotions, so fully impressed with a faith in the intercession and power of the Son who is thus invoked. And it would be as contrary to morality as to law to direct the professors of any religion daily to offer prayer to One in whose Divine power they have no faith, or to address as God, One whom they believed to be only man. The appellant, in his address to us, relied much on the absence of direct verbal contradiction in his writings to the words of the Articles of Religion, and asserted that, inasmuch as the Articles could not be all reconciled with each other, he might properly dwell on one view of an Article, which, from the inconsistent character of the Articles, would be opposed to the construction of another Article. The mode in which the appellant constantly misrepresents and caricatures the opinions from which he differs no doubt accounts for his thus attributing inconsistency to statements of doctrine which he has misunderstood. We are, on a perusal of the appellant's writings, driven to the conclusion, not removed by his arguments, that the appellant advisedly rejects the doctrines on the profession of which alone he was admitted to the position of a minister of the church. He disclaims all wish to reconsider his avowed and published opinions, and does not desire an opportunity of retracting any of his opinions. We are bound, therefore, to advise her Majesty that his appeal against the admission of the articles should be dismissed with costs, and that, on the merits of the whole case, sentence of deprivation should be pronounced against the appellant, and that he should be condemned in the costs of the suit. In pronouncing this decision their Lordships have assumed that the appellant adheres to the intimation, made by him on the conclusion of the argument, that he does not desire an opportunity of retracting the opinions which have now been condemned; but their Lordships are, nevertheless, unwilling to proceed to the last step of their duty if he do, within a week from this date, expressly and unreservedly retract the several errors of which he has been convicted. Their Lordships would have followed the precedent afforded by Mr. Heath's case if the appellant had been present and would have required his immediate decision, but they have been informed that Mr. Voysey's absence is occasioned by a sufficient reason.

Proctors for the promoter, *Moore* and *Currey*.
Proctors for the defendant, *Shaen* and *Roscoe*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

May 26, 29, *and June* 5, 1871.

PITTS *v.* KINGSBRIDGE HIGHWAY BOARD.

Highway Board—Power to remove shingle from beach—General Highway Act (5 & 6 *Will.* 4, *c.* 50), *ss.* 51 *and* 52—*Respective liabilities of contractor and employer.*

A special custom to take shingle from the beach above high water mark for the repairing of the highways of the parish, is bad as to such portion of the beach as is private property, being a custom of a *profit à prendre in another man's land.*

The General Highway Act (5 & 6 *Will.* 4, c. 50) *does not empower a highway board to take shingle from the beach below high water mark for the repair of the highways, so as to cause an increased danger of encroachment by the sea.*

The employers of a contractor are liable for the injurious acts of the contractor which flow out of the fulfilment of the contract, but where the injurious acts flow out of a matter foreign to the contract, the contractor is personally liable.

Where a plaintiff fails in establishing a case for relief, the uncertain character of the evidence on which the case turns, and the setting up of unfounded claims by the defence, are grounds for dismissing the bill without costs.

THIS was a suit instituted by one Nicholas Pitts to obtain an injunction to restrain the Kingsbridge Highway Board, their contractors, servants, workmen, and agents from gathering or getting, raking, digging, taking away, and removing stones, pebbles, shingle, or other like materials on and from the beach or shore of Lannacombe Cove, in the highway district of Kingsbridge, Devon. The bill also prayed that the damages occasioned to the plaintiff by the gathering, taking away and removing by the defendants of stones, pebbles, shingle and other like materials, on and from the beach or shore of Lannacombe Cove, might be ascertained and the amount thereof assessed, and that the defendants might be ordered to pay the same to the plaintiff.

The plaintiff, as owner in fee simple of a portion of the manor of South Allington, which adjoins Lannacombe Cove, claimed to be entitled to the sea beach, waste land, and foreshore above high water mark adjacent to the manor of South Allington. The lands in question had been vested in the plaintiff and his ancestors for sixty years and upwards. The manor of South Allington is an ancient manor, and the bill alleged that the manor, both by grant and immemorial right and custom, consisted of (amongst other things) the sea beach and waste lands adjacent thereto.

The plaintiff was also the owner in fee simple of an estate called Down, which extended to Lannacombe Cove, and which he purchased in 1858 from the trustees of the then lord of the manor of Stokenham, an ancient manor, with similar rights over the sea shore, to those belonging to the manor of South Allington. Under and by virtue of the deed of conveyance of this estate of Down the plaintiff claimed to be entitled to the sea beach, waste lands, and foreshore adjacent to the estate of Down, such waste being by such deed expressly conveyed and assured to him.

The sea beach, waste lands, &c., in question, are comprised in the Kingsbridge highway district, which was duly formed under the statute 25 & 26 Vict. c. 61, by which statute also the Kingsbridge Highway Board was constituted as a corporate body.

The defendants under their Act from time to time employed contractors to repair the highways. In the fulfilment of their contract the contractors had on various occasions removed quantities of shingle from the beach of Lannacombe Cove, both from above and below, high water mark.

The plaintiff, by his solicitor, Mr. Richard Andrews, in June 1868, applied by letter to the defendants through their clerk, Mr. Gabriel Beer *Lidstone, and requested them to prevent their contractors from continuing to remove stones,* shingle, and other like materials from the beach of Lannacombe Cove, but the defendants refused to comply with the plaintiff's requests, alleging that under and by virtue of the 5 & 6 Will. 4, c. 50, ss. 51 & 52 (*a*), they and their contractors had a right to remove such stones, shingle, &c., from the beach in question for the purpose of repairing the roads and highways of the Kingsbridge district.

Thereupon the plaintiff instituted the present suit, alleging by his bill that on the part of the coast where his estates are situate, the sea is continually advancing and encroaching on the adjoining lands, and the gathering or getting, raking and digging up stones, pebbles, shingle, or other like materials on, and removing the

(*a*) By the 51st section of the General Highway Act (5 & 6 Will. 4, c. 50), it is provided that "it shall and may be lawful for every surveyor, in any waste land or common ground, river, or brook, within the parish for which he shall be surveyor, or within any other parish wherein gravel, sand, stone, or other materials are respectively likely to be found (in case sufficient cannot be conveniently had within the parish where the same are to be employed, and sufficient shall be left for the use of the roads in such other parish), to search for, dig, get, and carry away the same, so that the said surveyor doth not thereby divert or interrupt the course of such river or brook, or prejudice or damage any building, highway, or ford, nor dig or get the same out of any river or brook, within the distance of 150ft. above or below any bridge, nor within the like distance of any dam or weir; and likewise to gather stones lying upon any lands or grounds within the parish where such highway shall be, for such service or purpose, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways, without making any satisfaction for the said materials; but satisfaction shall be made for all damages done to the lands or grounds of any person or persons by carrying away the same, and in the manner hereinafter directed for getting and carrying materials in inclosed lands or grounds; but no such stones shall be gathered without the consent of the owner of such lands or grounds, or a licence for that purpose from two justices at a special sessions for the highways, after having summoned such owner to come before him and heard his reasons, if he shall appear and give any, for refusing his consent.

By sect 52 it is provided that "nothing in the Act contained relative to the gathering or getting of stones or other materials, shall extend to any quantity of stones or other materials thrown up by the sea, commonly called beach, where the removal of the same would cause any damage or injury by inundation to the lands adjoining, or increased danger of encroachment by the sea."

And by sect. 53 it is provided that "it shall not be lawful for any surveyor, or other person acting under the authority of this Act, to dig, gather, get, take, or carry away any materials for making or repairing any highway out of or from any inclosed land or ground, until one calendar month's notice in writing, signed by the surveyor, shall have been given to the owner of the premises from which such materials are intended to be taken, or left at the house or last or usual place of abode of such owner or agent, and also of such occupier, to appear before the justices at a special sessions for the highways, to show cause why such materials shall not be had therefrom; and in case such owner, agent, or occupier shall attend pursuant to such notice, but shall not show sufficient cause to the contrary, such justices shall, if they think proper, authorise such surveyor or other person to dig, get, gather, take, and carry away such materials at such time or times as to such justices shall seem proper; and if such owner, agent, or occupier shall neglect or refuse to appear by himself or his agent, the said justices shall and may (upon proof on oath of the service of such notice) make such order therein as they shall think fit as fully and effectually to all intents and purposes as if such owner or occupier, or his agent, had attended."

same from the beach or shore increased the danger of encroachment by the sea on the adjoining lands belonging to the plaintiff.

The plaintiff submitted that the defendants and their contractor had not, under the General Highway Act, or any other enactment or authority, any right to remove stones, &c., from the beach in question, and that they ought to be restrained by injunction from removing such stones, &c., from the beach in question, as well from below as above high water mark, and more especially so having regard to the increased danger of encroachment by the sea on the plaintiff's lands, occasioned by such acts.

The defendants by their answer contended that as to stones, &c., removed from below high water mark (such part of the beach not being the private property of the plaintiff) they were entitled to remove them by the 51st and 52nd sections of the Act, and also by a special custom by which from time immemorial the inhabitants of the parishes or manors of Chivelstone and Stokenham (in which the plaintiff's estates were situate), or the persons for the time being, and from time to time charged with the duty of repairing the roads and highways in such respective parishes had been used and accustomed to have and enjoy the right to enter upon the sea shore between high and low water mark in Lannacombe Cove, and to get, take, and collect, gravel, stones, pebbles, beach, and other such materials there deposited by the sea, and remove and carry away the same therefrom for the purpose of repairing the roads and highways in the said respective parishes when and so often as need and occasion required. The defendants further contended that it was their contractors, and not themselves who had committed the acts complained of, and that the contractors were alone liable in respect thereof.

In a contract entered into on the 20th May 1869, by the defendants, with the persons whose tender was accepted for the repair of the roads, it was provided that "whenever the contractors are required to use pebbles or other materials thrown up by the sea for hardening any of the roads, they are not to cause any damage or injury by the removal of such pebbles or other materials by inundations of the lands adjoining to where the same may have been removed, or increased danger by encroachment by the sea, and the board will not be responsible for the illegal removal of such pebbles or other materials by the contractors."

As to the shingle removed from above high water mark, the defendants admitted that they had removed some in 1866, three years before the filing of the bill, but not since, and they disclaimed all intention of removing shingle therefrom in the future.

The evidence was very conflicting as to the quantity of shingle removed, and as to whether its removal caused increased danger of encroachment by the sea.

Mackeson, Q. C. and *W. Wellington Cooper*, for the plaintiff, submitted that the defendants had no right under sect. 51 of the Act to remove the shingle above high water mark, as that part of the beach was the plaintiff's private property. As to the shingle below high water mark, its removal caused increased danger of encroachment of the sea on the plaintiff's private property, and therefore the defendants could not remove the shingle, as such a case was *expressly excepted from* the operation of the 51st section by the terms of the 52nd section. They cited

Johnson v. *Wyard*, 2 Lutw. 1344, and
Padwick v. *Knight*, 7 Ex. 854,

where it was held that a surveyor of highways cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea shore between high and low water mark, or otherwise, for the purpose of repairing the highways of the parish. They contended that the alleged custom to take stones, &c., for the repair of the roads was bad as being a claim of a profit *à prendre* in another man's soil:

Constable v. *Nicholson*, 14 C. B., N. S., 230;
The Attorney-General v. *Matthias*, 4 K. & J. 579;
Willingale v. *Maitland*, L. Rep. 3 Eq. 103; 36 L. J. Ch. 64;
Clowes v. *Beck*, 13 Beav. 353.

They contended that it was the defendants and not their contractors who were liable for the injury done; on this point they cited,—

Hole v. *The Sittingbourne and Sheerness Railway Company*, 3 L. T. Rep. N. S 750; 6 H. & N. 488, and
Gray v. *Pullen*, 11 L. T. Rep. N. S. 569; 5 Best & Sm. 978.

Jessel, Q.C., *Charles Hall*, and *Solomon*, for the defendants, contended that it was now too late to obtain relief for the injury done in 1866 by taking shingle from above high water mark, as the defendants had disclaimed the intention of taking any more from that part of the shore. As to taking shingle below high water mark they referred to 7 Jac. 1, c. 18, and Hall on the Sea Shore, p. 246. Assuming that the shingle was wrongly taken, they contended that the defendants were not liable for the wrongful acts of their contractors: (*Gray* v. *Pullen*, 11 L. T. Rep. N. S. 569; 5 Best & Sm. 978).

Mackeson, Q.C. in reply,

June 5.—Lord ROMILLY.—This is a suit instituted for the purpose of preventing injury to the property of the plaintiff, by removing shingle from the beach in Lannacombe Cove, near Kingsbridge, in Devonshire. The plaintiff says that the defendants' right to take away the beach is only given by the General Highway Act (5 & 6 Will 4, c. 50), and that this right is limited by sects. 51 & 52, that sect. 51 prevents their taking the property of the plaintiff without his assent, or paying him for it, and that sect. 52 prevents their taking any beach from any place in such a manner as to increase or cause danger from the encroachment of the sea. The defendants, on the other hand, not only insist that they are entitled to do what they have done, under the General Highway Act, but they also contend that if that does not enable them to do so, they can take it by special custom; and if that contention fail, that they are not liable, because it is the act of the contractor whom they have employed and not their act, that the words of the contract employing the contractors told them to do nothing they were not entitled to do, and that the bill ought to be against the contractor and not against them. It is necessary, in consequence of this defence, to distinguish the case of the taking of stones from the beach from below and from above ordinary high water mark. The plaintiff alleges that the defendants have taken stones from the beach from above high water mark. This piece of ground was formerly part of the waste, and was conveyed by the lord of the manor to the plaintiff for valuable consideration. It must therefore be treated, for this purpose, as the private property

of the plaintiff. So treating it, I am of opinion that the defendants are not entitled to take away stones from this part of the cove by means of any custom, and that the custom of a profit *à prendre* in another man's land is bad, as indeed is admitted by the defendants; and that the attempt to set up a grant from the Crown has no application to this case, as the plaintiff's title proceeds from a grant by the lord of the manor of a part of the waste, which supersedes, or, rather, is inconsistent with, a grant from the Crown: and as to the 53rd section of the statute I think that the defendants have not proceeded under it. With respect to the stones below high water mark, they stand on a very different footing, and the right to them is limited by the 51st and 52nd sections of the statute. The real question which I have to try upon the evidence laid before me is, whether taking away the beach causes or increases the danger of encroachment by the sea. And here I may at once dispose of an argument relied on by the defendants, namely, that if injury has been done, the contractors are the only persons to blame, and that they might be made liable personally. I am of opinion that the defendants are liable for the improper acts of the contractors which flow out of the fulfilment of the contract entered into with the defendants; and that if the contractors under this contract, which does not exclude their taking away such stones, have removed beach from above high water mark, the defendants are liable; and that if the contractors have, by taking beach from below high water mark, caused or increased the danger of the encroachment of the sea, contrary to the provisions of the statute, the defendants are liable, and that the contractors, although they may be liable to the defendants, are not liable to the plaintiff. Of course if the matter were foreign to the contract, then the contractors would be personally liable; but what the contractors have done is that which they contracted to do as part of the contract under which they were employed for value to do a particular act, and if the act cannot be done without injury to the plaintiff, and is against the provisions of sect. 52, it is not they, but the defendants, who are liable. But the real questions to be determined are those of fact. With respect to the first, the taking of shingle from the land of the plaintiff above high water mark, I am satisfied upon the evidence, that no shingle has been taken from that spot since 1866, and the defendants now disclaim the right to take away any unless under the 53rd section, under which they would have to pay for it. With respect to that, therefore, an undertaking by the board that they will not take or authorise the taking of any shingle from that part of the shore will be sufficient. With respect to the taking of shingle below the high water mark, the only question is, whether it accelerates the encroachment of the sea. On this subject there is much conflicting evidence. I think that the evidence is distinct that the sea does encroach, though not, I think, rapidly. But I cannot, upon the evidence, attribute any portion of the encroachment to the abstraction by the defendants of the shingle from the beach. The evidence is uncontradicted that a single tide with the wind in one direction will abstract the greater part of the beach from the cove, and that another tide, with the wind in another direction, will fill the cove with shingle, and I do not think that the abstraction by the defendants of two or three hundred cartloads of shingle from time to time would produce any effect on a shore so influenced by tides and winds, especially when it appears that the shingle is washed along the bottom of the cliffs below low water mark for a considerable distance. I am of opinion that the evidence is not conclusive; but, forming the best opinion I can, the conclusion I have come to is, that the removal of shingle from time to time below high-water mark from the cove to the extent to which it has been removed by the defendants, does not accelerate the encroachment of the sea in the least. I shall, therefore, dismiss the bill; but, having regard to the uncertain character of the evidence, and the unfounded claims which the defendants have put forward, I shall do so without costs, and on the assumption that the defendants continue their disclaimer of all right to take any part of the beach above the level of ordinary high water mark.

Solicitors for the plaintiff, *Godwin* and *Pickett* for *Richard Andrews*, Modbury, Devon.

Solicitors for the defendants, *Edmund Byrne*, for *G. B. Lidstone*, Kingsbridge, Devon.

July 8, 15, *and* 22, 1871.

Re THE MARYLEBONE (STINGO-LANE) IMPROVEMENT ACT 1868; *Ex parte* EDWARDS.

Lands Clauses Consolidation Act 1845—*Notice to take land under compulsory powers—Interest created after service of notice—Compensation.*

A tenancy created after service of notice to treat is not a subject for compensation by the party serving the notice.

PETITION.

By the Marylebone (Stingo-lane) Improvement Act 1868, which incorporates the Lands Clauses Consolidation Act 1845, and the Lands Clauses Consolidation Act 1860, the Metropolitan Board of Works were authorised to make a new street commencing in the Marylebone-road at or near the point where Stingo-lane unites with that road and terminating in Upper York-street at the place where Stingo-lane unites with Upper York-street, and to treat and agree for the purchase of any lands authorised to be taken and used by them, and of any subsisting leases, terms, shares, estates, and interest therein and charges thereon, or such of them, or such part thereof as they should think proper.

In pursuance of the powers vested in them by this Act or the Acts incorporated therewith, the Metropolitan Board of Works on the 24th May 1869 served upon Henry Topple a notice to treat for the purchase of his leasehold interest in the messuage and premises No. 6, Stingo-lane, which they required for the purposes of the Act.

At that time Edwards was weekly tenant of a portion of the premises at the rent of 12*s.* a week. He had resided there for five years, and carried on business as a barber and hairdresser.

On the 14th Jan. 1870 an agreement in writing, dated the 18th Dec. 1869, was executed between Henry Topple of the one part and William Edwards of the other part, whereby Topple agreed to let and Edwards agreed to take, the shop, parlour, and kitchens, and one room upstairs, situated at No. 6, Stingo-lane, at the weekly rent of 12*s.* for the term of three years from the 18th Dec. 1869.

The petition stated that Topple had on several occasions promised to grant a lease of the rooms in question to Edwards.

In Feb. 1870 Topple sent in to the Metropolitan Board of Works particulars of his claim, in which he stated that his interest was subject to that of Edwards under the agreement of the 18th Dec. 1869, and the value of Topple's interest was assessed on the footing of the claim so made, and the amount of compensation awarded to him was 1381*l.*

On the 7th March 1871 Edwards gave notice to the Metropolitan Board of Works that he claimed the sum of 350*l.* in respect of his interest in the premises under the agreement of the 18th Dec. 1869.

On the 27th March 1871 the Metropolitan Board of Works issued their warrant to the sheriff of Middlesex, whereby, after reciting that they did not admit but denied that Edwards was entitled to receive any compensation at all from them in respect of the matters mentioned in his notice, they required him to summon a special jury to determine the amount of compensation (if any) payable by them to Edwards.

On the 29th April 1871 a jury was summoned, and assessed Edwards's claim to compensation at 100*l.*

Edwards's costs of these proceedings were taxed at 62*l.*

The Metropolitan Board of Works still disputed Edwards's claim, and paid the sum of 162*l.* into court under the 76th section of the Lands Clauses Consolidation Act 1845.

Edwards accordingly presented the present petition, praying that the amount might be paid out of court to him.

Jessel, Q. C. and *Willis-Bund* in support of the petition.

Southgate, Q. C. and *Charles Hall*, for the Metropolitan Board of Works, opposed.

July 22.—Lord ROMILLY said that if the agreement in question had been executed before the landlord received the notice to treat, the petitioner would have been entitled to compensation in respect of his interest, even though the three years' tenancy had been created in the expectation of the house being taken by the Metropolitan Board of Works under the compulsory powers vested in them by the Act. Here, however, the tenancy was created after service of the notice to treat, and his Lordship was of opinion that it was therefore not a subject for compensation by the party serving the notice. The petition must, therefore be dismissed, but without costs.

Solicitor for the petitioner, *Silberberg*.

Solicitor for the Metropolitan Board of Works, *W. Wyke Smith*.

V. C. WICKENS' COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

PRATT *v.* HARVEY.

Tuesday, July 11, 1871.

Will—Bequest for building a church—Mortmain Acts—Bequest invalid.

A testator bequeathed a sum of money towards the expenses of building a church, and provided that, if the church should not be commenced in his lifetime, or before the expiration of two years from his death, or within half a mile of a certain place, the legacy was to go over to his general personal estate:

Held, that the legacy was invalid, as coming within the Statutes of Mortmain.

THE question in this case was whether a legacy was invalid, as contravening the provisions of the Statutes of Mortmain. The facts were these:

J. T. Fisher, by his will dated in Dec. 1868, bequeathed (*inter alia*) the sum of 1000*l.* to the vicar and churchwardens of the town of Newark-upon-Trent, to be applied by them in and towards the expenses of building and erecting a new church, near Northgate, in connection with the Church of England; and the testator provided that if the church should not be commenced during his lifetime, or before the expiration of two years after his death, or if it should not be erected within half a mile of Northgate, then such legacy was to go over to his general personal estate; and the testator bequeathed the residue of his property to the plaintiffs, who were infants.

The testator died in May, 1869.

Freeman for the plaintiffs.

Charles Hall for the defendants, the legatees, contended that the bequest, when made to them, was contingent on the fact of land being purchased within the lifetime of the testator, and therefore good. It was true that no land had been so purchased; but that would not invalidate a bequest originally valid. He cited

Cresswell v. *Cresswell*, L. Rep. 6 Eq. 69; 18 L. T. Rep. N. S. 392;
Philpott v. *St. George's Hospital*, 6 H. of L. Cas. 338;
Re Watmough's Trusts, L. Rep. 8 Eq. 272.

Borthwick for trustees.

The VICE-CHANCELLOR.—The authorities referred to lay down the law that a charitable gift for building is only good in two instances—namely, where it is directed that the building should take place on specified land already in mortmain, or where by the gift the purchase of land is expressly excluded. This case does not come within those definitions. I consider that the restriction on the gift is not nearly enough to exclude its application in the purchase of land, and that being so, the legacy must fail, except to the extent of the 500*l.* allowed by the Act.

Solicitors for the plaintiffs, *Swann* and *Co.*

Solicitors for the defendants, *Pelgrave* and *Hodgkinson*.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-law.

Wednesday, May 31, 1871.

THE GUARDIANS OF THE POOR OF THE STOURBRIDGE UNION (apps.) *v.* THE GUARDIANS OF THE POOR OF THE DROITWICH UNION (resps.).

Poor law—Parish not maintaining its poor—Association of townships for rating purposes—Severance—Loss of settlement therefrom—Alteration of area.

The ecclesiastical parish of Old Swinford never maintained its own poor; but the township of Upper Swinford, within the said parish, and three other townships also therein, from time immemorial associated together under the designation of the "parish of Old Swinford," jointly appointed overseers, and made rates for the relief of their poor.

The four townships, however, disjoined, pursuant to a mandamus directed to one of them in 1842, *and separate overseers have since been regularly appointed, and separate rates made for each.*

The township of Upper Swinford now forms part of Stourbridge Union, which comprises the parishes and places of Stourbridge, Old Swinford, &c.

A. was born about the year 1804 *in the township of Upper Swinford.*

The wife and children of his son, paupers, were entitled to derive a settlement from the birth settlement of A., and were therefore adjudged by an order of justices to be legally settled in the parish of Old Swinford, and to be removable to the Stourbridge Union.

Held (in consequence solely of the decisions in Reg. *v.* The Inhabitants of Tipton, (3 *Q. B.* 215); Reg. *v.* The Inhabitants of Hunnington (5 *Q. B.* 273), *and successive similar cases), that as there had been a change in the chargeable area wherein the birth settlement of A. lay, by the separation of the united townships, the paupers had no legal settlement there, and that the order was bad.*

1. By an order of two justices for the county of Worcester, made on the 28th April 1869, on the complaint of the Droitwich union guardians, it was adjudged that the settlement of Mary Ann Smith and two children, aged six and two years, was in the parish of Old Swinford and Stourbridge union, and the former union was ordered to remove the said paupers to the Stourbridge union. On appeal, by an order of a judge the following case was stated for the opinion of this court.

2. Mary Ann Smith, in the order mentioned, is the widow of William Smith.

3. The grounds of removal, including the particulars in the settlement relied upon in support of the order, stated, amongst other things, "that William Smith was the son of Samuel Smith; that the last-mentioned Samuel Smith was born in the parish of Old Swinford, in or about the year 1804, and that the last legal settlement of the said Mary Ann Smith and her two children is in the said parish of Old Swinford, in virtue of the birth settlement of her late husband, William Smith's father, Samuel Smith, in the said parish of Old Swinford."

4. It is agreed that if the alleged birth settlement of Samuel Smith, in the alleged parish of Old Swinford, or otherwise in the Stourbridge union was, under the circumstances herinafter stated, available at the time of the making of the order, then the last-mentioned settlement was and is the last legal settlement of Mary Ann Smith and her two children, and the order for the removal of Mary Ann Smith and her two children to the Stourbridge union was rightly made.

5. Samuel Smith was born in the township of Upper Swinford, in the ecclesiastical parish of Old Swinford, in the county of Worcester, in or about the year 1804.

6. The ecclesiastical parish of Old Swinford has existed from time immemorial, with a parish church, and churchwardens have been from time immemorial, and still are, regularly appointed for that parish; but portions of the old ecclesiastical parish of Old Swinford have been from time to time separated off into ecclesiastical districts, under the Church Building Acts; and at the time of the making of the said order, the only part of the old ecclesiastical parish of Old Swinford remaining was and is the township of Upper Swinford, in which the church and rectory are situate, and which still constitutes the ecclesiastical parish of Old Swinford. And the portions so separated off have been since such separation, and still are, distinct for all ecclesiastical purposes from the *present ecclesiastical* parish of Old Swinford as *provided by the Church* Building Acts.

7. The ecclesiastical parish of Old Swinford did not, before the passing of the 28 & 29 Vict. c. 79, maintain its own poor, and there is not now, and there never was, any poor rate made for such ecclesiastical parish, and there are no overseers appointed, nor were there any ever appointed for such parish.

8. The ecclesiastical parish of Old Swinford was originally made up of a number of townships and hamlets. These townships and hamlets are as follows: The township of Stourbridge, the hamlet of Amblecote, the township or hamlet of Upper Swinford, in which the old parish church and rectory are situate, the township or hamlet of Wollaston, the township or hamlet of the Lye, and the township or hamlet of Wollescote.

9. The township of Stourbridge has from time immemorial had separate overseers appointed for it, and a separate poor rate has always been made for such township.

10. In like manner the hamlet of Amblecote has from time immemorial had separate overseers appointed for it, and it also has a separate poor rate.

11. The townships or hamlets of Upper Swinford, Wollaston, the Lye, and Wollescote, forming part only of the ecclesiastical parish of Old Swinford from time immemorial previously to the year 1842, were together called "the parish of Old Swinford," and they had two overseers appointed for such townships or hamlets jointly, who were called the overseers of the poor of "the parish of Old Swinford," and one poor rate used to be made by such overseers for such last-mentioned four townships or hamlets, which jointly supported their poor.

12. The Stourbridge Union was formed in the year 1836 by an order of the Poor Law Commissioners for England and Wales, under the 4 & 5 Will. 4, c. 76, s. 26; and by such order the parishes and places of Stourbridge, Old Swinford, Cradley, the borough of Halesowen, Illy, Hawn, Hasbury, Sutley, the Hill, Catkemore, Ridgacre, and Lapal, in the county of Worcester and King's Swinford and Amblecote in the county of Stafford, were formed into a union called the Stourbridge union.

13. In the year 1842 a rule for a *mandamus* was made absolute, commanding the justices to appoint separate overseers for the township of Wollaston, in pursuance of the statute 13 & 14 Car. 2, c. 12, s. 21, which they did; and such separate overseers have been annually appointed for that township, and a separate poor rate has been since made for the same. In consequence of the decision of the Queen's Bench in that case, separate overseers have since the year 1842 also been legally and regularly appointed for the township of Upper Swinford, the township of Lye, and the township of Wollescote, and each of those townships has since that period had a separate rate made for it by its own overseers. After separate overseers had been appointed in 1842, by an order of the Poor Law Commissioners, dated the 18th Aug. 1842, after reciting their said order dated the 19th Sept. 1836, forming under the provisions of the Act of 4 & 5 Will. 4 the Stourbridge union aforesaid, and reciting that the parish of Old Swinford aforesaid was one of the places the names of which were specified in the margin of the said order, and that the same was still one of the places forming the said Stourbridge union, and reciting that the parish of Old Swinford comprised several townships, and among others the townships

of Upper Swinford and Wollaston, but that at the date of the said order the poor of the said parish of Old Swinford were maintained by such parish as the poor of one parish, but that since the date of the said order the said townships of Upper Swinford and Wollaston had been lawfully separated for the maintenance of the poor thereof from the said parish of Old Swinford, and the other townships comprised therein, and that each of the townships of Upper Swinford and Wollaston then maintained its own poor separately; and also reciting that by reason of such separation the ratepayers and owners of property in the said township of Upper Swinford and Wollaston respectively had become entitled, under the provisions of the said last-mentioned Act, separately to elect one guardian at least for each of the said townships, and that the said townships became liable to contribute separately towards the common fund of the union.

The Poor Law Commissioners did, by their order now in recital, order and direct that one guardian of the poor should be separately elected for each of the said townships of Upper Swinford and Wollaston, with the qualification specified in the therein-recited order, wherein the said union was founded.

Similar orders were made by the Poor Law Board as to the other two townships, on separate overseers being appointed for them; and it is agreed that the court may refer to any order of the Poor Law Board mentioned in the case.

14. The whole of the said townships or hamlets which formerly constituted the ecclesiastical parish of Old Swinford, are in the Stourbridge union.

15. Since 1842 there has been no place with separate overseers or with separate poor rates called Old Swinford, but there is still an ecclesiastical parish as before mentioned, called Old Swinford, which is co-extensive with the township of Upper Swinford, in which the said Samuel Smith was born, which township is a place with separate overseers and separate poor rates.

It was contended by the appellants that there is no poor law parish of Old Swinford, in which the paupers could be legally adjudged to be settled, and that the order in question was therefore void; as it in point of fact adjudged them to be settled in the parish of Old Swinford, the only parish of that name being an ecclesiastical parish, and not a parish with overseers, or a parish for which a separate poor rate is made.

It was contended by the respondent, that for the purpose of removal to the Stourbridge poor law union, under the Union Chargeability Act (28 & 29 Vict. c. 79), the paupers could be legally adjudged to be settled in the parish of Old Swinford, in the Stourbridge union, or otherwise in the Stourbridge union by virtue of the birth settlement of Samuel Smith in the township of Upper Swinford, in the parish of Old Swinford, and that the order was therefore properly made.

The question for the opinion of the court, was whether the justices were entitled under the circumstance above stated to make the order of removal (either in its then present, or in an amended form). If the court should answer this question in the affirmative, the order was to be confirmed with costs; if in the negative, the order was to quashed with costs.

Field, Q. C. (with him *Poland*) for the appellants.—The settlement was destroyed by the destruction of the area in which it was. Three decisions conclude this case: first, *Reg. v. The Inhabitants of Tipton* (3 Q. B. 215). There a pauper was born a bastard in the workhouse of Halesowen, where her mother was maintained as a pauper belonging to Halesowen. Halesowen consisted of several townships, maintaining their poor jointly; the workhouse was in one of these; and the pauper's mother was settled in Halesowen in respect of a part of Halesowen, which was in another township. After the pauper's birth separate parish officers, under stat. 13 & 14 Car. 2, c. 12, s. 21, were appointed for each of the townships, and thenceforward they maintained their own poor separately. Held, that both under and independently of stat. 54 Geo. 3, c. 170. s. 3, the pauper at her birth was settled in the parish of Halesowen, but not in any particular township; and that she had not, after the separation of the townships, a settlement in the township in which the workhouse was: (See per Lord Denman, C. J., delivering the judgment of the court therein, p. 219.) The division of parishes into townships separately maintaining their own poor was effected by 14 Car. 2, c. 12 (*a*). Until officers are appointed to relieve the poor of a parish, &c., a settlement there does not come within the definition of "the right acquired in any one of the modes pointed out by the poor laws to become a recipient of the benefit of those laws, in that parish or place which provides for its own poor, where the right has been last acquired:" (Burn's Justice, 30th edit. Tit. Poor, p. 316.) In the case above cited, Lord Denman, C. J., says (p. 222): "To sustain the order of removal into the township of Halesowen, we must hold that a settlement by birth was gained equally in the parish and each of the twelve townships comprising it, for which we can find no warrant of direct authority, or analogy in the law of settlement. It has been suggested as a difficulty, that unless we so hold, the parish, by subdivision, will get rid of settlements, and that persons who would otherwise have gained them may have none. A similar result happened under circumstances nearly the converse of the present in the case of *Reg.* v. *Saighton-on-the-Hill* (2 B. & Ald. 162);" and the learned judge, after stating the facts of that case, adds that the necessary effect of the decision of it was to leave the pauper without any settlement at all. As soon as the parish is divided into townships under the statute of Car. 2, all antecedent settlements disappear. In *Reg* v. *The Inhabitants of Hunnington* (5 Q. B. 273), the facts were as follows—viz., that part of the parish of Halesowen which lay in Shropshire, consisted of several townships, Hunnington, Oldbury, and others, but maintained its poor out of a common fund administered by officers for the whole of that part of the parish. Afterwards, in obedience to a *mandamus*, separate appointments of overseers were made for the respective townships, and each then maintained its own poor. Before the subdivision, a pauper was settled in the Shropshire

(*a*) The 14 Car. 2, c. 12, after reciting that certain counties, "by reason of the largeness of the parishes within the same," are unable to reap the benefit of 43 Eliz. c. 2, enacts that the poor within every township or village within the counties aforesaid shall be maintained within the several and respective township and village wherein he, she, or they shall inhabit, or was or were last lawfully settled, according to the intent and meaning of this Act, and "that there shall be yearly chosen and appointed according to the rules and directions in the said Act of 43 Eliz., two or more overseers of the poor within every of the said townships or villages," &c.

district of Halesowen, by a hiring and service in the township of Hunnington; and it was held that he was not therefore removable to the township of Hunnington as the place of his settlement, when overseers were appointed for that place. Lord Denman, C.J. there says "The principle we acted upon in *Reg.* v. *Tipton* (*sup.*), must decide this case. In *Rex* v. *Saighton-on-the-Hill* (*sup.*), this court decided that although the settlement in the last place of residence was extinct by the destruction of the township, that did not prevent the extinction of the settlement previously acquired." [BLACKBURN, J.—I cannot understand what they mean by the use of the word destroyed. If the parties liked to obtain a *mandamus*, they could still have compelled Saighton-on-the-Hill to appoint overseers.] The definition of "parish" in Burns's Justice as a "place that provides for its own poor" (*sup.*), is adopted in 4 & 5 Will. 4, c. 76, s. 109, which declares that "the word parish shall be construed to include any parish, city, borough, town, township, liberty, precinct, vill, village, hamlet, tithing, chapelry, or any other place, or division, or district of a place maintaining its own poor, whether parochial or extra parochial." Then "parish settlement" must mean the right of a pauper to the benefit of the poor law in any parish maintaining its own poor, and the right of the poor law authorities to remove him thither. The case first cited was again approved of in *Reg.* v. *The Inhabitants of Acton* (8 Q. B. 114), and in *Reg.* v. *The Inhabitants of St. Martin, New Sarum* (9 Q. B. 245) Lord Denman, C. J., says, "The result of the cases arising upon the division of Halesowen may perhaps be regretted; but we had not the power to create a settlement by relation." It is a well known doctrine of this court that the law of settlement should not be lightly disturbed. Then the above cases must govern the decision of the court in the present one, Here the settlement was not in the parish of Old Swinford. The principle of the later legislation has been to make the paupers chargeable where found. In this case there is mere consent of the litigant parishes that the grandfather was born in Old Swinford. [COCKBURN, C. J.—I quite agree that the whole system of settlement is based on false considerations, but that is beside the question to-day.] The Union Chargeability Act 1865 (28 & 29 Vict. c. 79), provides for the removal of paupers to the union or parish in which they shall be settled; and sect. 13 enacts that, "except as herein provided, no alteration shall be made in respect of the settlement of poor persons in parishes." The order could not have been amended, because there was no proof before the justices that the pauper was born in Old Swinford. [LUSH, J.—It is so found as a fact.] The only amendment which would validate the order is one which there is no power to make, viz., to substitute some township for the union of Stourbridge.

Jelf (*H. Matthews*, Q.C. with him), for the respondents. — As to the last observation, it was intended to submit to the court the question whether in any way an order could be made to fix on the appellant union the charge of maintaining these paupers. No doubt the court would desire to distinguish if possible this case from those cited. [BLACKBURN, J.—*Reg.* v. *Hunnington* seems most clearly in point. What say you to it?] The Stourbridge Union was formed in 1836, and if the law as between the union and the different parishes constituting it had been at that time as it now is, then, irrespective of any division under the statute of Charles, that union would have been liable. [BLACKBURN, J.—But union chargeability did not then exist.] If the Union Chargeability Act had come into operation simultaneously with the separation, then *Reg.* v. *Hunnington* (*sup.*) would not have been decided as it was; the *ratio decidendi* of that case probably being that it was a necessary application of the law of settlements to hold that whereas a liability distributed over an area had been incurred, it would be a hardship to load any one of those townships with the burdens, because before that the parish would have borne the burdens evenly. Now an order made under the Union Chargeability Act really has an operation to distribute over the whole union the burden of any pauper born. [BLACKBURN, J.—But can it be, that if he had not been removeable to any place before the Union Chargeability Act received the royal assent, he would be removeable the day after?] At least the settlement is not available. The argument *contra*, on the statute of Car. 2, shows the real ground upon which the decisions rest, viz. that there was not machinery to properly carry out the law of settlement. It is conceded by the appellants, that if there had been officers to provide for the poor, the settlement might have been made available. [BLACKBURN, J.—Lord Campbell, C.J. does not say so; while Lord Denman, C.J., and the rest of the court do not expressly say so, although they do give reasons which appear to me equally unsound.] It was only necessary to decide in those cases that each particular settlement then brought into question was not available. Anything said beyond that was extra-judicial. In *Reg.* v. *The Inhabitants of St. Martin New Sarum* (*sup.*), a pauper gained a settlement in parish J. Afterwards, by Act of Parliament J. was united, for all but for ecclesiastical purposes, with parish B. by the title of the United Parishes of J. and B., and it was held that the pauper was settled in the united parishes. [MELLOR, J.—That is, of course, the converse case. They were united, and the burthen of each parish still remained.] The principle is the same. If the effect of the area being destroyed is to destroy the settlement, then, as in the other cases, the settlement would be gone, and it was only by a fair interpretation of the poor laws the court was able to say there was a settlement available against the united parishes. The counsel in the last named case for the respondents was arguing thus: "Here the parish officers of the whole are parish officers for each part; though the converse would not be true," when he was stopped by the court, which shows that the point as to machinery was brought forward. Although the settlement in Upper Swinford may not be available, yet there may be a settlement available in the parish of Old Swinford. [COCKBURN, J.—If you cannot show a settlement within "a parish" you cannot come within the 2nd section of 28 & 29 Vict. c. 79, that presupposes a settlement in a parish. Now here there is no settlement in the parish. The person must be settled in some place in the union.] He may be said to be settled in the old parish. [COCKBURN, C. J.—But that has ceased to exist.] See paragraphs 12 and 13 of the case.

COCKBURN, C. J.—The only satisfaction we can have in deciding this case is the melancholy one of feeling that if we are wrong our illustrious

essors were equally liable to error; and
er felt more sure that they were wrong
I do in the present instance, for I cannot
that by the 14 Car. 2, c. 12, s. 21, it was
ded to curtail and abridge the operation of
tatute of Elizabeth. The three cases cited
ll directly in point, more especially that of
r. *Hunnington*, and cannot be distinguished
the present one. They decided that the
of altering a parish by subdividing it into
hips separately maintaining their own poor,
o annihilate settlements within the original
I think that what has been said in the
r cases equally applies to the one before us,
hat the courts having originally gone wrong
ir ruling, we must not produce such un-
nty in the decisions on the principles appli-
to poor law settlements as we should do
were now to depart from the authorities cited,
hat we must abide by them, more especially
this case, I am happy to say, our so doing
ot be productive of any great hardship—
t all, indeed, to the pauper—and as regards
rishes, if the state of the law works unfairly
e case, yet, in another, the same decisions
e in their favour.

CKBURN, J.—I am entirely of the same
n. We find that from *Reg.* v. *Tipton* (re-
l in 3 Q. B. 219) to *Reg.* v. *St. Martin's, New*
(in 9 Q. B. 249), on four occasions when the
t question has come before the court the
have always held according to the decision
present case. I quite agree with my Lord
hey were originally mistaken; but I also
we ought not lightly to upset their judg-
. I say that for this reason, viz., that when
does not go to a court of appeal and
quite sure that there has been a mistake,
not bound to follow on in error, but when
atter is not an important point affecting
in general, then *communis error facit jus* is
im which we should apply, unless we see
tly that the decided cases were founded in
e, and that the reversal of them would be
ater benefit though unsettling the law.

LOR, J. - I am of the same opinion. If the
n question had been recent we should pro-
ave felt ourselves at liberty to have said the
was wrong; but the first of the decisions we
w acting upon was pronounced so long ago,
been followed by such a series of cases, that
: we should not disturb it.

t, J.—I am of the same opinion I think
one of those questions where it is much
nportant that the law should be settled than
ass how it ought to have been settled.

Judgment for the appellants.

rneys for the appellants, *Gregory* and *Co.*,
for *Barnard* and *King*, Stourbridge.
rneys for the respondents, *Taylor* and *Lake*,
for *N. Bearcroft*, Droitwich.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

Saturday, June 17, 1871.

ERRORS FROM THE EXCHEQUER.

(Before BYLES, BLACKBURN, KEATING, MELLOR, M. SMITH, and LUSH, JJ.)

THE ATTORNEY-GENERAL v. BLACK.

Income tax—5 & 6 Vict. c. 35, ss. 60, 100, scheds. A and D—Local coal dues levied by corporation of Brighton—Liability of, to income tax—Rate of duty—Tolls Tax.

Under a local Act (13 Geo. 3, c. xxxiv.), *improvement commissioners for the town of Brighton were empowered to levy a duty of* 6d. *upon every chaldron of coal, culm, &c., landed on the beach, or brought into, and consumed within, the town, for the purpose of erecting and maintaining groyns and other works against the encroachments of the sea. By a subsequent Act* (50 Geo. 8, c. xxxviii.), *the duty was continued and increased; and subsequently, by the Brighton Town Improvement Act* (6 Geo. 4, c. clxxix.), *it was, together with market tolls, and other rates, duties, and assessments, which the said commissioners were empowered to levy, consolidated into a common fund for the general purposes of the Act, which included, in addition to the maintenance of the groyns, &c., the paving, lighting, watching, cleaning, and otherwise improving the town. By the Brighton Commissioners Transfer Act* 1855 *the said commissioners ceased to act as such, and the corporation and their successors were appointed commissioners in their stead.*

Held (*affirming the judgment of the Court of Exchequer*), *that the coal duty was a property in respect of which the corporation* (*who had succeeded to the rights of the commissioners*) *were liable and bound to pay income tax, either as a "hereditament" under schedule A, or as "property or profits" under schedule D, of the Income Tax Act* (5 & 6 *Vict. c.* 35).

THIS was error upon a judgment of the Court of Exchequer in favour of the Crown, upon a case stated without any pleadings under 22 & 23 Vict. c. 21, s. 10, upon an information filed by the Attorney-General against the defendant, as town clerk of the Corporation of Brighton, to recover penalties incurred by him for not including in the returns under the Income Tax Act (5 & 6 Vict. c. 35) certain duties levied by the corporation under their local Acts upon all coal landed on the beach, or brought within the limits of the town of Brighton.

The facts, shortly summarised, were the following:

The defendant is town clerk of the Corporation of Brighton, which belongs to the port or harbour of Shoreham, in the county of Sussex, and is the proper person to make such returns as are required by the 5 & 6 Vict., c. 35, and the proceeding, though nominally for the recovery of penalties, was, in fact, brought for the purpose of obtaining the decision of the court on the question at issue between the Crown and the corporation, whether the corporation are liable or not to pay income tax upon the amount of the rate or duty, which they levy and receive, in respect of coal, culm, coke, cinders, ashes, and charcoal, landed on the beach, or brought within the limits of the town of

Brighton, by virtue of the powers conferred on them by the Acts hereinafter mentioned.

By an Act, 13 Geo. 3, c. xxxiv. (A.D. 1733), intituled "An Act for paving, lighting, and cleansing the streets, lanes, and places within the town of Brighthelmstone, in the county of Sussex, for removing nuisances and annoyances, and preventing the like for the future, for holding and regulating a market within the said town, *for building and repairing groyns to render the coast safe and commodious for ships and vessels to unload and land sea coal, culm, and other coal for the use of the inhabitants of the said town, and for levying a duty thereon*, and for other purposes," powers were given to the commissioners thereunder to pave, light, and cleanse the streets of the town, and for that purpose to assess and levy rates or assessments, not exceeding 3*s.* in the pound in one year, on the occupiers of all property in the town, and to purchase lands for, and to establish, a market, the rents and profits whereof, after satisfying the moneys borrowed for purchasing the land and establishing the market, were directed to be paid and applied towards the paving, repairing, lighting, and cleansing the said streets, and *in repairing the groyns thereafter mentioned*. And after reciting that the said town of Brighthelmstone was situate by the seaside, and within six miles of the port or harb ur of Shoreham, and belonged to the said port, and that a great part of the town having been destroyed by the breaking in of the sea, *several groyns had been, some years since, erected*, and the coast was now safe and commodious for ships and vessels to unload and land sea coal, culm, and other coal on the beach of the said town, for the use of the inhabitants thereof; and that the said groyns were become greatly out of repair, and the inhabitants of the said town were not able to raise money sufficient to repair the same without the aid and authority of Parliament, it was enacted that the said commissioners should be, and they were, thereby constituted and appointed trustees for repairing, improving, maintaining, and preserving the said groyns and other works, as to them should seem most proper; and that for the better effecting and support of the said premises, there should, from and after the 24th June 1773, be paid to them and their successors *the sum of 6d. for every chaldron of sea coal, culm, and other coal, that should be landed on the beach of the coast, at the town of Brighthelmstone*, with power to the said trustees and their successors to demand and take of and from the masters and owners, or other persons having the rule or command, of every ship, bark, or other vessel, for every chaldron of sea coal, culm, or other coal, landed on the said beach or coast of Brighthelmstone, *or otherwise brought into the said town*, within the parish of Brighthelmstone aforesaid, the said sum of 6*d.* And the Act gave power to the commissioners to enforce the payment of the said duties through the collector or officer of customs of the port or harbour of Shoreham, and to detain and sell the vessel in case of non-payment of the said rate or duty.

Under that Act the old groyns were preserved and improved, and new ones erected. The rate or duty of 6*d.* mentioned in the said Act, and thereby granted, was duly demanded and paid, and the rents and profits of the market, established under the said Act, were duly collected and applied, as thereby directed, until the year 1810, in which an Act of 50 Geo. 3, c. xxxviii was passed, whereby the Act of 1773 was repealed, and larger and more extensive powers were enacted for the government of the town. Additional powers were given to the said commissioners, as trustees for the repairing, improving, and maintaining the old groyns, and erecting new ones, and the rate or duty on coal, &c., granted by the Act of 1773, was raised to any sum the commissioners might think fit to direct, not exceeding 3*s.* per chaldron, and a drawback of the whole rate or duty paid for every chaldron of coals, landed or unloaded within the town, and which should have been forwarded elsewhere for sale or consumption was provided. And it was enacted that, after the moneys borrowed on the credit of the duties, and of the expenses incurred about the groyns, &c., should have been fully paid, the commissioners were empowered to apply the surplus, arising from the said duty, in aid of the rate for paving, watching, lighting, and cleansing the town, which rate, by other sections of the Act, the commissioners were empowered to assess and levy on occupiers of property in the town, to an amount not exceeding 4*s.* in the pound, in any one year. Fresh powers were also given for enlarging and regulating the market, and the surplus arising from the market, and the rents and tolls thereof, was to be applied in aid of the paving, &c., rate, or of the said coal duty, as the commissioners should think proper.

The town continued to be governed and regulated by the last-mentioned Act, until the passing of the Brighton Town Improvement Act (6 Geo. 4, c. clxxix), passed in 1825, by which the former Acts (13 Geo. 3, c. xxxiv. and 50 Geo. 3, c. xxxviii), were repealed, and by sect. 3, new commissioners were appointed; and it was enacted by sect. 117 that "all the rates, tolls, duties, assessments, and impositions which by this Act were authorised to be rated, levied, assessed, or imposed by the said commissioners (except the rate for watering as aforesaid), should, when received, *be consolidated into and form one fund, and be applicable by the commissioners, to be appointed by virtue of this Act, for the general purposes thereof.*" The general purposes referred to in the above-mentioned sect. 117 include repairing, lighting, watching, and cleansing the streets, lanes, and other public passages and places within the town (sects. 31, 33, 34, 37, 41, 50, 59, 60, 70); the providing of fire engines (sect. 61); the purchase of lands, &c., for widening and improving streets, or for providing a site for a town hall (sect. 97); the erection of a town hall, the enlargement of the market, the erection of a town pound, and providing a prison (sect. 139); the establi hment of an additional market for the sale of provisions, if deemed expedient (sect. 148); and the establishment of a cattle, corn, and hay market (sect. 149). The rates, tolls, duties, assessments, and impositions mentioned in the said section include the rates or dutes levied on coal, &c., the tolls of the market, and all other sums receivable by the commissioners or the governing body of the town, as well as all sums levied by way of rates assessed upon occupiers, except the water rate. And by the same Act the Commissioners were authorized to repair, improve, maintain, or remove the groyns, walls, or other fences and works already erected and built for the protection of the town from the encroachments of the sea, and also from time to time to erect, set up, build, repair, and maintain such other groyns, walls,

jetties, piers, and works for the better protection of the said town, &c., and for facilitating the approach to the sea, and the landing of coals and other merchandise on the beach or shore of the said town. And they were also thereby empowered to levy a *rate or duty* not exceeding 3*s.* for every chaldron of coals, &c., *landed on the beach of the said town, or in any other manner, by land carriage or otherwise brought or delivered within the limits of the said town.* By sect. 171 a drawback of the whole rate or duty paid is provided for upon all coal, &c. landed or unloaded within the limits of the Act, for the purpose of being forwarded to any other place, *and not to be consumed within the said limits.*

The Court of Exchequer (Kelly, C.B. and Martin and Channell, BB.) held, that the said coal duty was a property in respect of which the corporation were liable and bound to pay income tax, whether as a "hereditament" under Schedule A, or as "property or profits" under Schedule D of the Income Tax Act (5 & 6 Vict. c. 35). (See the case below fully reported, and the various statutes set out at length, *ante* p. 62; 24 L. T. Rep. N. S. 370; 40 L. J. 89, Ex.; L. Rep. 6 Ex. 78.)

The defendant having brought error upon the above decision of the Court of Exchequer,

Manisty, Q.C. (with him was *D. A. Freeman*) appeared to argue the case on behalf of the defendants, and

The *Attorney-General* (Sir R. P. Collier, Q.C.) (with whom were The *Solicitor-General* (Sir J. D. Coleridge, Q.C.) and *C. Hutton*) argued *contra*, on behalf of the Crown.

The same arguments were urged on either side as were used in the court below.

BYLES, J.—After paying the fullest attention to the argument of Mr. Manisty, I am of opinion that the judgment of the court below must be affirmed. It seems to me that these dues are, at all events, in the nature of "tolls," under rule 3, of No. 111, sect. 60, of 5 & 6 Vict. c. 35. With respect to the incidence of this impost, one thing is quite plain, viz., that it originally falls on the importers, the shipowners or others engaged in the importation of the coals. What its ultimate incidence may be, it is not perhaps necessary to inquire, and it would be very difficult to ascertain; but, at all events, this observation may be made, that the incidence of the tax falls at last upon strangers as well as upon the inhabitants of Brighton. With reference to the benefit of the tax, there is no doubt who has the benefit of it. The benefit is taken solely by the taxpayers of Brighton, there being a wide discretion as to its application. On these short grounds I entertain no doubt whatever that the decision in the court below was right.

BLACKBURN, J.—I am of the same opinion.—I apprehend that the question raised really is on the construction of 5 & 6 Vict. c. 35; by schedule A. of which Act an income tax, or property tax was granted to Her Majesty in these terms: "For all lands, tenements, and hereditaments or heritages" (the word "heritages" evidently applying to Scotland), "in Great Britain, there shall be charged yearly in respect of the property thereof," so much. Then, as applying to schedule A., there are the rules to which I will call attention presently; and then comes schedule D., by which "upon the annual profits or gains arising or accruing to any person residing in Great Britain, from any kind of property whatever, whether situated in Great Britain or elsewhere, there shall be charged yearly "the same sum." Then, when we come to the rules appertaining to schedule D, which are given in sect. 100, we find it is enacted that "the said last-mentioned duties" (that is, those under schedule D.), "shall extend to every description of property or profit which shall not be contained in either of the said schedules A, B, or C." As Martin, B. observed, in the court below, those words are very extensive indeed. He said, "It seemed almost impossible that any net could be extended more widely, for every possible source of income seems included;" and I agree with him that it is a most extensive and wide net; still, I do not think that it embraces everything in the sense that any money which any body corporate or otherwise receives would necessarily become taxable under this Act. Wide as the words are, I think it must be something in the nature of the property mentioned in the schedule A and the rules attached to it, and consequently I think it would not apply to such a matter, as, for instance, the amount which a municipal corporation receives from the borough rate, or the amount which the guardians of the poor receive from the poor rate, or the amount which a highway board receive from the highway rate, because I do not think that these things which I have mentioned, assessments of borough rates, or poor rates, or highway rates, come within the analogy of the description of "property or profits," which are what are mentioned. But then comes the question, whether this particular rate or duty, which the Corporation of Brighton receive under a local Act, does come within the description of "property or profits?" After listening attentively to all that Mr. Manisty has said upon it, I have come to the conclusion that it does. In the first place, we find that the 3rd sub-section of rule No. 3, applicable to schedule A, is as follows: "Of iron works, gas works, salt springs, or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, *rights of markets and fairs, tolls*, railways and other ways, bridges, ferries, and other concerns of the like nature." Therefore where we find "fairs" and "tolls" mentioned it seems quite clear that the Legislature meant to say "profits and property" arising from the proceeds of "tolls of markets and fairs," and *other tolls too*, and that would include harbour dues, port dues, and all dues of that description. It seems clear that these things were intended to be included under the head of property in schedule A, and that it embraces them. Then, when we find afterwards that schedule D is to extend to every kind of property, which is not contained in schedule A, and the other schedule, I think, we must take this as a wide and sweeping description, applying to everything *ejusdem generis* with those things named in schedule A. And consequently market tolls, or harbour dues, or dues which a corporation, or anyone else, receives in consequence of holding the franchise of a market; dues attached to goods brought into the market to be sold, or dues, such as port dues which are frequently charged upon goods brought into a harbour, all which were originally granted to the owner of the port in consideration of his keeping up the port in that way, are clearly, as it seems to me, brought within schedule A. as being under the word "tolls." And I think

that the general sweeping words in schedule D would include everything of that kind. So the question came to this, whether this duty, imposed upon coal, &c., in Brighton, is of the same kind as a harbour duty or toll? I must just observe, in passing, that I think that, although this money when received is directed by the local Act to be brought into a general fund, where it is to be applied with a great many other things, some of which would be clearly taxable (such as market tolls and others), whereas others would clearly not be taxable according to my view (such as the district rate), though they are all brought into the common fund to be applied to this common purpose, I do not think that that affects the question. I think the principle to be adopted, is that which was adopted in the *Mersey Docks and Harbour Board* v. *Cameron* (35 L. J. 1, M. C., in the H. of L.; 11 H. of L. Cas. 443-35; 9 L. T. Rep. N. S. 643). I thinkt hat where the property is, in its nature, clearly subject to a particular tax (in that case it was the poor rate) then, though the profits, when received, are to be appropriated by Act of Parliament to a particular purpose, it is the profits, after discharging those incidents, which the law has allowed to them. In that case it was the poor rate; here it is the income tax. If the profits be taxable I do not think that the purposes to which they are to be applied renders them untaxable. This duty is a duty originally granted, partly in consideration of supporting the groyns and sea wall, and partly in ease of the inhabitants in their taxes. It is a duty granted upon all coals and a particular class of goods brought and landed within Brighton. And it seems to me that that is strictly *ejusdem generis* with those tolls, petty customs, and dues of that sort, which are frequently granted by the prerogative of the Crown, to the owner of a market, in respect of his franchise on all goods brought into the market for the purpose of sale; or, in the case of a port, on all goods brought and landed in the port. These would be clearly property, and clearly subject to income tax. Until of late years the corporation of Liverpool received 100,000*l.* a year town dues on goods imported and landed within the Mersey, and that amount used to go to the borough fund, and was appropriated like all other property. Clearly that would have been taxable as tolls, *ejusdem generis* with the "tolls of fairs" mentioned in sub-sect. 3 of Rule III., Schedule A. Probably it would come directly under the word "tolls," but they would, at all events, be taxable property. Now that has been taken away and appropriated to the Mersey Board, and does not any longer form part of the funds of the Corporation of Liverpool at all. I think myself that what the Brighton Corporation have granted to them here by the Legislature —viz., the right to levy a tax upon coals—is *ejusdem generis* with that, and consequently that the wide and general words, to which Martin, B., alluded, would include it. I do not think that the net is so wide as to catch things that are not in the nature of property, but I think that it is wide enough to catch all moneys received in the nature of property; and I think that such a grant as this by Act of Parliament of a toll to be levied by the Corporation of Brighton, is *ejusdem generis* with markets, and fairs, and tolls, and royalties, specially mentioned under Schedule A.

Keating, J.—I am of the same opinion. The argument is brought, in truth, to a very narrow point. On the one hand, Mr. Manisty did not contend that harbour dues, and impositions of that character, would not be taxable; and, on the other hand, the Attorney-General admitted that a district rate would clearly not come within the Income Tax Act. The simple question then is, whether the rate or duty in question is more in the nature of one than of the other of these classes of payments. Now it does not partake of the character of a district rate—a rate which is imposed by the inhabitants of the borough, through their representatives, upon themselves; but it seems to me that it not only partakes of the nature of a harbour toll, but that it is extremely difficult to distinguish it, in principle, from such a toll, and I entirely agree with the observations of my brother Blackburn, that the purpose to which, when collected, it is applied, cannot make a distinction which would prevent this rate or duty being taxable under the Income Tax Act. Therefore I think that the judgment of the Court of Exchequer is right, and ought to be affirmed.

Mellor, J.—I am of the same opinion. It appears to me that this is "property;" that it is a source of income to the corporation, and though they have the power apparently, of diminishing it or raising it up to a point not exceeding 3*s.* a chaldron, yet it is a rate or duty which they are empowered to impose, and which appears to have been granted to them as a corporation, for the repair of the groyns and other works, necessary for the protection of the coast at Brighton; and it appears to me, therefore, that it is certainly made more in the nature of a harbour due, than it is in the nature of a direct tax upon the district. I think it is quite distinguishable from that, because it is, undoubtedly, as my brother Byles observed, levied in the first instance upon all the importers of coal, and paid by them. The question is, what is it when it is *received*, not when it is amalgamated and mixed with the other moneys, which consist, partly, probably, of matters not taxable, and partly, probably, of matters that are taxable?

M. Smith, J.—I am of the same opinion. Mr. Manisty has said all that can be said in support of the view that this payment is more in the nature of a rate or assessment than of a "toll." But, on the whole, I think that his argument is not sufficient to impeach the judgment of the Court of Exchequer. I quite agree that the purpose for which the payment is made cannot be regarded, if the thing is in nature "property or profits." It can only be regarded, and so I understand Mr. Manisty to put it, as one of the circumstances in coming to a conclusion whether the payment is more in the nature of a tax than of a toll; and in that view of it, and in that view of it only, the purpose and object of the payment may be regarded. On the whole, the argument has not satisfied me that the judgment of the Court of Exchequer is wrong, and therefore I am of opinion that it should be affirmed.

Lush, J.—I am also of opinion that the amount of these dues is a "profit" within the meaning of the Income Tax Act. And I think that there is an essential distinction between these dues and a district rate, to which Mr. Manisty has compared them. These dues are granted by Parliament to the corporation of Brighton, upon the importation of coals, and the other matters named, and they are payable upon the importation by the person

ting, and without any act of the corporation. become a debt accruing to them on the tation of the coals, &c., whether the corpora- equire the amount or not; and I cannot agree Mr. Manisty that any importer could resist ayment of this duty upon the plea that the ration do not need it. It seems to me that, g as the Act of Parliament exists, these dues ayable; the amount payable becomes a debt o the corporation by the person importing, the importation, a drawback being allowed should afterwards appear that the coals are ted for the mere purpose of being consumed me other place. The dues are payable as as the Act of Parliament exists, whether the ration need the amount or not. A district to which these dues have been compared, and other rate, properly so called, is an impo- made by the authorities themselves; a call by the local authority on a given class of itants, viz., "upon the occupiers of rateable rty within the district. That is to be made time to time as occasion requires and for sary purposes. The corporation cannot make rates except for necessary purposes, whereas dues are a payment made without any act on the part of the corporation, and without quiry whether they need the amount or not. fore I am clearly of opinion that these dues ot in the nature of rates, but that they are in ature of "property or profits," and are there- roperly assessable to income tax under the

Judgment affirmed.

orney for the Crown, the *Solicitor of Inland ue*, Somerset-house, W.C.

orneys for the defendants, *Tilleard, Son, n*, and *Holme*, 34, Old Jewry, E.C., agent for *ck*, Town Clerk, Brighton.

BAIL COURT.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

Monday, June 12, 1871.

(Before BLACKBURN and MELLOR, JJ.)

REG. *v.* THE POOR LAW BOARD.

ution of union—Clerk to the guardians— pensation for loss of office—Business of rney—Emoluments—"Goodwill" of employ- d—Order of Poor Law Board—30 & 31 Vict. 06, s. 20—Consolidated Orders of Poor Law missioners.

31 Vict. c. 106, s. 20, enacts that when any n shall be dissolved, if any person shall by ns of such dissolution be deprived of any office mployment, the Poor Law Board may, accord- to their judgment, award a compensation to aid to such person, and shall direct the same e paid out of the poor rate of the parish or ishes for which such person was acting at the of the dissolution.

clerk to the board of guardians of an union. g also an attorney, it was his duty to perform execute, without charge for anything beyond ursements, all legal business connected with nion, or in which the guardians should be ged, except prosecutions at the assizes or rior or general sessions or Central Criminal rt, all other proceedings at the said quarter or ral sessions, actions, and other proceedings he Superior Courts of Law, suits and other proceedings in the Superior Courts of Equity and Parliamentary business: (Consolidated Order Amalgamated Order of Poor Law Commissioners 1866, *Art.* 3.)

Lands belonging to the guardians having been taken by a railway company, B. was instructed to conduct proceedings on behalf of the guardians at inquisitions holden by the sheriff under the Lands Clauses Act, and performed, and was paid for such services.

The union was dissolved, whereupon B. applied to the Poor Law Board to award him compensation for the loss of his office and emoluments.

Accordingly the Poor Law Board made an order awarding compensation, in assessing which they took into consideration the profits he had derived from transacting the above-mentioned legal business, and allowed a specific sum for the loss of the same.

On a rule nisi for a certiorari:

Held, that they were justified in so doing, as the business performed at sheriff's inquisitions was of the exceptional kind for which the clerk might reasonably charge and be paid within the spirit of the Consolidated Order 1866, *art.* 3, *and as the profits he made thereby were part of the "goodwill" of the office.*

RULE *nisi* calling upon the defendants to show cause why a writ of *certiorari* should not issue to remove a certain order made by them into this court for the purpose of being quashed, on the ground that they had exceeded their jurisdiction in making it.

On the dissolution of an union Mr. Baylis, the clerk to the guardians, who was also an attorney, made an application to the defendants, the Poor Law Board, for compensation for the loss of his office as clerk, which he had held for thirty-two years.

It appeared that during his tenure of such office he had been instructed by the guardians to conduct proceedings on their behalf before the sheriff respecting the assessment of compensation for lands taken by a railway company, under the Railway and Land Clauses Acts. For such law business he was paid sums in addition to his salary as clerk. The guardians might have employed another attorney if they had chosen so to do.

The defendants made an order under 30 & 31 Vict. c. 106, s. 20, whereby they awarded payment to him of a sum for compensation, in assessing which they estimated the emoluments of his office as enhanced by the extra profits derived by him from the above employment at the sheriff's inquisitions, and gave a specific sum of 169*l.* 10*s.* for the loss of such additional law business.

They computed this particular sum by taking the average of those profits for the three years last before the dissolution of the union.

The facts appeared from affidavits, but were undisputed, and are more fully stated in the judgment of the court.

This order was objected to by the union, out of whose poor rate the sum awarded was directed to be paid, on the ground that the Poor Law Board had exceeded their jurisdiction in awarding the sum of 169*l.* 10*s.* for the loss of the extra profits above-mentioned.(*a*)

(*a*) The Consolidated Order of the Poor Law Commissioners, 24th July 1847, Art. 172, directs that, "The guardians shall pay to the several officers and assistants appointed to, or holding any office or employment under

The *Attorney-General* (Sir R. Collier, Q.C.) (with him *Lumley*) showed cause.—The Poor Law Board were the judges as to the amount of compensation to be awarded: 30 & 31 Vict. c. 106, s. 20. They have exercised their discretion fairly, proceeding on principles analagous to those adopted by the Treasury in making superannuation allowances under certain statutes. It is the practice, after forty years' service, to give as compensation two thirds of the value of the office. Here the clerk had served only thirty-two years, but they considered that he was deprived of his office, and, therefore, gave him compensation for what they deemed the office to be worth. They were arbitrators. [BLACKBURN, J.—Even if they were such in the strictest sense of the word, yet, if they took into consideration matters which they were not entitled to consider, we may review their award: the whole question is, were they limited to making compensation for the loss of the actual salary of the office, or might they take into computation matters clearly *ultra*, as part of the goodwill of the office.] The words of sect. 20 are wide: "The Poor Law Board may, according to their judgment, award a compensation." No restrictive words follow, such as "for the loss of his office." [BLACKBURN, J.—They do not say for what, but plainly mean "for the deprivation." The Poor Law Board put this construction on their consolidated orders, viz., that the guardians must employ their clerk, if he be an attorney, in law business, but had they intended to exclude him from the benefit of any conceivable payment for business other than that of the class specified in those orders, they would have said so. If he had negotiated with a purchaser for the sale of his office, he would have estimated the whole profits in the valuation of it. The court will not question the discretion exercised by the defendants unless it appears to have been wrongly exercised, and will not set their award aside unless it is clearly shown to have been made without jurisdiction.

Jelf (appearing for the Clerk to the Union) (*a*) was not required to argue.

Prentice Q.C. and *Mortimer*, in support of the rule.—The mode in which the amount of compensation was computed is admitted. There are express provisions for the removal of the rules made by the Poor Law Board into this Court clearly proving that excess of their jurisdiction may always be shown here. [BLACKBURN, J.—I do not think that is questioned.] The Act gives compensation for loss of office. This case comes within the first part of the Consolidated Order 1866, Art. 3, for the clerk being an attorney, it was his duty to "perform and execute, without charge for anything beyond disbursements, all legal business." There are certain exceptions within which he did not come. [BLACKBURN, J.—Not within the letter of them, perhaps.] The defendants rely on Art. 172 of the Order of 1847, by which it is provided "that the guardians, with the approval of the commissioners, may pay to any officer or person employed by such guardians a reasonable compensation on account of extraordinary services, or other unforeseen circumstances connected with the duties of such officer or person, or the necessities of the union." These moneys were paid by the union to their clerk for his services touching the railway compensation cases, but there is nothing to show that such payments were made "with the approval" of the Poor Law Board. [BLACKBURN, J.—Nor is it necessary. Who can doubt that, if the guardians had applied to the commissioners, they would have sanctioned those payments made without express authority?] Performing this legal business cannot be called "extraordinary services." [BLACKBURN, J.—Conducting compensation cases before the sheriff is quite within the spirit of the proviso, and the commissioners would surely have said it was work for which the clerk should be remunerated. MELLOR.—And we have nothing to do with the quantum.] He is bound to perform all legal business for 200*l.*; if there is extraordinary work to be done the guardians might employ some other attorney, and pay him. [BLACKBURN, J.—Though he has no absolute right to the extra work and emoluments therefrom, that does not defeat his claim to compensation for the loss of them if he is deprived of the office to which they were incident.] Points of a similar kind have arisen on the Municipal Corporation Act. In *Reg.* v. *The Mayor of Manchester* (3 Q. B. 402), it was held that an attorney could not, under stat. 5 & 6 Will. 4, c. 76, s. 66, or 5 & 6 Vict. c. 111, s. 2, claim compensation for fees and emoluments which he derived from being employed by the justices of a division to prosecute offenders committed by them for trial, where the prosecutor did not employ another attorney. Lord Denman, C. J. there said: "With respect to the value of Mr. Milne's office as clerk to the magistrates, the court is most clearly

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the order, such salaries or remuneration as the commissioners may from time to time direct or approve: Provided that the guardians, with the approval of the commissioners, may pay to any officer or person employed by such guardians, a reasonable compensation on account of extraordinary services, or other unforeseen circumstances connected with the duties of such officer or person, or the necessities of the union: (Glen's Poor Law Board Orders, 7th edit., p. 129.)

By Consolidated Order Amendment Order, 26th Feb. 1866, after rescinding former articles as regards the duties of the clerk, it is ordered that "It shall be his duty (art. 3), to conduct all applications by or on behalf of the guardians, to any justice or justices of petty or special sessions or out of sessions; and, if he be an attorney or solicitor, to perform and execute, without charge for anything beyond disbursements, all legal business connected with the union, or in which the guardians shall be engaged, except prosecutions at the assizes or quarter or general sessions, or Central Criminal Court, all other proceedings at the said quarter or general sessions, actions and other proceedings in the Superior Courts of Law, suits and other proceedings in the Superior Courts of Equity and Parliamentary business: (Ibid. p. 287.)

30 & 31 Vict. c. 106, s. 20, enacts that when any union shall have been or shall be dissolved, or when any parish shall have been or shall be placed under the management of a board of guardians, the time passed in the service of such union or parish prior to such dissolution or the constitution of such board, shall be deemed service which the guardians of any other union comprising such parish, or the board of guardians for such parish, may, if they think fit, take into consideration in any case where an officer applies for a superannuation allowance; and if any person shall by means of such dissolution be deprived of any office or employment, the Poor Law Board may according to their judgment, award a compensation to be paid to such person, either in a sum certain or by way of annuity, and shall direct the same to be paid out of the poor rate of the parish or parishes for which such person was acting at the time of the dissolution, in such manner and according to such proportions as to the said board shall appear equitable.

(*a*) To whom notice of the rule had been given.

of opinion that he has no claim to compensation for the loss of professional gains, such as were formerly received by him in respect of the prosecution of offenders by desire of the magistrates. That is not a species of patronage which belongs to them, and is no ground of compensation." [*Lumley* referred to *Reg.* v. *The Mayor of Norwich* (3 Q. B. 285), where the Lords of the Treasury, in awarding compensation to B. under 5 & 6 Will. 4, c. 76, s. 66, for the loss of the offices of town clerk and clerk of the peace, gave a sum, as they stated in their minute, for the loss of employment in matters relating to certain charity trusts which were under the management of the corporation of the borough, and it was held that the Lords had jurisdiction to make an allowance in this respect; that B. was entitled to compensation for loss of the last mentioned employment when the Act came into operation, and that supposing any deduction due on account of his continuing to be employed afterwards, that was a question of amount as to which the award was final.] See, however, the judgments in that case. Here the statute enables the Poor Law Board to give compensation in those cases only where a person is "deprived of an office or employment." Those words are synonymous; "employment" has not a more extended meaning than "office;" if the words had been "office or employment" it would have been otherwise. It might actually happen that the guardians might now employ their late clerk as an attorney to do the business in respect of the loss of which compensation has been given to him. [BLACKBURN, J.—But now he has only the same chance of being so employed that every other attorney has, and no more.] It is not an inseparable incident to the clerkship of the guardians that the clerk should do legal business for which he is to be paid, and therefore the value of the emoluments now in question ought not to have been estimated in awarding compensation for the loss of the office.

BLACKBURN, J.—I think, when we once understand the facts of this case, that there is no ground for saying that the Poor Law Board exercised their jurisdiction wrongly, and I am far from saying they have not exercised it as I, for one, should have done, had I been in their place. Sect. 20 of 30 & 31 Vict. c. 106, says that "where by the dissolution of an union any person shall be deprived of any office or employment, the Poor Law Board may, according to their judgment, award a compensation to be paid to such person;" plainly, of course, meaning that they are to award compensation for deprivation of office and employment. And I think also, that, although the words used are "according to their judgment," the meaning is, that they are not to be liberal with other persons' money, but to apply their judgment in seeing what is fair compensation. Here they have taken into computation all Mr. Baylis's salary and emoluments of the office of clerk. As to the first no doubt they were right, and to the second, when the rule was moved, we thought he was fairly entitled. Then, besides that, they say that he, being a solicitor, was deprived of certain work which produced profits. The Poor Law Board estimated those profits in the following manner. Having ascertained the amount of the profits in three years and divided it, they obtained an average, and said it shall be taken into the account. That was by no means a perfect way of assessing compensation, for the two or three years selected for the calculation might have been profitless, or, on the other hand, the profits might during those years have been exceptionally large; nevertheless, for a rough mode of assessing compensation, that seems fair enough. They have taken the profits of three years as representing with tolerable accuracy the average of the business. The particular thing dwelt on in argument is this, viz., during that time lands belonging to the board of guardians were taken by a railway company, and disputes arose as to the amount of compensation to be paid for the lands, consequently proceedings were instituted and an inquisition set on foot before a sheriff, and a warrant obtained by the railway company for a jury to assess the compensation for the taking of the lands. Mr. Baylis, being an attorney and clerk to the guardians, was employed about this business, and, besides costs out of pocket, he became entitled to his charges for doing the work. Mr. Prentice laid stress on the terms of the order of the Poor Law Board, before this Act of Parliament passed—that the clerk shall transact all legal business, with certain exceptions therein specified; but the order did not mention among those matters enumerated, proceedings to assess compensation under the Lands Clauses Act; therefore it was contended Mr. Baylis was bound to attend to those without salary; but then, as has been pointed out, there was a prior order in which the Poor Law Board declared that if the clerk has had unusual or extraordinary matters to transact for which he ought to have compensation, the guardians may give it, with the assent of the Poor Law Commissioners. Here the commissioners were unaware of what the clerk had to do, and it is likely that they would have said, if they had been aware of it, that the employment of him in such matters as compensation cases was within the spirit of the Act of Parliament, and that he ought to be paid, and they would sanction payments made to him. Clearly, the commissioners would have sanctioned that. Now comes the important question, are the Poor Law Board, when estimating the compensation to be given for deprivation of an office, tied down to things strictly and legally attached to the office, or are they entitled to say, "It is worth so much besides the actual value of the salary attached to it"? When he entered upon the office it was almost a certainty that it would bring him emoluments arising from legal business done for the union. It is true the guardians might quarrel with their clerk, and, without violating the Act of Parliament, might take the business from him and give it to someone else, but still in all ordinary cases the clerk would be likely to have it; and may not the Poor Law Board take into computation what they would give for the "goodwill"? There is an analogy between this case and cases of compensation under the Lands Clauses Act. You give a man compensation for his house, and take into consideration the fact that it was an old established house of good custom, and that the owner or occupier will suffer from the loss of that. True it is a precarious loss to estimate, but being *de facto* a loss arising from the taking of the house, it is always considered in assessing compensation. Now that seems a precise and strict analogy, and shows that the "goodwill" is to be taken into account in estimating the loss of the office. *Reg.* v. *The Mayor of Norwich* (8 Ad. & E. 633) seems to point to the same

principle. There a gentleman held an office which in law was of annual tenure only, but which in practice and fact was enjoyed during good behaviour. He was removed from it by the town council without reason assigned, and they chose to assess compensation for one year only. On appeal by him to the Lords of the Treasury, they considered that *de facto* the office was one worth in profits to him as much as an office for life, and on that principle they assessed compensation. The Court of Queen's Bench held that the Lords of the Treasury had a right so to do, and some of the court said that they had exercised their discretion soundly. No doubt that was only an opinion, but still one with which I am inclined to agree; for when there is a deprivation of an office, the principle to follow is to give the person compensation as if the late holder had not been deprived. In *Reg* v. *The Mayor of Manchester* (*sup.*), the court thought, and thought rightly, that the clerk to the justices ought not to receive compensation for the loss of that which, I think, was much too remote to be taken into consideration. I think, therefore, the present rule must and should be discharged on the ground that the Poor Law Board did not exercise their jurisdiction improperly, but took into account matters which they were justified in taking into account. With the amount of compensation given by them we have not to interfere.

MELLOR, J.—Under the statute enabling the order to be brought up to be quashed, our exercise of jurisdiction must depend on whether we are satisfied that the order was one with which we should interfere. But here it was a question of quantum. Some of the arguments addressed to us were directed to the question of amount. With that I think we have nothing to do. I do not, for myself, say that the language of all the judges who decided the cases on the Municipal Corporations Act is quite reconcileable, but the principle on which they all rest their judgments is clear enough, and is well illustrated by *Reg.* v. *The Mayor and Corporation of Norwich* (8 Ad. & E. 633). There two judges expressed their opinion that the Lords of the Treasury had exercised their powers rationally, and another judge was silent upon that point, and said merely he thought they had discretion to amend the compensation they had awarded. In this particular case I should be very disinclined to interfere with the quantum, which the Poor Law Board are much more competent to assess than we are. Clearly such business as conducting cases at sheriff inquisitions is kindred to all those things enumerated in the Act of Parliament, and was therefore incident. not to his office of attorney, but to his office of attorney and clerk to the guardians of the union. It is sufficient to say that though Mr. Prentice has failed to satisfy me that we have the power or ought to interfere in this case, my opinion is that the Poor Law Board have exercised their jurisdiction reasonably.

Rule discharged.

Lumley applied for costs.

BLACKBURN, J., after consulting a Master.—It seems to be the practice to discharge such a rule without costs, unless something is shown to the contrary.

Attorney for the clerk to the guardians, *Baylis*; for the guardians, *Farrar* and *Farrar*; for the Poor Law Board, *Sharp*, *Parkes* and *Co.*

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, E. STEWART ROCHE, and H. PEAT, Esqrs., Barristers-at-Law.

July 31, *and Aug.* 1, 1871.

(Before the LORDS JUSTICES.)

Re THE PROFESSIONAL, COMMERCIAL, AND INDUSTRIAL BUILDING SOCIETY.

Winding-up—Benefit building society—Advanced members—Borrowing power—Illegality—Discretion of the court—Regard to wishes of creditors and contributories—"Just and equitable"—The Companies Act 1862, *s.* 79, *cl.* 5.

The court will not make an order to wind-up a Benefit Building society compulsorily on the petition of advanced members, contrary to the wishes of the majority of the creditors and the contributories, unless a plain injustice will be done to the petitioners by refusing the order.

The trustees of a Benefit Building society under 6 *&* 7 *Will.* 4, *c.* 32, *were by the rules authorised from time to time, as might be necessary for the purposes of the society, to borrow money, for which they might give their own personal security, and they were to be indemnified out of the first funds of the society which should be received. The society owed about* 19,000*l. to* 105 *depositors, most of whom were not members. There was also* 4300*l. due to the society's bankers, and there were a few other debts which brought up the total of debts to about* 25,000*l. The assets were estimated as worth* 24,500*l. There were fifty-five advanced and twenty-four unadvanced members. The society became involved in difficulties, principally by reason of a number of notices to withdraw deposits having been given. The directors reported that the business must be closed, and proposed an amalgamation with another society of a similar nature. This proposition was approved by seventy-seven of the depositors, and at a meeting of the members, at which forty-four members were present, the proposition was approved, two only dissenting. Four advanced members, one of whom was in arrear in making the repayments due from him, petitioned to have the society wound-up compulsorily, alleging that it could not pay its debts, that it would be just and equitable to make a winding-up order, and that there had been an erroneous division of alleged profits among the members. After the petition was presented the bankers released the petitioners from their debt, as did nearly the whole of the depositors, and the trustees of the society covenanted to indemnify the petitioners from the remaining debts:*

Held (reversing a decision of Wickens, V.C.), that no winding-up order ought to be made:

Held, also, that the rule authorising the borrowing of money was bad, and that the society could not be sued for the sums due to the depositors.

THIS was an appeal by the above society, which was a Benefit Building society at Birmingham, formed under the Act 6 & 7 Will. 4, c. 32, and having its rules duly certified, from an order made by Wickens, V.C., to wind-up the society compulsorily. The trustees of the society and some of the members joined in the appeal. The petition on which the order was made was presented by four advanced members of the society named Smart, Hall, Dutson, and Edwards. Edwards had committed default in making repayments due by him to the society.

The society was established in June, 1865, its objects being "to enable each member to receive out of the funds the amount or value of his share therein, each share not to exceed the sum of 120*l.*, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to the society until the amount or value of his shares shall have been fully repaid with the interest thereon, and all fines and other payments incurred in respect thereof."

A new rule was made in March, 1870, and duly certified, which provided that "the trustees for the time being may, from time to time, as may be necessary for the purposes of the society, borrow and take up money at interest from any banker with whom the funds of the society shall be deposited, or from any other person, to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of the society which shall be received."

At the time when the petition was presented, the society consisted of seventy-nine members, of whom fifty-five were advanced and twenty-four unadvanced. The assets were, according to evidence given by the secretary, worth 24,579*l.* 14*s.*, and the debts amounted to 25,117*l.* 17*s* 1*d.*, leaving a balance of 538*l.* 3*s.* 1*d.* against the society. The assets consisted principally of sums lent to advanced members, and secured by mortgages given by them to the society, the sums being repayable in periodical instalments. The debts included a sum of 4267*l.* 0*s.* 9*d.*, due to the society's bankers; a total of 19,100*l.* 6*s.* 3*d.*, due to 105 depositors, most of whom were not members of the society; 1700*l.* 10*s.* 1*d.*, owing to unadvanced members, and 50*l.* due for rent. On the 25th May 1871, a meeting of the members of the society was held, and the directors then reported that there were no funds available to advance to members in consequence of the large withdrawal of deposits which had been made, and that it was necessary to close the business of the society. They submitted to the meeting for their approval a proposal for an amalgamation with another similar society, called the Queen's Building Society, which was willing, upon certain conditions, to assume the liabilities of the Professional Society. This proposal had already received the assent of seventy-seven of the depositors. Forty-four members attended the meeting, and a resolution was carried authorising the carrying out of the proposed amalgamation with the Queen's Society. Two members only dissented from this resolution, and these were Edwards, one of the petitioners, and a Mr. Walker.

According to the allegations of the petitioners, depositors to the amount of 5000*l.* had given notices to withdraw their deposits, and the contributions of advanced and investing members, coming in at stated periods in small sums, were wholly insufficient to provide for the demands of the depositors. It was further alleged that large sums of money had been divided as profits among investing and advanced members, whereas there had been an erroneous calculation made, there having been in fact no profits earned, or at any rate a much less sum than had been actually divided. Investing members, it was alleged, had been allowed to withdraw from the society, removing in cash their capital, and also the profits allocated to them, thus leaving the advanced members liable for the debts of the society, and without sufficient assets to enable them to redeem their mortgaged properties, upon the terms of including in their account with the society the share of profits which had been allocated to them respectively. It was further alleged that it was just and equitable that the society should be wound-up; that it had, in fact, ceased to do any business, and that it existed only for the purpose of winding-up its affairs.

The Vice-Chancellor, on hearing the petition, thought that a sufficient case was shown for a winding-up order; but he allowed the drawing-up of the order to be postponed to give the society an opportunity of entering into a compromise with the petitioners. The result of this was that the bankers of the society were induced to execute a deed whereby they absolutely released the petitioners from the debt of 4267*l.* 0*s.* 9*d.* due to them, and that almost all the depositors executed a similar deed as to their respective debts. With regard to the remaining claims of creditors, the five trustees of the society executed another deed by which they personally covenanted to indemnify the petitioners against those claims, which amounted in the whole to only 592*l.* 15*s.*

The Vice-Chancellor, however, was still of opinion that a winding-up order must be made, and he accordingly made the order now appealed from.

Karslake, Q.C. and *Ince*, on behalf of the appellants, relied upon *Re The Suburban Hotel Company* (L. Rep. 2 Ch. App. 737; 17 L. T. Rep. N. S. 22), as showing that the court would have regard to the wishes of a majority of the members of the society, and further argued that the society was not legally liable for the sum borrowed on deposit, and that, even if it were, the petitioners were now fully protected by means of the releases and indemnity which had been given by the three deeds executed since the petition was presented. On these points they referred to:

Fleming v. *Self*, 3 De G. M. & G. 997;
Re The National Permanent Benefit Building Society, L. Rep. 5 Ch. App. 309; 22 L. T. Rep. N. S. 284;
Laing v. *Reed*, L. Rep. 5 Ch. App. 4; 21 L. T. Rep. N. S. 773;
Hope v. *Sparrow*, 22 L. T. Rep. N. S. 154;
Re The Doncaster Permanent Benefit Building Society, L. Rep. 3 Eq. 158; 15 L. T. Rep. N. S. 270;
Re The Victoria, &c., Society, Hill's Case, L. Rep. 9 Eq. 605; 23 L. T. Rep. N. S. 777;
Ex parte Wise, 1 Drew. 465;
Ex parte Wyld, 1 Mac. & G. 1;

Dickinson, Q.C. and *Higgins*, on behalf of the petitioners, supported the order of the Vice-Chancellor, and cited:

Farmer v. *Smith*, 2 H. & N. 196;
Sparrow v. *Farmer*, 26 Beav. 511.

Graham Hastings, on behalf of Walker, desired to be heard in support of the Vice-Chancellor's order.

Their Lordships, however, decided that he must be taken to be practically on the same side as the petitioners, and therefore could not be heard, the rule of their Lordships now being not to hear more than two counsel on the same side.

Karslake, Q.C. was called upon to reply only in respect of the costs of the petition. He argued that it ought to have been dismissed with costs.

Lord Justice JAMES said: With all respect to the Vice-Chancellor, I am of opinion that a proper case has not been shown for an order to wind-up this society. This is a petition of contributories, and of contributories who are all of them in fact

debtors to the society, for they are all persons who have received advances, and in respect of which they are mortgagors to the society. One of them, the man whose petition this really is—Edwards—is not only a debtor to the society, but he is in arrear in respect of a sum which he ought to have paid; and one cannot help seeing that the real object of the petition was to try and get the question settled between him and the society as to the terms upon which he was entitled to redeem. That was substantially the object with which the petition was presented. That is not a proper object for a winding-up petition to settle a dispute between one member of the society and the society as to the terms upon which he is to redeem some particular property which he has mortgaged to them. Then, he says, "I have a strict right. I am a contributory," and one of the grounds alleged in the petition is that the society is unable to pay its debts, and the other is that it is just and equitable (that being the general expression at the end of the 79th clause of the Act of Parliament), under the circumstances of the case, that the society should be wound-up.

Now with regard to the debts. Certainly the petitioners have not given the statutory proof of the existence of the debts which the company is unable to pay, because the statutory proof is that an action should be brought, or that there should be a demand made in the nature of a summons in bankruptcy, and that the amount has not been paid, unless it is proved otherwise to the satisfaction of the court that the company is unable to pay its debts. It has not been proved in this case to my satisfaction that there is any debt whatever in respect of which the society could be liable. First of all a society of this kind is not entitled to borrow money, except under a special rule; it is no part of its ordinary business to borrow money. It may incur debts, no doubt, of this kind—it must incur debts for office rent, and it must employ a solicitor and a secretary, and to that extent probably there is always some small amount of debt which every society of this kind must have. But beyond that it is very difficult to see what debts it could legally contract. But, I suppose, having gone on receiving deposits, as they are called, from persons other than members, and having incurred a debt to its bankers, this society did pass a resolution, very late in its history, authorising the trustees to borrow money for the purposes of the society. I am of opinion that, in accordance with the decided cases, that resolution was expressed in terms far too wide to make it a valid or binding resolution; and therefore there never was, in my opinion, any debt on which the society, *quâ* society, could be sued.

It is said that the trustees have borrowed this money for the purposes of the society, that they have pledged their personal liability, and that they may be entitled to be repaid out of the assets. That may be so, and then they would have a right to go to the funds of the society to repay themselves; that is to say, having borrowed money without the power to do so, still, if they did lend that money so borrowed to other persons upon securities, I suppose they would be entitled to have the securities and the money thereby secured applied in exonerating themselves from the debts for which they have made themselves liable. That is the only mode in which, as it appears to me, there could be any liability of the society or of its funds, and that seems to me to dispose of the first part of the case.

Then I come to the question whether it is just and equitable to make an order to wind-up this society. These four petitioners are persons who take a different view altogether from all the creditors, from all the other persons interested in the society, who desire to have their affairs settled out of court, without the expense and the ruinous consequences of a winding-up in this court. They desire to have it so done, and the creditors, so far as there are creditors, desire the same thing. With the exception of these four persons, they all desire that the matter should be settled by themselves out of court, and without the interposition of the court.

Then what is the wrong which these four men will suffer? They say, Some funds have been or may be taken away from us, which would probably result in profits, and would so diminish the amount of our nominal mortgage debt. If there had been no mistake, they say, in the mode in which profits have been calculated before, if there had been no mistake in the mode in which they are dealing with the profits now, possibly we might have had something in diminution of the money which we have borrowed, and which we are liable to repay. If there has been an error of that kind, still it does not appear to me that there was ever any fraud, nor is any suggestion of fraud made on the part of these persons. The managing body may have committed an error, and the proper mode of setting right a thing of that kind—any error in the management of a society—is to apply to that managing body, or to call a meeting of the managing body or of the general body of members, and get that managing or that general body to take care to rectify its course for the future. That is the proper course, and it is a course which this court has always allowed in a matter of internal management; it has always left the internal management to be settled by the persons interested in the society.

But then it is said, if we have a winding-up order, possibly we may get back for the society moneys which have been paid out to retiring members upon that miscalculation of profits which we allege. I cannot see that it is the object of a winding-up to enable an existing society to get back from its past members something which upon a miscalculation, to which apparently all persons were parties, those past or retiring partners have received. And as far as these gentlemen are concerned, it appears to me, by their own statement, that no profit whatever can ever result to them. They say that possibly those moneys would go in diminution of debts to which they are liable. My opinion is that they never were liable for those debts. They never could be liable to the trustees to repay those debts, because the trustees could only be entitled to receive whatever funds were available for the purpose of recouping themselves, and the petitioners' own case is that there never were these profits; therefore if there never were these profits, no return of moneys paid away would ever give these gentlemen profits which would go to reduce their debts. Then, if that were so, they never were under any liability at all; but if they were under any liability whatever it is impossible they could ever be made liable in consequence of this mode of dealing with the funds. There may have been some degree of irregularity, but the releases which have been ex-

ecuted seem to me to have amply relieved them from every possible liability, so that they cannot, in my opinion, have a shadow of interest in anything that could be gained from the result of a winding-up in which, possibly, they might expose other people to losses which they would not share themselves. There was an irregularity, as it seems to me admittedly, on the part of the society in the mode of dealing with the profits. The releases have been obtained, which have altered the case very much since it was before the Vice-Chancellor. I am of opinion that the petition ought to be dismissed, but without costs.

Lord Justice MELLISH said: I am of the same opinion. This is a petition by members who, no doubt, if the society was wound-up, would be contributories, and they allege that the society is unable to pay its debts. Now if a creditor cannot get paid, if he issues a proper summons and cannot get paid, then, no doubt, it is *ex debito justitiæ* to grant a winding-up order. But when members come and ask for a winding-up order, it appears to me that it is the duty of the court to see whether the other members and the creditors agree in thinking that a winding-up is the best course. Now here it is quite clear that, if there are any creditors, which is extremely doubtful, the creditors without an exception, and all the members of the society, with the exception of the four who have presented this petition and one other, agree that the best course is not to wind-up. Under those circumstances the court, in my opinion, ought not to grant a winding-up order unless it sees that some plain injustice is being done to the members who present the petition, which cannot be avoided except by making a winding-up order. Now, the present petitioners are advanced members, and it appears that there are altogether fifty-five advanced members; therefore, fifty of these fifty-five, who are apparently in exactly the same position as the present petitioners, do not desire a winding-up; they agree with all the unadvanced members and with all the creditors, that the society is more likely to get rid of its difficulties, and that the creditors, if there are any, are more likely to get paid, and the shareholders are more likely to get their proper share of the assets, by not having than by having a winding-up order. I cannot see that these petitioners are liable to suffer any injustice, or are liable to any such risk, as entitles them to a winding-up order. It seems to be almost admitted that the only loss, as between them and the other members which they can suffer is, that they may possibly lose the benefit of having the profits applied towards paying their 120*l.* advanced per share. Now, in the first place they themselves allege, and it is the chief ground of their petition, that the profits are principally fictitious, that there are none. It does not at all appear that if the accounts were rightly taken there would be any profits coming to them, and the whole matter is left in uncertainty.

Then as respects their liability to creditors, I agree with the Lord Justice that, in all probability, they are not liable at all; but, even if they were liable, all the alleged creditors of the society have joined in releasing them, and I have no doubt that that release is an effectual protection.

Therefore, upon the whole, I am of opinion that we should be doing wrong in allowing the society to be wound-up against the wish of all the creditors, and of the great majority of the contributories of the society. I agree that the petition should be dismissed without costs.

Solicitors for the appellants *Doyle* and *Edwards*.

Solicitors for the petitioners, *Lewis, Munns*, and *Co.*

Monday, Nov. 13, 1871.

(Before the LORDS JUSTICES.)

COWLES *v.* GALE.

Vendor and purchaser — Specific performance — Agreement for sale of public house—Transfer of licence—9 Geo. 4, c. 61, ss. 11, 14—Licence in name of deceased owner.

The trustees of a will, under their power of sale, put up a public house for sale by auction as a going concern.

On the day fixed for completion the purchaser refused to complete, on the ground that the trustees were not in a position to transfer the licence, which had been renewed in the name of the testator after his death:

Held (reversing the decision of the Master of the Rolls), that as time is of the essence of the contract upon the sale of a public house as a going concern, and as the trustees were not on the day fixed for completion in a position to transfer to the purchaser a valid licence, that in the name of the deceased owner being a nullity, the purchaser was entitled to repudiate the contract, and accordingly a bill for specific performance of the contract was dismissed with costs.

Day v. Luhke, L. Rep. 5 *Eq.* 336 *followed.*

THIS was an appeal from a decision of the Master of the Rolls, who held, under the circumstances stated in the head note, that though the renewal of the licence was irregular, the purchaser would not incur any risk on that account, and that under the licence, endorsed by the vendors, he would have an unimpeachable title to carry on the trade of the public house, and his Lordship accordingly made a decree against the purchaser for specific performance.

The hearing before the Master of the Rolls is reported *ante*, p. 166, where the facts and judgment are fully stated.

Rosburgh, Q.C., *Poland* (of the Common Law Bar), and *Marten*, for the appellant.—We purchased this public house as a going concern, and in such a case it is settled by *Day* v. *Luhke* (L. Rep. 5 Eq 336) that time is of the essence of the contract, therefore the vendors were bound to transfer a valid licence to us on the day fixed for completion; but the licence having been renewed in the name of the testator after his death was no licence at all, and the vendors had no licence to transfer to us on the day fixed for completion. It is contended by the vendors that we waived this objection. In reply to our requisition, "In whose names are the licences now standing?" the vendors stated: "In the name of the late George Ross; they will be transferred by the executors in the usual way." We made no further requisition on this, being content to accept a transfer from the executors in the usual way; but the executors were not in a position to do so. It is settled by *Day* v. *Luhke* (*supra*), that in the absence of an express stipulation to the contrary, the purchaser is entitled to have a transfer of the licence under sect. 11 of the Licensing Act, 9 Geo.

4, c. 61. Sect. 4 of that Act empowers the justices assembled at the general annual licensing meeting in every year to appoint special sessions, "at which special sessions it shall be lawful for the justices then and there assembled . . . . to licence such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in exercise of the powers herein contained and in exercise of their discretion deem fit and proper persons under the provisions hereinafter enacted, to be licensed," &c. And sect. 11 provides that "every person holding a licence under the authority of this Act, or his heirs, executors, &c., being desirous to transfer such licence to some other person, and intending to apply at the special session then next ensuing for permission so to do, shall, five days at least prior to such special session, serve a notice of such his intention upon one of the overseers of the poor, and one of the constables of the parish . . . in the form in schedule B, signed by the party intending to make such application, or by his agent thereunto authorised, and setting forth the Christian and surname of the person to whom it is intended that such licence shall be transferred, together with the place of his residence, and his trade or calling, during the six months previous to the time of serving such notice." Here the vendors were not "persons holding a licence under the authority of the Act," and could not transfer the licence under sect. 11; and time being of the essence of the contract, we were not bound to wait till they could take proceedings under the 14th section. (*a*) There being no valid licence we should in the interval have been exposed to a penalty of 5*l.* for every glass of beer we sold, under sect. 18, which enacts that persons selling exciseable liquors without a licence shall be liable to a penalty of not more than 20*l.*, and not less than 5*l.*, for each offence. We therefore contend that we were entitled to repudiate the contract, and that the plaintiffs' bill should be dismissed with costs. They also referred to

Claydon v. *Green*, 18 L. T. Rep. N. S. 607; L. Rep. 3 C. P. 511.

Southgate, Q.C. and *Horton Smith*, for the plaintiffs, contended that the purchaser, having been informed that the licence was in the testator's name, and having taken no objection to that when the abstract was before him, had waived the objection, and could not now raise it. Moreover, the objection was merely formal, as the purchaser could have carried on business safely under the irregular licence, and any penalties that might have been incurred would have fallen on the plaintiffs, and not on him.

Daniel Jones, for the testator's widow.

No reply.

Lord Justice JAMES said that he was of opinion that the decision of the Master of the Rolls in this case could not be reconciled with his former decision in *Day* v. *Luhke* (L. Rep. 5 Eq. 336). In the case of the sale of a public house as a going concern, time was necessarily of the essence of the contract, for the person who bought a public house did so for the purpose of occupying it and carrying on business in it, and it would be very injurious to him if he could not commence business at once. His Lordship thoroughly agreed with what was said by the Master of the Rolls in *Day* v. *Luhke* on this subject. In the present case the 16th of Nov. 1870 was the day fixed for completion, and the vendors were bound to show that they were on that day in a position to transfer to the purchaser a licence under which he could lawfully carry on the business of selling excisable liquors by retail, to be consumed on the premises. Beyond all question the vendors were not on that day in a position to transfer such a licence to the pur-

(*a*) Sec. 14 provides that "if any person, duly licensed under this Act shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose, or shall be by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn, it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assignees shall, by sale or otherwise, have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging, or to grant to the person, whose house shall, as aforesaid, have been, or shall be about to be, pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein: Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th April or the 10th Oct. then next ensuing, as the case may be: Provided also, that every person intending to apply in any of the above-mentioned cases at any such special session for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house or premises thereunto belonging, in which exciseable liquors shall not have been sold by retail, to be drunk or consumed on the premises, by virtue of a licence granted at the general annual licensing meeting next before such special session, shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and of four in the afternoon, affix or caused to be affixed on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, or some other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not theretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place.

The licence to a dead man was a mere
and consequently they had nothing at
ansfer to the purchaser on the day fixed
pletion. It was said that the vendors
medy the irregular renewal of the licence
e 14th section of the statute 9 Geo. 4, c. 61,
bably they could do so. But how long
purchaser to wait? He was clearly not
o wait till the next session of the magis-
o see whether the vendors could get the
right under the 14th section, and then
the licence to him under the 11th section
Act. They had intimated no intention to
y steps to rectify their mistake even on
e bill. As for the question of waiver, his
p was of opinion that the purchaser had
thing to waive his objection; in answer
quisition, in whose name the licence was
the vendors had replied, that it was stand-
he name of the testator, and that it would
sferred by the executors in the usual way.
wever, the executors were not in a position
It had not been brought clearly before
d that the licence had been renewed in
e of the testator after his death, and it
e mischievous to hold that the purchaser
nd by notice of the date of the testator's
In his Lordship's opinion the present case
irely governed by *Day* v. *Luhke* (*sup.*) and
endors were not in a position to transfer
licence to the purchaser on the day fixed
pletion, their bill for specific performance
contract must be dismissed with costs.
endant to have his costs in the court be-
deposit repaid with interest at 4 per cent.
um, and the costs of an injunction made
Master of the Rolls to restrain an action
recovery of the deposit, &c.

Justice MELLISH concurred.

itors for the appellant, *H. J.* and *T. Child.*
itor for the respondents, *Frederick Mason.*

V. C. WICKENS' COURT.

ted by EDWARD WINSLOW, Esq., Barrister-at-Law.

Thursday, July 27, 1871.

MARYLEBONE IMPROVEMENT ACT 1868; *Ex parte* TOPPLE.

Clauses Act (8 *Vict. c.* 18), *ss.* 78, 80—*Pur-
under*—*Leases granted by landlord after
to treat*—*Compensation*—*Costs.*

*tropolitan Board of Works gave notice to
for the purchase of houses. After notice the
ord granted leases for three years to his
ly tenants. The tenants sent in their claims
ompensation, which, after some litigation,
1. Subsequently the landlord petitioned for
ent of his purchase-money, which had been
into court under the Lands Clauses Act,
the board claimed to be reimbursed for the
they had incurred in adjusting the claims of
mants:*

*hat there was no power under the Act to make
rder asked, but that as the board had been
unnecessary expense by the petitioner's con-
the court would go to the full extent of its
diction, and refuse him his costs of the peti-*

as a petition for payment to the petitioner
ain compensation money which had been paid into court by the Metropolitan Board of Works under the following circumstances:—

In May 1839 the Metropolitan Board of Works, under the provisions of the Marylebone Improvement Act 1868, which embodied the Lands Clauses Act, gave notice to the petitioner for the purchase of three houses, of which he was the landlord, and which were then let to three weekly tenants. Shortly after receiving the notice the petitioner granted to each of the three tenants leases for three years. There had been no previous agreement between the petitioner and his tenants for effecting this arrangement, but it was done, as the petitioner admitted, at his instance, with a view of giving the tenants a claim to compensation.

In Feb. 1870 the petitioner sent in his claim against the Board of Works, but the arbitrator, in making his award, treated the leases as non-existent, and the compensation money was paid into court on that footing. In March 1871 the tenants sent in their claims, and an award having been made upon them, on the supposition that they were valid, the compensation money was paid into court. In July 1871 the tenants presented a petition for payment of this money out of court, but the Master of the Rolls decided that they were not entitled to it, and dismissed the petition without costs.

The present petition was presented by the landlord for payment of his compensation. The Board of Works had paid about 200*l.* in adjusting the claims set-up by the tenants, and they now asked to be recouped out of the money to which the petitioner was entitled.

Dickinson, Q.C. and *Bagshawe*, in support of the petition, submitted that the landlord was not answerable for the costs incurred by the board. He had made no secret of the circumstances affecting the tenants' claims, and the board might have refused at once to entertain them, without going to the expense of assessment. They further submitted that the petitioner was entitled to interest on the purchase money.

Greene, Q.C. and *Charles Hall*, for the Board of Works, contended that the court had power to make the applicant pay the expense to which the board had been so unnecessarily put. The 78th section of the Lands Clauses Act gave the court power to make such order as it thought fit, and the 80th section, after directing payment of costs by the board, except in certain cases specified in the Act, went on to enact that it should be "lawful" for the court to order such payment; thus giving a discretionary power to the court. The practice of manufacturing claims was a growing one, and ought to be discouraged. As to the interest asked for, the court had no jurisdiction to grant it.

Dickinson, Q.C. in reply.

The VICE-CHANCELLOR.—I am of opinion that the money in court cannot be treated as a fund out of which the board can be indemnified for the expenses they have incurred in settling the claims of the petitioner's tenants. I consider that I have no discretion in the matter; but even if I had, I should have hesitated long before permitting any portion of the fund to be applied for such a purpose. The claim set up by the board, if it can be enforced, is not one to be made here or now. With regard, however, to the costs of the present application the case is different. It does

not lie in the mouth of the petitioner to say that the board were unnecessarily alarmed at his good-natured, but ill-considered, attempt to compensate his tenants out of the board's pocket. His conduct has entailed upon the board unnecessary expense, and I think I shall only be doing justice if I go to the full extent of my jurisdiction under the Act, and refuse him his costs of this application. I do not think I have jurisdiction to make him pay the costs, otherwise I might have done so. With regard to interest, I consider that I have no power to make the board pay it, and I am not sure that, even if I had the power, I should have exercised it in the applicant's favour.

Solicitors: *Kernot* and *Rawlinson*; *W. W. Smith.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Thursday, Nov. 9, 1871.

BRADLEY *v.* SYLVESTER.

Quo warranto—Clerk to a school board—Office held during pleasure of the board.

Upon an application for a writ of quo warranto against the clerk to a school board, on the ground that he was improperly elected according to the provisions of 33 *&* 34 *Vict. c.* 75, *s.* 35;

The Court refused a rule, considering that the majority of the board might, without assistance, remedy the impropriety themselves, the office being held during the pleasure of the board.

Gane moved for a rule for *quo warranto*, calling upon the Rev. W. T. M. Sylvester to show cause by what authority he acted as clerk to the school board of the borough of Castleford. By 33 & 34 Vict. c. 75, s. 35, "A school board may appoint a clerk and a treasurer and other necessary officers, including the teachers required for any school provided by such board, to hold office during the pleasure of the board, and may assign them such salaries or remuneration (if any) as they may think fit, and may from time to time remove any of such officers; but no such appointment shall be made, except at the first meeting of the board, unless notice in writing has been sent to every member of the board." [BLACKBURN, J.—But is it a case in which *quo warranto* will lie? It will not lie against a churchwarden, and why should it here? You might as well say it would lie in the case of a secretary to a railway company. This question was discussed in *Darley* v. *The Queen* (12 Cl. & F. 520.] The two cases are not analogous, for the secretary to a railway company is appointed by a private corporation to deal with private funds, whereas the clerk to a school board is appointed under a statute, and one of his duties is to countersign all orders of the board for the payment of money. It was held by Campbell, C.J. and Erle, J. in the case of *Reg.* v. *St. Martin-in-the-Fields* (17 Q.B. 149), that an appointment immediately or mediately by statute, where the officer had to countersign cheques for the payment of money raised by a rate was to a great extent at least a public appointment. Sect. 54 of the Act above mentioned provides that a deficiency in the school funds shall be supplied by a rate. In May last the second meeting of the Castleford School Board was held to consider applications for their clerkship. Two candidates were selected—viz., Bradley and Sylvester—and a poll was taken. Six members of the board were present, one of whom remained neutral. Three members first voted for Bradley, one of whom afterwards also voted for Sylvester. This made the recorded votes for each candidate equal, and the Chairman gave a second or casting vote in favour of Sylvester, whom he thereupon declared to be elected. At the following meeting a protest was made against the election; but it was overruled by the chairman. Another ground of objection is that the election did not take place at the first meeting of the board, and that no notice was given according to the statute. [COCKBURN, C.J.—The tenure of the office is only during the pleasure of the board; and it was held in *Re Fox* (27 L. J. 151 Q.B.) that an information will not be granted in the case of clerk to borough justices, as such clerk is removable at the pleasure of the justices.] In *Reg.* v. *St. Martin-in-the-Fields*, above cited, the appointment of clerk to the Board of Guardians for life and during sanity, or until resignation or removal, was held *quamdiu se bene gesserit*, and was subject to a writ of *quo warranto*.

COCKBURN, C.J.—Upon consideration of the case of *Darley* v. *The Queen*, and the provisions of this statute, it may be that a writ of *quo warranto* may be applicable to the office of clerk to a school board; at all events, I will not now undertake to say that it could not lie against the defendant. If it would lie we should still have to exercise our discretion as to granting a writ. Here the ground upon which we are asked to interfere is an impropriety in the election, and as the office is held at the pleasure of the board, it is competent for the board to do what might be accomplished by our interference. If the election were really effected by a colourable majority, or upon insufficient notice, the real majority have the power to eject the present clerk, and to elect the person whom they prefer. At all events, it should be shown before asking this court for a writ that some other attempt than a mere protest, overruled by the chairman, has been made to obtain the assistance of the board to remedy the impropriety complained of.

BLACKBURN, MELLOR, and HANNEN, JJ. concurred.

Rule refused.

Attorneys for applicant, *Blakeley* and *Beswick.*

Saturday, Nov. 11, 1871.

POUND (app.) *v.* THE BOARD OF WORKS FOR THE PLUMSTEAD DISTRICT (resps.).

LORD NORTHBROOK (app.) *v.* THE BOARD OF WORKS FOR THE PLUMSTEAD DISTRICT (resps.).

New street—Expenses of draining and paving—Apportionment — Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolitan Management Amendment Act,* 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 77, 98, 112.

At the time of the passing of the Metropolis Management Act, 1855, *a certain lane, having but a few houses near it, was kept in repair as a highway by the parish. Between the hedges which bordered the adjoining fields, there was an average distance of about forty feet, but only eighteen feet in the middle of this space was kept as a hard metal road. Since that time, both before and after the passing of the Metropolis Management Amendment Act,* 1862, *a great many houses have been built on both sides of this lane; a sewer, at the*

request of the inhabitants, has been constructed by the District Board of Works; a footpath, and also a broader carriage road, have been made and kept in repair by the Board. All the expenses of these works were defrayed out of the general rates, but the Board now claimed them from the owners and occupiers of the houses and land adjoining. Orders enforcing this claim were made by a magistrate.

Upon appeal by an owner of houses, and by the proprietor of some private roads which ran across the lane, and had been assessed at the same rate as the houses:

Held, that this lane, although a highway repairable by the parish at the date of the Act of 1855, *might become a new street within the meaning of the Metropolis Management Acts; and that the proprietor of the private roads was an owner of land within the meaning of sect.* 250 *of the Act of* 1855.

Held, however, that unless all these expenses were included in one apportionment upon the owners and occupiers of the whole new street, the claim of the Board was bad.

THIS was a case stated for the opinion of the court under the provisions of the statute 20 & 21 Vict. c. 43, and the point for decision related to the powers of the Plumstead District Board of Works (thereinafter called "the board") to pave a certain portion of a certain road in the parish of Lee, in their district, commonly known as Burnt Ash-lane, and to charge the expenses thereof to the owners of the houses thereto adjoining, and of the land bounding the said road, or abutting thereon, under the provisions of the statutes 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77.

On the 23rd June 1869, complaints were made and summonses were obtained by the clerk to the board against the appellant, Mr. Pound, for the recovery of 1122*l.* 16*s.* 6*d.*, being the aggregate amount of the various sums assessed upon the several houses and portions of land of which he is the owner, as set forth in a schedule annexed to the summonses; and against the appellant, Lord Northbrook, for the recovery of 144*l.* 13*s.*, as being the aggregate amount of the various sums assessed upon several roads, of which he is the owner, as set forth in the schedule indorsed upon the said summons, as being their due and proper respective shares of the said expenses. These summonses came on for hearing before the stipendiary magistrate of the district on the 5th July 1869, and on successive days by adjournments, when for the purpose of raising the question in dispute between the parties, the magistrate decided in favour of the board, and made orders that the defendants should pay the amounts sought to be recovered from them respectively. At the defendant's request, they being dissatisfied with this decision in point of law, the magistrate stated the present case.

On the 1st Jan. 1856, when the Metropolis Local Management Act came into operation, Burnt Ash-lane was an ancient highway and public carriage road leading in a north and south direction from Lee-green, in the parish of Lee, in the county of Kent, to Bromley in the same county. It was a public thoroughfare for carriages, of an average width of forty feet or thereabouts between the hedges, of which a width of about eighteen feet or thereabouts had been time out of mind repaired as hard road by the parish, leaving the remainder in grass on each side of the road. The grass was bounded on each side of the road by a watercourse, outside which was a bank and hedge separating the watercourse from the adjoining land. At the northern end of the highway in question, viz., Burnt Ash-lane, on the west side was a house used as a butcher's shop, one of six houses, three being shops, all of which houses fronted towards a road running across the highway in question, and leading from Eltham to Lewisham. At the back of these houses and at a distance of sixty feet or thereabouts from the highway in question, was a seventh house (called Eagle Cottage) fronting towards the highway in question. and having a path leading therefrom to the front door. At the same end, on the east side was a pond, which was filled up by the board in the course of the year 1856, and which discharged itself into the watercourse on the east side of the highway in question. Beyond the pond was an orchard belonging to a farm called Lee-green Farm, the buildings of which farm were at a distance of from 100ft. to 200ft. from the highway. On the west side of the highway in question, and at a distance of 850ft. or thereabouts from the north end was a house, then lately built by the appellant, Mr. Pound. This house, called Stratton Villa, is about seventy feet from the centre of the highway, and is occupied, together with a plot of ground fifty feet wide, and 200ft. deep, on which it stands, and which forms a forecourt and back garden to the house.

At the date mentioned, 1st Jan. 1856, no other houses than those already mentioned existed along the portion of the highway in question which the board has paved or purposes to pave, or had approaches thereto; but the ground on either side, except the before-mentioned orchard, consisted of open fields cultivated as ordinary farm land.

Between the years 1856 and 1862 building operations had been carried on, and on the 7th Aug. 1862 (the date of the passing of the Metropolis Management Amendment Act) twenty-one additional houses had been built on the west side of the highway in question. The appellant Mr. Pound is owner of several of the houses which were built prior to Aug. 1862, and part of the claim of the board against him is in respect of the said houses.

On the 31st Jan. 1861 the board approved of a certain plan laid before them by the appellant, Mr. Pound, setting out a line of frontage for the forecourts of houses on the east side of the highway in question to the extent of 1200 feet. The line of frontage was staked out on the land sometime in the year 1861, and posts were put down marking the permanent boundary between the forecourts and the road. As a condition for the said approval the board had required that the highway should be made throughout of the width of fifty feet, and in consequence, the appellant Mr. Pound laid into the highway in question a strip of land on the east side sufficient to comply with this condition. The highway being already fifty feet wide for a length of about 200 feet at the North-east corner, nothing was there laid in. The line of the frontage so approved of and marked out was that on which the line of the forecourts was subsequently built. A plan for the drainage of the above proposed houses was submitted to the board in May 1861, but was disapproved of, and an amended plan was approved of in Jan. 1863. The building of the houses was commenced shortly afterwards, viz., in Jan. 1863.

Between the 7th Aug. 1862 and the date of the

summonses mentioned, a line of railway had been constructed by the South-Eastern Railway Company, crossing the highway in question nearly at right angles to it, and at a distance of 850 yards or thereabouts southwards from Lee-green. It is this length of road from Lee-green to the southern side of the land occupied by the South-Eastern Railway Company, extending to 850 yards or thereabouts, which the board allege to be a new street within the meaning of the Metropolitan Management Acts; and the portion which they have paved or propose to pave under the powers thereby conferred upon them, is so much as is not comprised in the eighteen feet described as having been repaired as hard road. All the houses mentioned in this case are in and upon this length of road, and the board have apportioned the estimated expenses of paving the same upon the owners of all the said houses. The appellant (Mr. Pound) is owner of several of the said houses, some of which were built prior to Aug. 1862, and part of the claim of the board against him is in respect of the said houses.

Subsequently to the 7th Aug. 1862 other houses were built on both sides of the highway in question.

Before the 7th Aug. 1862 nothing had been built on the east side of the highway in question, but between that date and the date of the summonses, fifty-six houses had been built on that side.

In the year 1862, and before the passing of the 25 & 26 Vict. c. 102, the board received an application from the owners to construct a sewer which had become necessary for the drainage of the new houses on the highway in question, which had by that time been built. The board agreed to the proposal, on condition that the owners paid two-thirds of the expense, and constructed, on these conditions, 1350ft., commencing at the north end. Subsequently, in the year 1865, the sewer was carried on a further length of 1050ft., and in 1867 a further length of 2110ft., the board having agreed to construct the further lengths on the same conditions.

In the year 1856 the board constructed a footpath on the western side of the highway in question, commencing at Lee-green, of 8ft. in width, and 1100ft. in length, and paved the same, that is to say, made the top thereof hard with suitable gravel; and have, from the time of its said construction, repaired and maintained the same. In the year 1863 the board constructed a similar footpath on the eastern side of the highway in question of the length of 300ft. and 8ft. in width, and have, since its construction, maintained and repaired the same. At the time of the constructing the path last mentioned, the board made a hard carriage road on the spaces then remaining between the said footpaths and the said 18ft. of hard road which had always existed, so as thereby to construct a hard road comprising the whole of the width between the said footpaths, and have since repaired the same. All the expenses of the above works were defrayed, and repairs paid for, by the board out of the general rates. All the said expenses are included in the estimates of the costs now caused to be made by the board as hereafter mentioned and sought to be recovered from the appellants.

Although between some of the houses on both sides of this road there are distances of various lengths, yet the building plots on which the houses stand are actually contiguous, except where the roads occur. Many of the houses above-mentioned have been and are occupied, and such houses have from the time of occupation been rated by the board for the same purpose and to the same extent as all the other occupied property in the district.

In consequence of the erection of so many new houses, 112 in all, of which 90 have been built since the 7th Aug. 1862, the board have now determined it to be necessary to form and pave proper and convenient footpaths each side of the highway in question similar to and in continuation of those already formed and paved as before mentioned, and a portion of the road to the width of 8ft. is intended to be appropriated on each side for that purpose; and the board have also determined to make, in continuation of the length of 300ft. constructed in 1862, a hard carriage-road along the residue of the highway in question, on the spaces between the said footpaths and the said 18ft. of hard road which has always existed.

In order that such paving of the footpaths and carriage-road as have now been determined on by the board may be done, and that the expense of doing such as has been previously paved may be repaid to the board, the board have caused proper estimates to be made of the cost of the whole works, and have apportioned the cost among the several owners of houses and land bounding and abutting on the highway in question, under the powers of the 25 & 26 Vict. c. 102, s. 77.

The several appellants are such owners of houses and land so bounding or abutting on the highway in question, and the amount sought to be recovered from each is admitted to be his share under such apportionment, assuming the board are entitled to recover the cost of the whole works, and provided also, as to Lord Northbrook, that he is liable to be charged as follows:

The new roads on the west side of the highway previously alluded to are five in number, and are at present private roads, and Lord Northbrook is the owner of the soil and freehold thereof, and the amount sought to be recovered from him by the board, 144*l.* 13*s.*, is charged upon him solely as the owner of the said private roads, considered as land within the 77th section of the Act 25 & 26 Vict. c. 102, according to the width left between the forecourts of the houses in the highway in question, forming the corners of the said private roads; and such amount is charged at the same rate and in all other respects as the frontage of houses is charged. Lord Northbrook has no exclusive possession or occupation of such private roads, the same having been laid out and formed for the common use of the lessees and occupiers of property in the said private roads, and the several leases by the said Lord Northbrook grant such common use to the several lessees and their tenants.

The appellants contend that the board has no power to cast upon the owners of the houses and land adjoining to and in and upon the highway in question, as the cost of paving the same, the amounts now sought to be recovered. The board contend that they have such power.

The question for the court was, which of these contentions is correct. If the court should be of opinion that the board have not the power for which they contend, the orders of the magistrate

were to be quashed; if otherwise, they were to be confirmed. But if the court should be of opinion that on the facts and the present summonses the magistrate ought to have made an order for the payment by the said Mr. Pound of part of the said amount assessed upon him, upon the ground that a portion only of the said highway is a new street, then the further question for the opinion of the court was, what part? and the order was to be amended so as to include such part only of the said amount; and the same as to the amount assessed upon Lord Northbrook.

Willis argued for the appellant, Mr. Pound.—These claims by the respondents are based upon the provision in sect. 105 of 18 & 19 Vict. c. 120, for paving a new street. According to the interpretation clause, sect. 112, of 25 & 26 Vict. c. 102, this place cannot be a new street within the meaning of the Legislature, because the road upon which the houses front had previously been a highway repairable by the parish. According to the case of *Reg.* v. *The United Kingdom Electric Telegraph Company* (31 L. J. 166, Mag. Cas.), not only this eighteen feet of hard metal road, but the whole space between the hedges also formed part of the highway, and therefore no part of this Burnt Ash-lane could be a new street. This is not only the necessary interpretation of the words defining a new street, but it also appears to have been the intention of the Legislature so to limit the expression, from the provision at the end of the 98th section of the same Act, concerning "any road, passage, or way hereafter to be formed or laid out." This provision would be superfluous if it were not for the subsequent definition of a new street. This, too, is consistent with the case of *Sawyer* v. *Paddington* (23 L. T. Rep. N. S. 662; L. Rep. 6 Q. B. 164), where a part of Harrow-road, having been laid out for sewerage after 1862, was held to be a new street. There are analogous provisions under the Public Health Acts, and if this road were subject to a local board of health instead of the Metropolitan Board of Works, the appellants clearly, under 11 & 12 Vict. c. 63, s. 69, would not be liable for this claim:

Wallington v. *White*, 10 C. B., N. S., 128;
Hirst v. *Halifax Local Board*, L. Rep. 6 Q. B. 181.

MELLOR, J.—The question is whether an old road cannot become a new street.] Even assuming this to be a new street, the board have no right to adopt the course they have taken. They are asking now for an amount, some of which was expended thirteen years before these summonses, and a part of which has already been contributed out of the rates paid by the whole of the ratepayers of the parish. *Whitchurch* v. *Fulham Board of Works* (L. Rep. 1 Q. B. 233). is an authority that the board can make only one apportionment on all the owners along an entire road, and the case finds that they claim for what has been long completed, and also for what they have now determined to do.

Tayler, for the appellant, Lord Northbrook, relied upon the points argued for the other appellant, and further contended that Lord Northbrook was not an "owner" within the meaning of the 18 & 19 Vict. c. 120 s. 250. By that section the word "owner" shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same, if such land or premises were let at a rack rent. These are merely private roads, which it would be impossible to let at a rack rent, and which can be only a source of expense to the owner.

Brown, Q. C. (with him *Barrow*) for the respondents.—[COCKBURN, C.J.—We will not trouble you on the first point; in our opinion this was clearly a new street within the meaning of the Metropolis Management Acts.]—With respect to the last point taken on behalf of Lord Northbrook, every private road increases the value of house property in the neighbourhood; these roads, therefore, may be taken to be connected with lands or premises belonging to him, or they would produce a rack rent to him if let to the neighbouring house owners. As to the second objection made by both the appellants, sect. 77 of the Act of 1862 provides that these expenses shall be recoverable either before the work shall be commenced, or during its progress, or after its completion. And the Court of Common Pleas held, in *Vestry of Bermondsey* v. *Ramsey* (L. Rep. 6 C. P. 247), that an unsatisfied judgment against a former owner of premises was no bar to a subsequent action against a succeeding occupier. [BLACKBURN, J.—That does not relate to the apportionment. The facts stated are not sufficient to show us whether the board have claimed any expenses beyond those of a single apportionment. Unless the other side will consent to an additional statement with respect to that matter, it will be necessary to obtain further facts from the magistrate.] Some of these expenses were incurred before any apportionment was made, and as far as they are concerned it seems that the claim cannot be enforced. [BLACKBURN, J.—In that case, according to *Whitchurch* v. *Fulham Board of Works*, the whole of the apportionment is bad.] The Board desire to have the judgment of the court on the other two points for their future guidance.

COCKBURN, C.J.—Mr. Brown gives up the claim of the Board of Words against the appellants upon the present apportionment, as he feels he is unable to establish their right to the whole of the amount they have claimed. There are, however, two questions upon which he desires to have our judgment as a guide for future assessments. The first is, whether this Burnt Ash-lane, having been a highway repairable by the parish at the date of the passing of the Metropolis Management Act 1855, can be considered a new street within the meaning of the Metropolis Management Amendment Act 1862. The second question is, whether Lord Northbrook, being the proprietor of certain private roads which open into this Burnt Ash-lane, can be considered an owner of land within the meaning of the 77th section of the Amendment Act of 1862. With regard to the first point, I entertain no doubt that this road, as it now is, constitutes a new street according to the intention of the Legislature. It is ground which was formerly a highway, but now has two sides covered with houses, so as to assume the character of what is generally called a street. The arguments urged on behalf of the appellants fail to convince my mind that the term as used in the Metropolis Management Acts does not include in its meaning such a place as this. The definitions do not show such omission, nor do the Acts anywhere exclude the application of the word street to that which would otherwise, without reference to the definitions, be a street in the

general acceptation of the word. It is plain to my mind that a highway converted into a street is not distinguishable for the purposes of these Acts from a piece of land, not before kept in repair as a road, converted into a similar street. With regard to the other point, the 77th section of the Act of 1862 leaves no reasonable doubt that these pieces of ground which have been used as private roads were intended to be assessed for the payment of these rates. Lord Northbrook either receives compensation for the use of the roads from the occupiers of the houses, or they enhance the value of the neighbouring houses and lands. He has therefore a valuable enjoyment of the roads in the same way as if they were lands which he might let.

BLACKBURN, J.—I am of the same opinion. The first point made by the appellants is that this was at the time of the passing of the Act of 1855 a country lane repairable by the parish; and therefore, although it was subsequently converted into that which would be called a street in the natural acceptation of the term, yet it could not be considered a "new street" according to the technical definition of that expression. The Metropolis Management Act 1855, by sect. 105, enacts that, "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage way and footpaths thereof or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such streets shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." Taking that provision alone, the Legislature seems to use the word street in the ordinary and popular sense. Then, by the interpretation clause of the Act of 1862, the expression "new street" shall apply to and include all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate. This is quite intelligible; it does not signify that the word may not from its context be inferred to mean that which in its natural sense is a street, but it provides that the word shall carry with it a more extensive meaning for certain purposes of the Act. As to the second point upon which the counsel for the appellants relied, the facts found in the case are not sufficient for us to form our judgment on either side. Mr. Brown thinks that, whatever further facts can be elicited by another inquiry, the board have in this instance demanded too much, and in consequence this particular apportionment cannot be enforced. No costs will be allowed on either side, but these orders must be quashed. The last question in dispute concerns the 77th section of the Act of 1862, by which "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein." Lord Northbrook is the owner of land adjoining that which he has turned into private roads, and although these roads cannot be let, they are indirectly a source of benefit to his land, and I am unable to perceive why they should not be considered land within the application of that section. In the case of *Bowditch* v. *The Wakefield Local Board of Health* (L. Rep. 6 Q. B. 567), we held under the Public Health Act that a trustee for a school who received no rent for the master's residence was still liable as an "owner" for the paving of the street in which it stood.

MELLOR, J.—I am of the same opinion.

Judgment for the appellants without costs.

Attorneys for appellant, Mr. Pound, *Eaglets* and *Mason*.

Attorneys for appellant, Lord Northbrook, *Parker* and *Son*.

Attorneys for respondents, *Newman*, *Dale*, and *Stretton*.

Tuesday, Nov. 11, 1871.

CROSSHAW v. WIGAN BURIAL BOARD.

*Incumbent's right to burial fees—New parish—Contribution of inhabitants to burial ground—*20 & 21 *Vict. c.* 81, *s.* 5.

In 1852, *an order of council under* 59 *Geo.* 3, *c.* 134, *s.* 16, *authorised services and offices to be performed in a new church, assigned a district to it out of the parish in which it stood, and granted the incumbent the fees. The district formed part of a borough which separately maintained its own poor. There was no burial ground in the assigned district, and the persons dying in the district continued to be buried as before in the churchyard of the parish. No separate burial board has ever been appointed by, or ground provided for the district. The plaintiff was appointed incumbent of this church in* 1854.

The burial ground of the defendants for the whole borough was consecrated in 1856, *the district of the said new church having contributed to the rates for providing it. The rectory of the parish became vacant and a new rector was appointed in* 1864.

Held, in an action for the fees paid to defendants for the burials, since the last avoidance of the rectory, of persons who had lived in the plaintiff's district, that the plaintiff was entitled to recover.

THIS was an action which had been brought by the plaintiff against the defendants for the recovery of fees claimed to be payable by the defendants to the plaintiff for burials in the burial ground provided by the defendants for the borough and township of Wigan, under the provisions of the statutes relating to the burial of the dead, between the 11th Sept. 1869 and the 23rd March 1870.

The plaintiff declared for money received by the defendants for the use of the plaintiff: and to this declaration the defendants pleaded that they never were indebted as alleged: whereupon issue was joined, and the following case was stated for the opinion of this court by the consent of the parties, and by the order of Mellor, J. dated the 11th July 1860.

The rectory and ancient parish of Wigan comprises the borough and township of Wigan, and several outlying townships, and until a burial ground was provided for the said borough and

township, under the statutes relating to the burial of the dead as after mentioned, the remains of the inhabitants of the said borough and township, and of such of the outlying townships as had not burial grounds attached to their respective churches, were interred in the churchyard of the ancient parish church, and on all such interments within the churchyard of the said ancient parish, a burial fee was payable by the custom of the said parish; and the rector of the said ancient parish was alone authorised and entitled to perform the rite of burial, and to receive the fees as aforesaid in respect thereof.

In the year 1851, the Church of St. Thomas was built and consecrated in the said borough and township of Wigan as a chapel of ease under the provisions of the statutes 43 Geo. 3, c. 108; 58 Geo. 3, c. 45; and 59 Geo. 3, c. 134. A copy of the sentence of consecration bearing date the 1st Oct. 1851 is intended, if necessary, to form part of this case.

The plaintiff was appointed incumbent of the said church of St. Thomas on the 25th March 1854.

By an order of Her Majesty in Council made on the 11th Feb. 1852, upon the recommendation of the Commissioners for Building new Churches, under the 16th section of the said statute 59 Geo. 3, c. 134, and under and by virtue of any other power or authority in that behalf, vested in Her Majesty and the said commissioners, a particular district was duly assigned to the said church of St. Thomas, and the said order in council authorised banns of matrimony to be published, and marriages, baptisms, churchings, and burials to be solemnised and performed in the said church of St. Thomas, and directed that the fees to arise therefrom should be paid and belong to the incumbent of such church for the time being. A description of the bounds of the said district so assigned was also then duly enrolled in the High Court of Chancery, and registered in the office of the registry of the diocese, as required by the statutes in that behalf, and a copy of the said order and of the said description of the boundaries so assigned as aforesaid was inserted in the *London Gazette*, on the 24th Feb. 1852. A copy of this order in council is to be taken, if necessary, as part of this case.

The plaintiff contends that from and after the passing of the New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 14, the said district so assigned as aforesaid to the said church of St. Thomas, became a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the New Parishes Act 1843 (6 & 7 Vict. c. 37), but as this is not admitted by the defendant, the parties have agreed to call St. Thomas throughout the remainder of this case a "district," without prejudice to the question which is hereby submitted to the decision of the court.

There has never been any burying ground belonging to the said district of St. Thomas, nor has any vestry or meeting in the nature of a vestry of the said district appointed any burial board or provided a burial ground as aforesaid, but the remains of the parishioners and inhabitants thereof continued to be interred in the burial ground of the ancient parish church, until a burial ground was provided by the defendants for the borough and township of Wigan, under the statutes relating to the burial of the dead as after mentioned.

The said district of St. Thomas does not separately maintain its own poor, but lies wholly within the borough and township of Wigan, which has separate overseers of the poor, and separately maintains its own poor.

In the year 1854, under the provisions of the various statutes relating to the burial of the dead, a burial board for the borough and township of Wigan was duly established, and the said board afterwards duly provided under the said statutes a burial ground for the said borough and township.

In the year 1856, the churchyard of the ancient parish church of Wigan was closed by the order of one of Her Majesty's Secretaries of State. The burial ground so provided by the burial board, was, with a chapel erected thereon, on or about the 13th Aug. 1856, duly consecrated; from which time it became the burial ground for the said borough and township of Wigan, within the meaning, and according to the provisions of the said last mentioned statutes.

The said district of St. Thomas contributed to the rates, out of which the said last mentioned burial ground was provided. At the time when the said last mentioned burial ground was so provided and consecrated as aforesaid, the Rev. Henry John Gunning was rector of the ancient parish of Wigan, but on his resignation the Hon. and Rev. George Thomas Orlando Bridgeman was on the 22nd Oct. 1864, instituted and inducted to the rectory of Wigan, and has since continued to be rector of the said parish.

The plaintiff, as incumbent of the district of St. Thomas, has since the avoidance of the rectory of Wigan next after the passing of the New Parishes Act 1856, claimed under the statute 20 & 21 Vict. c. 81, s. 5, to be entitled to perform, and has offered to perform, the religious service in the burials in the burial ground so provided by the said burial board, of the remains of the parishioners or inhabitants of the said district of St. Thomas, and also to be entitled to receive the same fees in respect of such burials, as if the said burial ground were exclusively the burial ground of the said district of St. Thomas.

From the 24th Feb. 1868, until the 10th Sept. 1869, the defendants allowed the plaintiff to perform the religious service in the chapel, in the defendants' said burial ground, of the remains of the parishioners and inhabitants of the said district of St. Thomas, and paid to him the fees arising from the said burials, but since the last-mentioned date the defendants, in consequence of a claim to the same fees being made by the rector of Wigan, have refused to allow the plaintiff to perform any such religious service in the defendants' said burial grounds, and have retained the fees arising from the burial of the remains of parishioners and inhabitants of the said district of St. Thomas, until it shall be determined by the court whether the plaintiff or the rector of Wigan is entitled to receive them.

The court upon the above statement is authorised to amend the pleadings if necessary for determining the questions at issue between the parties, and to draw any inferences of fact which may be necessary to the decision of the case in the same manner, and as fully as any jury might determine the same.

The questions for the opinion of the court are whether the plaintiff is entitled to perform the

service in the burial of the dead in the defendants' burial ground, and to receive the fees above claimed by him.

If the court shall be of opinion that the plaintiff is entitled to perform such services in the burial, in the said burial ground provided by the defendants of the remains of parishioners or inhabitants of the said district of St. Thomas, and to receive fees in respect thereof, then the judgment in this case shall be entered for the plaintiff for the sum of 7*l.* 16*s.* 6*d.*

If the court shall be of opinion that the plaintiff is not entitled to perform such services, and to receive such fees as above claimed by him, then judgment shall be entered for the defendants.

The costs of the cause, taxed on the higher scale, to abide the event.

Manisty, Q.C, (with him *Forbes*) argued for the plaintiff.—The question of plaintiff's right to these fees depends upon the 5th section of the Act to amend the Burial Act 1857 (20 & 21 Vict. c. 81); "The vestry or meeting in the nature of a vestry, of any parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial ground, may appoint a burial board; and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they might have exercised and had under the said Acts, and this Act, if such parish, new parish, township, or district had had a separate burial ground before the passing of the said Act of the 18th and 19th years of Her Majesty: provided always, that all the powers of any other vestry or meeting and burial board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid; and until a burial ground shall be so provided as aforesaid, and consecrated for any new parish or district created or to be created pursuant to the provisions of 6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104, or any or either of them, and to which the said Acts or any or either of them may apply, the incumbent of such new parish or district (if any burial ground has been or shall be provided under the herein recited Acts for the burial of the dead, or any or either of them, for any parish or parishes out of rates to which such new parish or district, or any part thereof, shall have contributed, or contribute, or be liable) shall, with respect to the burial in such last-mentioned burial ground of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed or contribute as aforesaid, as the case may be, perform the same duties and have the same rights, privileges, and authorities, and be entitled to the same fees, and also the clerk and sexton of such new parish or district shall, when necessary, respectively perform the same duties, and be entitled to the same fees, in respect of such burials, as if the said burial ground were exclusively the burial ground of such new parish or district, subject, nevertheless, to all provisions to which the incumbents, clerks, and sextons of original parishes are respectively subject in and by the said Burial Acts, or any or either of them, provided also that nothing herein contained shall affect the rights or privileges of any existing incumbent, clerk, or sexton, without the consent of such incumbent, clerk, or sexton respectively." The effect of the involved language of this section, so far as it affects the present case, is, that the vestry of any new parish not separately maintaining its own poor, and having no separate burial ground, may appoint a burial board; upon which such vestry and burial board shall have the powers conferred upon other burial boards by 18 & 19 Vict. c. 128, provided that the powers of other vestries and boards shall then determine, so far as they relate to the said new parish; and until a burial ground shall be so provided for any new parish which has been created pursuant to 19 & 20 Vict. c. 104, and to which the said Act may apply, the incumbent of such new parish (if such new parish has contributed to rates by which a burial ground has been provided) shall perform the same duties and be entitled to the same fees with respect to the burial of his parishioners in the burial ground to which his new parish has contributed, as if the said burial ground were exclusively the burial ground of the said new parish. The case finds that this district has contributed to the rates of the burial ground, and it remains only to show that this district is a new parish, which has been created pursuant to 19 & 20 Vict. c. 104, and to which the said Act may apply. This is commonly called Lord Blandford's Act, and by sect. 14 it is enacted that "Wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the laws and canons in force in this realm are authorised to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first recited Act (viz., 6 & 7 Vict. c. 37), and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the said firstly and secondly recited Acts (the second is 7 & 8 Vict. c. 94) as amended by this Act relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last-mentioned Acts." [Stopped by the court.]

Holker, Q.C. (with him *McConnell*) for the defendants.—*Hornby* v. *The Burial Board of Toxteth Park* (31 L. J. 643, Ch.) shows that an incumbent who has no burial ground in his district is not entitled to burial fees. [*Manisty*.—That case was decided upon statutes before that of 1857.] My construction of the 5th section of that Act is that the provision, by which the incumbent is to have fees for burials in a ground to be used partly by his district, relates only to the time between the appointment of a burial board and the provision of a burial ground. Here the case does not find that any burial board has been appointed. Further this must be a new parish under Lord Blandford's Act 1856, and the description of the district in the case exactly comes within the exception to the 14th section, "such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes." Now this was a separate and distinct parish under the Order

in Council of 1851. Sect. 11 shows that the churches to which Lord Blandford's Act was intended to apply were those in which it was not lawful to perform the offices of the church. The 5th section of the Act of 1857 applied only to a new parish or district created by one of the Acts mentioned, as well as that to which one of them might apply. This district cannot be said to have been created by either of those Acts, for it is found expressly to have been made by an order in council under statutes of Geo. 3. [Lush, J.—It could not have been a separate parish; for before Lord Blandford's Act it was necessary to obtain the consent of the patron of a district in order to make it so. The case does not so find, and therefore Lord Blandford's Act would apply to it.] If your Lordships think that this district was then made a new parish, the latter part of the 5th section of the Act of 1857 would apply to it; but then arises the question whether that section did more than provide for the interval between the appointment of a burial board, and the formation of a burial ground.

Manisty was not heard in reply.

The Court [Cockburn, C.J., Mellor, Lush, and Hannen, JJ.] gave judgment for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff, *Bell, Brodrick,* and *Gray,* for *J. Park,* Wiend, Wigan.

Attorneys for defendant, *Gregory, Rowcliffe* and *Co.,* for *T. F. Taylor.*

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, Nov. 11, 1871.

(Before Kelly, C.B., Byles, J., Pigott, B., Lush, J., and Hannen, J.)

Reg. *v.* Chambers.

*Forgery—I O U—Surety—*24 *&* 25 *Vict. c.* 98, *s.* 23.

The prisoner, being pressed by a creditor for the payment of 35*l. obtained further time by giving an I O U for* 35*l., signed by himself, and also purporting to to be signed by W. W.'s name was a forgery:*

Held, that the instrument was a security for the payment of money by W., and that the forgery of his name was a felony within the 24 *&* 25 *Vict. c.* 98, *s.* 23.

Case reserved for the opinion of this court by Blackburn, J.

The prisoner was tried before me on an indictment for feloniously forging an instrument which was set out in the indictment in the words and figures following:

Nov. 21, 1870.

I O U thirty-five pounds.

£35. Arthur Chambers.
George Wickham.

It was described in one count as an undertaking for the payment of money, and in another as a security.

On the trial evidence was given that the prisoner having obtained a loan of 35*l.*, and being pressed for payment, obtained further time by giving as a security the instrument which purported to be signed by his brother-in-law, George Wickham.

It was objected that though, if the instrument had been genuine it might have been evidence of an account stated by Wickham, from which the law would have implied a promise on his part to pay the money, and so would in effect operate as an undertaking to pay the money, and as a security for its payment; yet it was not in itself either one or other.

I reserved the point, and left to the jury whether the instrument was forged by the prisoner with intent to defraud.

The verdict was guilty.

There was a second indictment against the prisoner on the same facts for a misdemeanor at common law for forging and uttering the same instrument.

After the first trial he withdrew the plea of not guilty to this indictment, and pleaded guilty to it.

I sentenced him to eight months' imprisonment on the indictment for misdemeanor, and to four months' imprisonment with hard labour on the indictment for felony, the latter sentence not to come into operation till after the decision of this court on the point reserved.

The question is whether the instrument in question was either an undertaking or a security within the meaning of the 24 & 25 Vict. c. 98, s. 23. (*a*)

If that question is answered in the affirmative, the sentence of imprisonment with hard labour is to come into operation concurrently with the residue of the sentence of imprisonment. If answered in the negative it is not to come into operation.

Colin Blackburn.

No counsel appeared to argue on either side.

Kelly, C.B.—The question in this case is whether the instrument set out in the indictment is an undertaking or security for the payment of money within the 24 & 25 Vict. c. 98, s. 3, and the forgery thereof an offence within its provisions. The facts are, that the prisoner having obtained a loan of 35*l.*, and being pressed for payment, obtained further time by giving as a security an I O U for 35*l.*, purporting to be signed by himself and his brother-in-law, George Wickham. It was a genuine instrument so far as regards his own signature, but the name of George Wickham was forged. I am of opinion that this was clearly a security for payment of money within the Act. It was said that there was no consideration for the giving of it. That is not so, for there was forbearance obtained from the creditor. And now that Lord Tenterden's Act is repealed, and there is no necessity for the consideration to appear on the face of the instrument, it would have operated at all events as a guarantee by Wickham for the payment of 35*l.* if his name had not been forged.

Byles, J.—I am of the same opinion.

Pigott, B.—I also think that this was a security by Wickham to pay the debt for the prisoner.

(*a*) This section enacts that, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money, or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on, or assignment of any such accountable receipt with intent in any of the cases aforesaid to defraud, shall be guilty of felony."

LUSH, J.—I think this was a security for the payment of money within the statute. Had this been the signature of Wickham he would have been bound by it, and it would have been a good guarantee for the payment of 35*l.* by him, and if that is so, the instrument is a security for the payment of money within the Act.

HANNEN, J. concurred.

Conviction affirmed.

REG. *v.* KNIGHT.

Larceny—Lost bank note—Misdirection.

Prisoner received from his wife a 10*l. Bank of England note, which she had found, and passed it away. The note was indorsed "E. May" only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could within a reasonable time have found the owner, and if, instead of waiting at all, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted.*

Held, that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found; and that the conviction was wrong.

CASE reserved for the opinion of this court.

At the general quarter session of the peace, holden by adjournment at St. Mary, Newington, in and for the county of Surrey, on Wednesday, the 26th July 1871, William George Green Knight was tried and convicted on an indictment, charging him in the first count with feloniously stealing 10*l.* in money, of the property of John Willimot Morgan; and, in the second count, with feloniously receiving the same money, well knowing it to have been stolen, upon the following evidence:—

Richard Adye Bailey, clerk in the Bank of England, having been sworn, produced a cancelled note of such bank for 10*l.*, paid 31st May 1871, No. 30,483, dated 22nd March 1871, indorsed E. May; E. Randall, 8, Cowland-terrace, Wandsworth-road; G. Hollyman, 345, Wandsworth-road.

John Willimot Morgan, on his oath, stated as follows:—

I am traveller and collector. On the 26th May last I received a 10*l.* note at Deptford, between one and half-past one o'clock, indorsed E. May. I put it in my left-hand waistcoat pocket. I went to South Bermondsey station, a quarter of a mile from where I received the note, and thence to Loughborough-park station. I called upon a customer in the Brixton-road. I walked from there to Clapham. I got there about three o'clock. It was the Oaks day. I walked along the Clapham-road. I put the note in my waistcoat pocket with my watch. I did not take out the note after. I missed it when I arrived at the office, Arthur-street, London-bridge. I went from Clapham station to the Borough-road station. I went the same night to Scotland-yard and gave information to the police. When at Clapham I went down High-street to Muswell's the butcher. I came up Acre-lane. I left Clapham at four o'clock by train.

George Hollyman, on his oath, stated:—

I am a clothier, carrying on business at 345, Wandsworth-road. On the 26th May last the prisoner came to me between seven and eight o'clock in the evening. I knew him by sight. I did not know his name. He purchased a waistcoat, two pairs of drawers, and other things, together of the value of 12*s.* 9*d.* He tendered a Bank of England note for 10*l.* The note produced by the witness Bailey is the one. I asked prisoner to indorse it, which he did. "E. Randall," as on the note produced. I put my initials under his name and gave him change. The articles produced by witness Tucker are of the same description as those I sold to prisoner. I will swear they are the same.

George Tucker, metropolitan police constable, 53 W. on his oath, stated:

I received a communication from the witness Hollyman. I apprehended the prisoner in the Wandsworth-road, about 7.15, on Saturday, 24th June. I said to him, I shall place you under arrest for some illegal proceedings or transactions in passing a 10*l.* Bank of England note, and a gentleman will charge you at the station. He did not say anything. I took him to the station. The sergeant there said to him, "You are charged with illegally converting this note to your own use." The prisoner said, "I know nothing about the note." He gave me his address, 2, Pensbury-street, Wandsworth-road, and gave me his latch key to be given to his wife. I took one pair of drawers from the prisoner, and detective Lonsdale brought me the waistcoat and other pair of drawers, which I now produce. When I apprehended him he said, "All right, I will go with you It is wrong in the deposition. I know nothing about it."

The prisoner's statement before the committing magistrate was read as follows:

My wife found it in Clapham-road on the Oaks-day, from half past four to five, between Manor-street and the Two Brewers. She left it till I came home from work at half-past six, and then told me what she had found. I said I did not think it was a good one, but I would take it to Mr. Hollyman and see if he could change it. I took it to him and thought no more about it. I had money to pay for the things in my pocket if it had not been all right. I did not come by it by dishonest means.

The counsel for the prosecution presented the case to the jury as a larceny of lost property by the finder.

The prisoner's counsel contended there was no evidence to show that the prisoner at the time when the note came into his possession had the intention of wrongfully and feloniously depriving the owner of his property, or that he knew or had any reasonable means of ascertaining to whom the note belonged (the only mark on the same when found being "E. May," not the name of the owner), and consequently, upon the authority of *Reg.* v. *Thurborn* (1 Den. C. C. 388; 3 Cox C. C. 453); *Reg.* v. *Moore* (30 L. J. 77, M. C.; 8 Cox C. C. 416); and *Reg.* v. *Glyde* (37 L. J. 107, M. C.; 11 Cox C. C. 103), the prisoner ought to be acquitted, it being laid down that on each of those points (as well as the conversion), there must be evidence to satisfy the jury.

The court, however, left the case to the jury, telling them that, if they were satisfied that the prisoner could within a reasonable time have found the owner, but, instead of waiting at all, he immediately converted the note to his own use by changing it, and that he intended to deprive the owner of the note against his will, it would be larceny, and in considering their verdict it would be right for them to remember the conduct of the prisoner, viz., that when asked by the person who changed the note to write his name and address on the back of the note, he wrote a false name and a false address, and when charged at the police station with the offence he said, I know nothing about the note.

The jury returned a verdict of guilty.

The court thereupon reserved for the decision of the Court for Crown Cases Reserved the question whether, under the circumstances, the conviction was right?

Judgment upon the prisoner was respited, and

he was committed to the custody of the governor of the common gaol at Newington, in the said county, until the decision of the Court for Crown Cases Reserved should be known.

E. RICHARDS ADAMS, Chairman.

No counsel appeared to argue for the prisoner.

Oppenheim for the prosecution.—The question in this case is whether there was evidence to show that the prisoner at the time he appropriated the note to his own use believed he could find the owner of it. The case of *Reg.* v. *Glyde* decided that the finder of a sovereign in the high road, who at the time of finding had no reasonable means of knowing who the owner was, but who at that time intended to appropriate it, even if the owner should afterwards be discovered, and to whom the owner was speedily made known, when he refused to give it up, was held not guilty of larceny. That decision was come to on the ground that there was no evidence to show that when the prisoner picked up the sovereign he had any reason to believe that the true owner could be found. Here the evidence is different. [LUSH, J.—But that point was not put to the jury.] The question reserved for this court is whether, under the circumstances, having regard to the prisoner's conduct in dealing with the note and denying all knowledge of it, the conviction was right. Now, may not the court after verdict infer that the jury substantially found that point.

KELLY, C. B.—It is quite clear that this conviction cannot be sustained. There was no evidence that the prisoner, at the time when he first received this note from his wife, believed that the owner of it could be found; and if there had been, the proper question has not been left to the jury.

BYLES, J.—I also am of opinion that this conviction cannot be sustained. The prisoner found the note in his wife's hands, and he did not know who the owner was; and there is no evidence that he had the means of knowing. The appropriating it under these circumstances is not larceny.

PIGOTT, B.—The question left to the jury, and which they have found, is whether they were satisfied that the prisoner could have found the owner within a reasonable time. That finding is quite consistent with this, that the prisoner himself believed he could not have found the true owner.

LUSH, J.—The real question for the jury in this case was, what was in the mind of the prisoner when the bank note first came into his possession. But without regard to his belief the jury were asked whether they were satisfied that the prisoner could, within a reasonable time, have found the owner. The jury have thought that he could, the prisoner might have thought that he could not. The conviction cannot be sustained.

HANNEN, J. concurred.

Conviction quashed.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. MCKELLAR, Esqrs., Barristers-at-law

Wednesday, Nov. 8, 1871.

REG. (on the prosecution of the Assessment Committee of St. Pancras, reps.) *v.* THE GOVERNORS OF THE FOUNDLING HOSPITAL (apps.)

Valuation Metropolis Act 1869 (32 & 33 *Vict., c.* 67) *ss.* 45, 54 *Valuation list—Entry of gross and rateable value—Exceptional principle of valuation.*

By sect. 45 *of the Valuation Metropolis Act* 1869 (32 & 33 *Vict. c.* 67), *the valuation made in pursuance of that Act is to be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein for the purpose of certain rates and taxes; but by sect.* 54 *nothing contained in the Act is to affect "any exemption or deduction from or allowance out of any rate or tax whatever, or any privilege of or provision for being rated or taxed on any exceptional principle of valuation."*

The assessment committee of St. Pancras having entered in the valuation list prepared by them in pursuance of the above Act, the true gross value and the true rateable value of lands belonging to the Foundling Hospital, notwithstanding that the Foundling Hospital Act (13 *Geo.* 2, *c. xxix.*) *provided that such lands were not to be rated at any higher value than that at which they were rated in* 1739—

Held, that the true gross and true rateable value had been rightly inserted on the valuation list; and that it was not for the assessment committee to take into account the exceptional principles of valuation saved by sect. 54 *of the Valuation Metropolis Act* 1869.

THIS was a case stated for the opinion of the court by the Court of General Assessment Sessions for the Metropolis.

On an appeal on behalf of the governors and guardians of the hospital for the maintenance and education of exposed and deserted young children against a decision of the assessment committee of the parish of St. Pancras, Middlesex, approving and confirming an assessment in the new valuation list for the said parish, made under and in pursuance of the Valuation Metropolis Act 1869, whereby the building and premises used by the appellants for the purposes of the said hospital was assessed at 1900*l.* gross, and 1592*l.* rateable value, the Court of General Sessions for the Metropolis, holden on the 27th Feb. 1871, confirmed the assessment without costs, subject to the opinion of the court on the following

CASE.

1. The Foundling Hospital was incorporated by royal charter, in the year 1739, under the name of "The governors and guardians of the hospital for the maintenance and education of exposed and deserted young children," and by an Act of Parliament passed in the same year, 13 Geo. 2, c, 29, the powers granted by the charter were confirmed and enlarged. This Act, after reciting the charter and the powers thereby given for the purchase of lands and the purchase or erection of an hospital, proceeds as follows:

And be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, that the said corporation called the governors and guardians of the hospital for the maintenance and education of exposed and deserted young children, and their successors,

shall have power by any instrument under their common seal, to contract for or to purchase, any lands, tenements, or hereditaments, provided the same do not exceed the value of 4000*l* a year in fee beyond repairs, or to take or purchase for any term or terms of years, or as tenants from year to year or at will, any lands or tenements whatsoever, to hold and enjoy the same, and to erect any house or houses, building or buildings thereon, or to convert any house or houses, building or buildings which they shall so purchase or hire for that purpose, to be an hospital or hospitals for the reception of such poor and exposed children, in such manner as to the said corporation shall seem meet, and be it further enacted by the authority aforesaid, that all and every house or houses, lands, tenements, or hereditaments, which shall at any time hereafter be purchased or hired by the said corporation, to be used and converted into an hospital or hospitals as aforesaid, or on which any such hospital or hospitals, house or houses, shall be erected, shall at all times hereafter, whilst such house or houses, lands, tenements, or hereditaments, shall continue in possession of the said corporation, be rated and assessed to all rates and assessments, at such yearly rates and value, and in such proportion as such house or houses, lands, tenements, or hereditaments were rated and assessed in the year 1739, and shall not at any time hereafter so long as they shall continue in the possession of the said corporation as aforesaid, be rated or assessed at any higher value notwithstanding any improvement which shall be hereafter made by the said corporation, of or upon the same, by erecting any such house or houses, or other building or buildings, or by converting any building or buildings into such hospital or hospitals, house or houses, any laws, statute, or usage to the contrary notwithstanding.

2. In the year 1747, the corporation purchased the freehold estate on part of which the hospital now stands. It consists of about 56 acres, lying in one block, and was at that time open ground, but with the exception of the inclosed space surrounding and attached to the hospital building, it is now covered with houses, and may be described roughly as lying between Guildford-street on the south, Tavistock-place on the north, Russell-square on the west, and Gray's-inn-lane on the east. It is situate in the three parishes of St. Pancras, St. George the Martyr, and St. George, Bloomsbury. The hospital building itself was commenced about 1742, and finished about 1752.

3. The portion of the lands so purchased, and still held by the hospital, were rated and assessed in the year 1739 to the poor rate of St. Pancras, at the yearly rate and value of 27*l*. gross and 23*l*. net, and the governors and guardians of the said hospital, since they acquired the aforesaid lands down to the present time, have been uniformly rated and assessed in respect of the said lands, and of the offices and buildings thereon, used for the purposes of the hospital, at the yearly rateable value of 23*l*. to all rates and assessments whatsoever, except such as were made under, and by virtue of, the 34 Geo. 3, c. 96, as hereinafter mentioned.

4. Up to 1790 no building leases were granted by the hospital on their estate, but in that year a committee was appointed, empowered to grant leases, and determine, amongst other things, what proportions, if any, of the expense of railing and maintaining the new squares (that is, Mecklenburgh and Brunswick-squares), and their pavements, should be borne by the hospital.

5. In consequence of the large building operations now projected and commenced, the hospital applied for and obtained in 1794 an Act of Parliament, entitled "An Act for paving, cleansing, lighting, watching, watering, and otherwise improving and keeping in repair the streets, squares, and other public passages which are and shall be made upon certain pieces of ground in the parishes of St. Pancras, St. George the Martyr, and St. George Bloomsbury, or some or one of them in the county of Middlesex belonging to the hospital for the maintenance and education of exposed and deserted young children, commonly called the Foundling Hospital." By this Act, after reciting that the governors and guardians of the hospital were seised for the use of the hospital of certain pieces of ground containing 56 acres, or thereabouts, situate in the several parishes of St. Pancras, St. George the Martyr, and St. George Bloomsbury, in the county of Middlesex, or some or one of them, and that several persons had entered into contracts with the said governors and guardians for laying out and building several streets, squares, and other public passages and places upon the said pieces of ground, and that the same were then carrying on, and that it would contribute to the benefit and safety of all persons who were or should become inhabitants of the said several streets, squares, and other public passages and places, and to all persons who should have occasion to pass along the same if provision was made for fencing and paving, or otherwise repairing and keeping in repair such intended streets, squares, and other public passages and places, and also for cleansing, lighting, watching, and watering, and keeping the same free from all nuisances, annoyances, and encroachments; it was enacted that certain persons therein named should be commissioners for carrying the Act into execution for the term of three years, and that in May 1795, and in every succeeding year, the governors and guardians of the hospital should at their annual meeting, to be held under their Act of Parliament, elect twenty-one of the said governors and guardians to be commissioners for the succeeding year, and at the same time certain of the inhabitants, being householders residing within the limits of the Act, should elect twenty-one persons, having certain property qualifications within the limits of this Act as commissioners to act jointly with the twenty-one governors and guardians of the hospital. All the pavements of the carriage-ways, and footways, and things purchased or gotten for the purposes of the Act, are vested in the commissioners, and the commissioners are empowered to cause the several streets, &c., then or thereafter to be made within the limits of the Act to be paved, and such pavements to be kept in good repair, and to cause the streets, squares, and other public passages and places, to be cleaned, lighted, and watched, and watered, and the sides thereof, and also the middle of any squares, to be fenced or enclosed with iron rails, and all encroachments, obstructions, nuisances, and annoyances therein to be removed, and drains, sinks, gutters, and watercourses to be made for conveying the water off from the streets, &c., and it is provided that no person shall (under a penalty) alter the form or break up the ground or pavements of the carriage ways or footways, within any of the said streets, &c., or make the same otherwise than as should be directed by the commissioners. The commissioners are also empowered to cause lamps to be set up in the streets, and the houses to be named and numbered, and to cause the water to be conveyed from the roofs of houses by pipes, and from them into the common drains or sewers.

6. With regard to the expenses of carrying out

the purposes of the Act, it is provided that one or more rate or rates, assessment or assessments, for the purpose of repairing, paving, cleansing, lighting, watering, and watching of the several streets, &c., within the limits of the Act, should be laid and assessed by the commissioners once or oftener in one year, upon all persons who should inhabit, hold, use, occupy, possess, or enjoy any land, ground, house, shop, warehouses, coach houses, stable, cellar, vault, building, or tenement in any of the said streets, squares, and other public passages, and places, in such sum or sums of money as the commissioners should direct; but so that the rates or assessments for any one year should not exceed the following sums: For paving, cleansing and lighting, 2*s.* in the pound, according to the yearly rent or value of such houses, &c.; for railing and ornamenting the areas or middle spaces of the squares, 1*s.* in the pound, according to the yearly rent or value of such houses as should be erected and built in such squares; for watching the said streets, &c., 6*d.* in the pound according to the yearly rent or value of the houses, &c., situate within the limits of the Act; and for watering such streets, &c., 6*d.* in the pound according to the yearly rent or value of the houses, &c., situate within the respective squares and other public passages and places to be watered in pursuance and according to the directions of the Act, and the commissioners were to cause separate and distinct accounts to be kept of the produce of the respective rates or assessments, and of the application of the same respectively.

7. The annual value of the tenements to be rated and assessed, was to be rated and ascertained according to the real rack rent or full yearly value thereof, or in any fair and equal proportion of such real rack rent or full yearly value as the commissioners should think proper.

8. There is a special provision in the Act as to the assessment of the hospital as follows:

Provided also that the aforesaid hospital, commonly called the Foundling Hospital, and the offices, buildings, and grounds, belonging, or to belong thereto, and used for the purposes of the hospital, shall be rated or assessed for all or any of the purposes of this Act, after and according to such annual sum or value as shall be equal to three-fifth parts of the amount of the several annual values which shall be rated or assessed upon the several houses abutting upon Guildford-street from Milman-street to the mews opposite to Lansdowne-place, and the several houses now built or hereafter to be built abutting and adjoining upon such other streets or ways as do or shall immediately adjoin the boundary walls or fences of the said hospital.

In the course of about thirty years from the commencement of operations in 1790, the whole of the hospital estate was laid out in squares and streets and let on building leases for terms of, in most cases, ninety-nine years, except the portion of ground inclosed by the walls of the hospital itself and retained for its use. This inclosed portion of about nine acres in extent is wholly within St. Pancras parish.

9. From the time of the passing of the 34 Geo. 3, c. 9 (A.D. 1794) down to the passing of the Police Metropolitan Act (10 Geo. 4, c. 44, A.D. 1829) the governors and guardians of the said hospital were rated and assessed by the commissioners appointed under the 34 Geo. 3, c. 96, for all the purposes of the said Act, including that of watching the streets and squares, &c., within the limits of the said Act, on a value ascertained in a manner provided by the said Act as above mentioned.

10. In the year 1829 the Police Metropolitan Act (10 Geo. 4, c. 44), was passed. By that Act, sect. 19, the night watch within their district was discontinued, and the power of assessing and levying any rate for that purpose ceased. By sect. 23 a rate for the metropolitan police became leviable according to the valuation for the time being acted upon in assessing the county rate. Accordingly from and after the passing of that Act down to the present time the governors and guardians of the said hospital ceased to be rated under the 34 Geo. 3, c. 96, for watching the streets and squares aforesaid, and have been rated for the metropolitan police upon the basis of the county rate under the said Act of 1829 at the yearly rate and value of 234*l.* rateable value.

11. For many years before and at the time of the passing of the Metropolis Local Management Act (18 & 19 Vict. c. 120) in 1855 the governors and guardians of the said hospital continued to be rated under the 34 Geo. 3, c. 96, for all the purposes of that Act, except that of watching upon the basis of value above stated, 1244*l.*, being the actual amount upon which the rate was made.

12. In 1855 the Metropolis Local Management Act was passed and came into operation on the 1st Jan. 1856. This Act recites that it is expedient that provision should be made for the better local management of the metropolis in respect of sewerage and drainage, and the pavement, cleansing, lighting, and improvement thereof.

13. The government of the metropolis for the purposes of the Act is placed under the control of the Metropolitan Board of Works and of certain local district boards of which the St. Pancras parish is one.

14. The principal sections relative to rating and assessment are as follows:

Sect. 161:

The overseers of the poor of every parish to whom any such order as aforesaid is issued, shall levy the amount mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied in respect of each sum thereby ordered to be levied, that is to say, a separate rate in respect of each sum ordered to be levied for paying expenses connected with sewerage, to be called a sewers rate. A separate rate in respect of each sum ordered to be levied for defraying expenses of lighting (where a separate sum is ordered to be levied for defraying such expenses) to be called a lighting rate. And a separate sum in respect of each sum ordered to be levied for defraying other expenses of executing this Act, to be called a general rate, and shall make such respective rates of such amount in the pound on the annual value of the property rateable, as will in their judgment, having regard to all circumstances, be sufficient to raise the sums specified in such order; and such rates shall be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor; and the said overseers shall for the purpose of levying such rates proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor; and all such rates shall be allowed in the same manner, and be subject to all the same provisions in relation to appeal, and to excusing persons from payment on account of poverty and otherwise as the rate for the relief of the poor in the same parish, and such overseers shall pay to the treasurer of the vestry or board, or otherwise as in such order directed, the amount mentioned in the order within the time or respective times specified for that purpose, and the excess if any which may have been levied beyond such amount, which excess shall be placed to the credit of the parish, or part in which the same has been

levied. And the said overseers shall at the time of making any such payment deliver with the money a note in writing signed by them specifying the amount so paid, which note shall be kept as a voucher for the receipt of that particular amount, and the receipt of the treasurer of the vestry or board of any proper officer or person of, or belonging to any bank into which such money is so paid specifying the amount so paid to him by the overseers, shall be a sufficient discharge to the overseers for such amount.

Sect. 162:

Provided always that all such hospitals, public schools, and other public buildings, dead walls, and void spaces of ground as are now by law rateable to any rate for the costs and charges of paving or repairing the pavements within any parochial or other district, either separately or jointly with any other object or objects (except only places of religious worship and burial grounds), or places which have been used for burial grounds and are not used for any other purpose, shall be rateable under this Act to the like extent and for the like objects or purposes as they may now be rated, and the rates to be made in respect of such objects or purposes shall be payable by the persons now liable to pay the same, and be recoverable in like manner as any rate to which such buildings and spaces of ground are now rateable as aforesaid in respect of like objects or purposes

15. The following sections relate to the repeal and varying of inconsistent or conflicting local Acts.

Sect. 247:

All Acts of Parliament in force in any parish or place to which this Act extends, or in any part of such parish or place shall, so far as the same are inconsistent with the provisions of this Act be repealed as regards such parish or place, or such part thereof, notwithstanding any provisions of this Act continuing and transferring respectively to vestries or parishes, and transferring to district boards any duties, powers, authorities now or vested in vestries, commissioners, or other bodies.

Sect. 248:

Upon the petition of the Metropolitan Board of Works, or of any district board or vestry representing to Her Majesty in Council, that by reason of the provisions of any local Act of Parliament relating to any district or parish, or any part thereof respectively, difficulties have arisen in the execution of this Act and of such local Act, or either of them, and praying for a suspension or alteration of all or any of the provisions of such local Act, or for the establishment of other provisions in lieu thereof, under this enactment, it shall be lawful for Her Majesty, by order in council, to suspend or alter all or any of the provisions of such local Act, and to make other provisions in relation to the matters thereof, as Her Majesty, with the advice of Her Privy Council, may think necessary under the circumstances of the case, and every such order in council shall be laid before both Houses of Parliament within one month after the making thereof, if Parliament be then sitting, or if Parliament be not sitting, then within one month after the next meeting of Parliament, and shall be published in the *London Gazette*. Provided always, that no such order in council shall remain in force beyond the term of one year from the making thereof."

16. From and after the passing of the Metropolitan Local Management Act down to the present time the governors and guardians of the said hospital have ceased to be rated for the purposes of paving, lighting, cleansing, or any other purpose whatsoever within the limits of the 34 Geo. 3, c. 96, and have been rated for the purposes of the Metropolitan Local Management Act within the parish of St. Pancras as well as to all other rates up to April 1867 at the yearly rent and value of 234*l.* gross, and 234*l.* rateable value, and since that time of 275*l.* gross, and 234*l.* rateable value.

17. Up to the passing of the Metropolitan Local Management Act, the governors and guardians of the said hospital paid sewerage rates to the commissioners of sewers upon the yearly rate and value of 234*l.* rateable value. Since the passing of the said Act they have paid sewers rates to the parish of St. Pancras upon the same value as above stated.

18. On the 9th Aug. 1869, the Valuation Metropolis Act 1869 was passed to provide (according to the preamble) a common basis of value for the purposes of government and local taxations, and to promote uniformity in the assessment of rateable property in the metropolis. This Act incorporates in it sects. 17 to 21, inclusive, of 25 & 26 Vict. c. 103.

19. By sect. 45 of the said Act it is enacted as follows:—

The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act, and the Act incorporated herewith, and shall for all or any purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted, that is to say—

(1.) For the purpose of any of the following rates, which are made during the year that the list is in force, namely, the county rate, the metropolitan police rate, the church rate, the highway rate, the poor rate, the police, sewers, consolidated, and other rates in the City of London, the sewers, lighting, general, and other rates levied by order of district boards or vestries, the main drainage improvement, and other rates and sums assessed on any part of the metropolis by the Metropolitan Board of Works, assessments for contributions under the Metropolitan Poor Rate 1867, and every other rate, assessment, and contribution levied, made, and required in the metropolis on the basis of value.

(2.) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely

(*a*) The tax on houses, levied under the House Tax Act and the Act therein incorporated or referred to.

(*b*) Any tax assessed in pursuance of the Income Tax Act, and any Acts continuing or amending the same on any lands, tenements, and hereditaments in all cases where the tax is charged on the gross value and not on profits.

(3.) For the purpose of determining so far as it is applicable, the value of any hereditament included therein for the purposes of the Acts relating to the sale of excisable liquors, to the qualification of a juror, to the qualification of a vestryman, and an auditor of accounts under the Metropolis Management Act 1855, and to the qualification of a guardian, and of a manager under the Poor Law Amendment Act 1834, or the Metropolitan Poor Act 1867, at any time at which such value is required to be ascertained.

And in construing the Metropolitan Police Act and the Acts amending the same, the last valuation for the time being acted upon in assessing the county rate shall be deemed to mean the valuation list for the time being in force.

And in construing the County Rate Act and Acts referring to the valuation estimate basis or standard for the county rate, the valuation estimate, basis or standard shall be deemed to be the rateable value stated in such list.

And in construing the House Tax Act and the Acts therein incorporated or referred to, the full and just yearly rate shall be deemed to be the gross value stated in such list.

And in construing the Income Tax Act and Acts continuing or amending that Act with respect to schedules A. and B. thereof, annual value shall be deemed to mean the gross value stated in such lists.

20. By section 54 it is provided that—

Nothing contained in this Act, or the Act incorporated herewith, shall affect any exemption or deduction from or allowance out of, any rate or tax whatever, or any privilege of or provision for being rated or taxed on any exceptional principle of valuation.

21. On the hearing of the appeal the appellants contended that the sums 275*l.* gross and 234*l.* net should alone be inserted in the valuation list, such sums being the sums ascertained in the manner

pointed out by the Foundling Hospital Act (13 Geo. 2, c. xxix.)

22. The appellant further contended that in every case the entry as it at present stands is improper and insufficient, and that if the actual gross and rateable value is entered at all, it ought to be accompanied with such special note or instructions as would prevent the parish officers from making the rates referred to in sect. 45 of the Metropolis Valuation Act 1869, upon such actual value, and would direct them to make the rates on the value ascertained, as provided by 13 Geo. 2, c. xxix.

23. The respondents contended that the true gross and rateable value of the said property, as defined by the Valuation Metropolis Act 1869, should be inserted in the valuation list, leaving the parish officers when making the poor rate to make it on this exceptional principle of valuation referred to in the statute of Geo. 2, and when making the general rate under sect. 161 of 18 & 19 Vict., c. 120, for maintaining, paving, and repairing, &c. the roads, &c., and for the payment of the interest on the bond debts of the extinct paving trust to make such general rate on the exceptional principle of valuation referred to in the statute of Geo. 3.

24. The respondents further contended that, at any rate, the sum of 275*l.* gross, and 234*l.* net, ought not alone to appear in the list but that some special entry ought to be made in the valuation list, with reference to the appellants' property, so as to enable the parish officers properly to make the rates referred to in sect. 15 of the Metropolitan Valuation Act 1869.

25. The court of general assessment sessions confirmed the valuation list in order that the opinion of the court might be taken on the beforementioned questions of law.

26. The Acts referred to herein are to be taken to form part of this case.

27. The questions for the opinion of the court are: first, whether the true gross and rateable value of the appellants' property now in their occupation, as defined by the Valuation Metropolis Act 1869, should be inserted in the valuation list; or, secondly, whether the gross and rateable value of such property for the purpose of such list, should be ascertained as pointed out by the Foundling Hospital Paving Act (34 Geo. 3, c. xcvii); or, thirdly, whether the gross and rateable value of such property for the purposes of such list should be ascertained in the manner pointed out by the Foundling Hospital Act (13 Geo. 2, c. xxix.); fourthly, whether the valuation list should contain a special entry showing, in addition to the true gross and rateable value of such property, the gross and rateable value ascertained under the said Acts of Geo. 2 and 3, or either and which of them, and whether it should contain any and what instructions as to the making or rates on the said values respectively.

28. If the court should be of opinion that the said property ought not to be charged and assessed in the valuation list in either of such before mentioned ways, then the court to decide in what way it should be valued and assessed in such lists.

29. The case to go back to the general assessment sessions to alter the valuation list in accordance with the judgment of the court.

Poland, for the respondents, showed cause.—It was the duty of the general assessment committee to enter on the valuation list the true gross and rateable value as they have done. The object of 32 & 33 Vict., c. 67, was to produce uniformity of assessment, rates having formerly been made on the annual value as stated in the Parochial Assessment Act, the mode of arriving at the annual value being different in different parishes. The Union Assessment Committee Act (25 & 26 Vict. c. 103), ss. 17-21, is by sects. 6 and 7 of the 32 & 33 Vict. c. 67, to be read with this latter part, and the assessment is to be made accordingly. The valuation list so made is by sect. 45, to be "conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted," for the purposes of the various rates and taxes mentioned therein. Sect. 54 provides for exceptional principles of valuation to be applied in any particular case, enacting that "nothing contained in this Act, or the Act incorporated herewith, shall affect any exemption or deduction from, or allowance out of any rate or tax whatever, or any privilege of, or provision for, being rated or taxed, on any exceptional principle of valuation." The assessment committee are bound to insert in the valuation list the true gross and true rateable value: it is not for them to apply or make allowance for the exceptional principles of valuation saved by sect. 54; that is the business of the particular local authority in each case. All the assessment committee have to do, is to see that the true gross and true rateable value of all the property in the metropolis are contained in the valuation list. It is submitted that they were right in doing this, and refusing to take account of the exceptional principle of valuation contained in the Foundling Hospital Act (32 Geo. 2, c. xxix).

Millward, Q.C. and *Fullarton* for the appellants.—The assessment committee, in making the valuation list, should have taken into account the exceptional principle of valuation affecting the property of the appellants by virtue of the Foundling Hospital Act (34 Geo. 2, c. xxix.), all exceptional principles of valuation being expressly saved by sect. 54 of 32 & 33 Vict., c. 67. No provision is made for any appeal from the determination of the assessment committee as to the rateable value of property, and by sect. 45, the assessment is to be conclusive for five years as to all taxes named in that section. [COCKBURN, C.J.—But sect. 54 preserves you the benefit of the exceptional principle of valuation contained in your Act.] The committee should have made allowance for that. [COCKBURN, C.J.—Are you not complaining before you are hurt? When a rate is made affecting you, you will be entitled to the benefit of the privilege contained in your Act; but the assessment committee are not imposing a rate, they merely prepare a statement of value.] At any rate there ought to be a memorandum attached to the entry in the valuation list, pointing out that the appellants' property is entitled to the privilege conferred by the Foundling Hospital Act. [COCKBURN C.J.—What power have we to order the committee to do that? And what would such a direction amount to, but simply calling their attention to the 54th section of the Act. We can only say that the valuation list must be made according to the Act of Parliament.]

COCKBURN, C.J.—It is unnecessary to add anything to what we have said in the course of the argument. This is neither a rate nor an assess-

ment, but only a valuation with a view to an assessment, and the appeal must be dismissed.

MELLOR and HANNEN, J.J., concurred.

Appeal dismissed.

Attorneys: *J. T. Simpson*; *W. T. Cooper*.

Saturday, Nov. 18, 1871.

EASTON (app.) *v.* RICHMOND HIGHWAY BOARD (resps.)

Highway Act 1864 (27 & 28 *Vict. c.* 101) *s.* 51—*Conviction for encroaching upon highway—Side of carriage way not dedicated to the public.*

By sect. 51 *of the Highway Act* 1864, *a penalty is provided upon summary conviction, "if any person shall encroach by making or causing to be made, any building, or pit, or hedge, ditch, or other fence, . . . on the side or sides of any carriage way or cartway, notwithstanding that the whole space of* 15 *feet from the centre of such carriage way or cartway has not been maintained with stones or other materials used in forming highways."*

Upon a case stated by magistrates, who had convicted the owner of the neighbouring soil of encroaching upon a highway by building a wall within 15 *feet of its centre, but upon part of a green which the carriage way crossed, and which had never been dedicated to the public.*

Held that this section did not relate to any ground which was not part of the highway, and that the conviction was wrong.

THIS was a case stated by two of her Majesty's justices of the peace in and for the division of Gilling West in the North Riding of the county of York, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose as hereinafter stated.

At a petty sessions holden at Richmond in and for the division of Gilling West, in the North Riding of the county of York on the 3rd Sept. 1870, an information was preferred by John Hodgson (hereinafter called the respondent), the surveyor of the Richmond Highway District Board, in the North Riding of Yorkshire, against John Easton (hereinafter called the appellant), for that he, the said appellant, on or before the 1st Aug. 1870, at West Layton, in the parish of Hatton Long Villiers, unlawfully did encroach on the side of a certain carriage way there situate, called the East Layton Road, within 15 feet of the centre thereof, by making, or causing to be made, a certain building, to wit, a stone wall thereon, contrary to the form of the statutes in such case made and provided: and was heard and determined, the parties respectively being then present, and upon such hearing the appellant was duly convicted of the said offence, and the said appellant was adjudged for his said offence to forfeit and pay the sum of twenty shillings, to be paid and applied according to law, and also to pay unto the said respondent the sum of four shillings and sixpence for his costs in this behalf.

And whereas the appellant, being dissatisfied with this determination, upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute (20 & 21 Vict. c. 43), duly applied to the justices in writing to state and sign a case setting forth the facts and grounds of such determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf.

Now, therefore, the said justices, in compliance with the said application, and the provision of the said statute, and by consent of the parties, hereby stated and signed the following case.

Upon the hearing of the said information it was admitted on the part of the appellant, and found as facts:

That the carriage way mentioned in the information is a highway repairable by the township of West Layton, and the portion of the highway on which the alleged encroachment was made, runs across the village green of West Layton aforesaid for the distance of 200 yards or thereabouts, into another highway, leading from the said village of West Layton to the village of Caldwill.

That the appellant is lord of the manor of West Layton, and the whole of the village, the green, and the property around belongs to him.

That before the alleged encroachment, the portion of the highway which crosses the said village green was wholly unenclosed, and the width of the metalled road crossing the green was 8ft.; the grass came up to the metalled road, and there was no difference between the grass adjoining the metalled road and the rest of the green.

That on the south side of the road, crossing the green for the greatest part thereof, the ground sloped gradually from the metalled road to the extent of from 1ft. to 2ft., or an average of 1½ft. all the way down the village green, and on the north side there was a hollow at about 3ft. distance from the metalled road, but neither the slope nor the hollow were of such a character as to prevent carriages or other vehicles passing along or crossing the same, if it were necessary to do so for the purpose of avoiding any carriage or other vehicle travelling in a contrary direction, although for a few feet in two or three places rather more than ordinary care would require to be taken to avoid any danger of overturning. On the east side of the village green, before entering on the green, the road is for a short distance enclosed between hedges, and the width of the enclosed part, including the waste on the side of the road, is 12ft. from hedge to hedge. The road is very little used.

That the appellant had lately enclosed the road across the said village green, for nearly the whole length thereof by building a wall on each side thereof. The said wall is built at the foot of the said slope on the south side of the road, and in the said hollow on the north side thereof, and upon both the north and south side the wall is built upon the green, and about 4ft. from the metalled road. The width from wall to wall is 16ft.

That the said village green had generally been depastured by the tenants of the adjoining farms, and the public have always been accustomed to ride and walk or take carts across the green where sufficiently level, without interruption, but they have not exercised any greater or other right of passage over the grass adjoining the metalled road than they have over the rest of the said green, which is about 5 or 6 acres in extent, and extends in width from 80 or 100 yards on each side of the road. It was alleged by the respondents that if two carts loaded with straw or hay met upon the road, one or other would have to go on the grass, although there was no evidence that two loaded carts had ever been seen to meet. It was admitted that in such event one or other might have to go on to the grass.

It was contended by the appellant that there

was nothing in the Highway Acts to prevent his building on his own land within 15ft. of the centre of the highway, providing that he did not build upon the highway or boundaries thereof, and it was also contended that as the walls were built on the village green, and at the distance from the metalled road above stated, but leaving no more than a width of 16ft. between wall and wall, and that as the part of the green on which the walls were built (though open ground) had never, as the appellant contended, been dedicated to the public as a highway to any greater extent than the whole green had been dedicated, the walls were not built upon the highway or sides thereof, so as be an encroachment within the meaning of the Acts, and therefore that the appellant ought not to have been convicted.

The justices, however, being of opinion that the walls had been built upon the sides of the highway, leaving only a width of 16ft. between wall and wall, and that the appellant had thereby encroached on the said highway within the meaning of the 27 & 28 Vict. c. 101, s. 51; and being also of opinion that by reason of such encroachment the said highway had been reduced in width to less than 30ft. between the fences on each side thereof, within the meaning of the said section, gave their determination against the appellant in the manner before stated.

The question for the opinion of the court is, whether, upon the facts above stated, the appellant was justified in building the walls in question, only leaving a width of 16ft. between wall and wall, or was bound to leave a space or roadway of the width of 30ft.

If the court should be of opinion that the appellant was not justified in building the walls as stated in this case, the conviction is to stand, but if the court should be of opinion otherwise, the information is to be dismissed.

Field, Q. C. (with him *Herschell*) argued for the appellant.—The section under which the appellant was convicted is the 51st of the Highway Act 1864 (27 & 28 Vict. c. 101.) "From and after the passing of this Act, if any person shall encroach by making or causing to be made any building or pit or hedge, ditch or other fence, or by placing any dung, compost, or other materials for dressing land, or any rubbish, on the side or sides of any carriage way or cartway, except for the purpose of improving the road, and by order of the highway board, or where there is no highway board, of the surveyor, he shall be subject on conviction for every such offence to any sum not exceeding 40s., notwithstanding that the whole space of 15ft. from the centre of such carriage way or cartway has not been maintained with stones or other materials used in forming highways: and it shall be lawful for the justices assembled at petty sessions, upon proof to them made upon oath, to levy the expenses of taking down such building, hedge, or fence, or filling up such ditch or pit, and removing such dung, compost, materials, or rubbish, as aforesaid, or restoring the injury caused by the removal of such soil or turf, upon the person offending. Provided always that where any carriage way or cartway is fenced on both sides, no encroachment as aforesaid shall be allowed whereby such carriage way or cartway shall be reduced in width to less than 30ft. between the fences on each side." To understand the effect of this provision, it is necessary to consider the previous legislation on the subject, and the authorities upon it. The case of *Lowen* v. *Kaye* (4 B. & C. 3) was decided upon 13 Geo. 3, c. 78, ss. 6 and 64, by which a person was liable to a penalty if he "shall encroach by making any hedge, ditch, or fence *on* any highway;" it was held that upon an action for trespass against the surveyor for pulling down a fence which plaintiff had erected, so that the road was only 24ft. wide, a proper question for the jury was whether the fence was erected on the highway, or on the plaintiff's soil. By 5 & 6 Will. 4, c. 50 (The Highway Act 1835), s. 63, "where, in this Act, any matter or thing is directed or forbidden to be done within a certain distance of the centre of a highway, that portion of ground shall be deemed and taken to be the highway which has been maintained by the surveyor as highway and repaired with stones or other materials used in forming highways for the six months immediately preceding." And by sect. 69 a penalty is imposed, "if any person shall encroach by making or causing to be made any building, hedge, ditch, or other fence, on any carriage way or cartway within the distance of 15ft. from the centre thereof." Under this Act, it was held that the erection of a building within 15ft. of the centre of a carriage way which has been repaired by the surveyor for the six months preceding, but not on any part of the highway which has been lately used for passage, is not an encroachment of which justices can take summary cognisance: (*Chapman* v. *Robinson*, 1 E. & E. 25.) "The encroachment," Wightman J. said in his judgment, "must be within 15ft. of the centre of the highway, and also upon that which is highway." Another authority upon this 69th section is that of Maule J., who summed up, in an action against a surveyor for pulling down a fence built by the plaintiff by which the highway was rendered only 22ft. wide: "In order that a fence put up by a party should come within the provisions of the statute that has been cited, two things must concur, the one, that it must be within 15ft. of the centre of the road, the other, that it must be *on* the road. If an encroachment was made by putting up a fence at the edge of a road as wide as Portland-place, that would not be within this enactment, because it would not be within 15ft. of the centre of the road. So if the road was under 30ft. wide, and the encroachment was at the side of it, but not *on* the road, it would on that ground not be within the 69th section of the Highway Act. Here we find that there is a road running along this line, but that the two places inclosed never were parts of that road, as no carriage ever did or could go along the steep bank at The Pound, or over the rough uneven ground at Nichols; and if these places at which the fences were put up have never either of them been used by the public as a part of the road, the surveyor had no right to pull down the fences, because they were within 15ft. of the centre of the road: (*Evans* v. *Oakley* Car. & Kir. 125.) Now, under the last Act of 1864, there is certainly a change in the language, but the question is whether the change is so extensive as to meet this case. There must be an encroachment, which, according to Jacob's Law Dictionary, "Signifies an unlawful gaining upon the right or possession of another man." There must, therefore, be some injury to the rights of the public, which the building of these walls cannot be, unless this grass had been dedicated to the public. According to the case there has been no such dedication. [BLACK-

BURN, J.—Your argument is, that although sect. 51 of the Act of 1864 was passed to overrule *Chapman* v. *Robinson*, it was not intended to overrule *Evans* v. *Oakley*?] Yes.

Manisty, Q.C. (with him *Cave*) for respondents.—In some cases it may be difficult to decide what is the side of a road, but it is clear that in this section the side must mean something different from the carriage way or cartway itself. In *Grove* v. *West* (7 Taunt. 39), cited in the note to *Evans* v. *Oakley*, Gibbs, C.J, said: "*Primâ facie* the presumption is, that a strip of land lying between a highway and the adjoining close belongs to the owner of the close, as the presumption also is that the highway itself *ad medium filum viæ* does. But the presumption is to be confined to that extent; for if the narrow strip be contiguous to, or communicate with open commons or larger portions of land, the presumption is either done away or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them." It must be a question of fact in every case how far a strip by the road is the side of the road, and here in effect the justices have found that the public had a right to use the land enclosed by the appellant. [COCKBURN, C.J.—The words of the case do not mean that the whole green is a highway, but they are express that the public have not exercised any greater or other right of passage over the grass adjoining the metalled road than they have over the rest of the green. MELLOR, J.—The justices do not find that these strips were dedicated to the public.] They find that it was used by the public. [MELLOR, J.—Yes; but they tell us the kind of user, in order that we may judge of its effect.] Taking the case as it is, clearly this is not like *Evans* v. *Oakley*, where the strip by the side of the highway could not be used as a road. Lord Denman said, in *Elwood* v. *Bullen* (6 Q.B. 409): "Where a highway passes through an inclosed country, it is not the formed road merely (whether of pavement, gravel, or other material), but the whole space from fence to fence which is the highway; and an obstruction in any part is equally the subject of an indictment. The extent of a highway, where it passes over a common, is frequently still more indefinite to the right and left of what may be the ordinary passage." Even if your Lordships hold that the side of a carriage way, to be within the Act must be dedicated to the public, I would ask that the case should be sent back to the magistrates, in order that they may find the facts on that point. [BLACKBURN, J.—I see nothing in the case to show us that the public had any right to go over the grass upon which the walls are built.]

COCKBURN, C.J.—In this case I am of opinion that the conviction was wrong, and that there was no encroachment on the appellant's part within the meaning of the 51st section of the Act of 1864. It is suggested by Mr. Field that this provision was not intended in any way to interfere with or limit the ruling of Maule, J. in *Evans* v. *Oakley*, and I think that its object certainly was rather to meet the circumstances of *Chapman* v. *Robinson*, and to set aside that decision so far as it was thereby held that this erection of a building by the side of a highway was not an encroachment, unless the place upon which it was built had been lately used for passage. It seems to me that the recent enactment on the subject was merely meant to meet the case of a highway wider than the metalled road. And the true construction of the statute is, not that it should include the case of building upon rough or waste land by the side of the road, which could not possibly be used by the public, but it is intended for the case of building upon that part of a highway which is not metalled or gravelled, but which has been dedicated to the public. This is reasonable; for the rough ground by the side of the road might be such as could never have been part of the highway, and it would be a confiscation of the owner's property to hold that he could not build upon it. But it would be reasonable that, whatever was part of the highway, though not gravelled, should be protected and preserved for the public, and this would be no interference with the rights of the owner, who has, indeed, abandoned all his rights to the strips by the side of the road when he dedicated them to the public. There could be no hardship or injustice in this; and by putting such a construction on the Act, the fair and proper objects of the Legislature would be attained, and all rights and interests would be reconciled and regarded. Applying this principle to the present case, the land by the side of the road, which formed no part of the highway, was not within the enactment, and therefore the magistrates were wrong in convicting the appellant for an unlawful encroachment on the highway, if, as we understand the case, the pieces of grass between the new walls and the metalled road had never been dedicated to the public.

BLACKBURN, J.—I also think that the magistrates have here mistaken the meaning of this Act, but I consider that theirs is a very natural mistake to fall into. When a highway exists of which a part only is metalled road, it is generally a question of fact how much between the fences is included in the highway. *Primâ facie*, the whole of it is highway, but this may be rebutted by evidence, and the facts of this case seem to show that none but the metalled part of this green was highway. Now at common law encroachments on the highway, whether it was gravelled or not, were unlawful and indictable. The early statutes, giving magistrates summary jurisdiction (13 Geo. 3, c. 78 and 5 & 6 Will. 4, c. 50) were restricted to the metalled or gravelled part. The two cases cited (*Chapman* v. *Robinson* and *Evans* v. *Oakley*) were clearly right. The recent Act simply adopted the principal of the common law, and related to the whole highway, gravelled or not. But it did not go beyond the boundaries of the highway, and therefore the magistrates in this case were wrong. The Legislature had a right to take away people's rights without compensation, but it was not to be presumed that they had done so without clear and express words to that effect. To have taken any land which was no part of the highway would have had this effect, and that construction did not appear to be required to carry out the object of the Act. The phrase, "on the side or sides of the highway," therefore, was to be confined to those parts which belonged to the highway. The conviction, therefore, will be quashed.

MELLOR, J.—I am of the same opinion. I think that it was not the intention of the Legislature to take away any person's property. Therefore, if on the sides of the carriage way there were any pieces of land not included in the highway, they were protected from the penalty of encroachment; but if they were pieces of land by the sides of the

y, and forming part of that which had been ›d to the public, the owner of the neigh- ; soil had no right to build upon them. agree that there is no evidence of dedica- the public, and I think the magistrates have rpreted the Act.

Judgment for appellant.

neys: *Pattison, Wigg,* and *Co.*; and *J. L.* for *J. R. Tomlin,* Richmond, Yorkshire.

BOROUGH UNION (apps.) *v.* WELCH (resp.).

rochial Assessment Act (6 *&* 7 *Will.* 4, *c.* 96), *—Expenses necessary to command rent— ıage rate under Local Act—Taxes payable by ›rd.*

Everton Drainage Act 1860 *the owners and pro- rs of land in Nottinghamshire were charged embankment and drainage works, without the annual value of the neighbouring lands l be considerably diminished. The rates so ed were made payable by the occupiers, who uthorised to deduct the amount from their rent: hat the average annual cost of the works to be deducted from the occupier's rent, in to estimate the net annual value under the chial Assessment Act* 1836.

eal from the decision of justices in special in the matter of a poor rate, the Court ter Sessions confirmed the decision of the tices, subject to the following case:

espondent is a farmer and occupier of cer- ıds in the parish of Misterton, in the poor on of Gainsborough, and the Duke of Port- the owner and proprietor of the said lands. r the provisions of a local Act (23 & 24 cliv.), called the Everton, &c., Drainage 0, which is to be taken to form part of this d which was "An Act to Consolidate into t and to Amend, Extend, and Enlarge the and Provisions of the several Acts for king and Draining certain Low Lands and s in the Parishes or Townships of Everton, rth, Gringley-on-the-Hill, Misterton, and ingham, in the county of Nottingham, and e further and better Provision for such kment and Drainage," the said lands in the of Misterton, so occupied by the respondent said, became liable to be rated, and have ted, under the 58th section of the said Act, year since the passing of the said Act, for poses for which the said Act was passed, in n of 29*l.* 5*s.*, and a similar rate will be l in future years.

Duke of Portland, the owner and proprietor said lands as aforesaid, has duly paid the m when required, and the same has not id by the respondent at any time.

respondent was rated in the poor rate l against, which was made in accordance e valuation list then in force for the parish rton, as under:

Owner.	Description of Property.	Name of Situation of Property.	Estimated Extent.	Grossest Rental.	Net Rateable Value.	Rated at in the Pound.
			A. R. P.	£ s. d.	£ s. d.	£ s. d.
Duke of Portland.	Land	Misterton-	148 3 22	147 5 9	132 10 0	7 14 7

whole rate raised under the said Act is spent in each year in maintaining drainage works. No portion of it is expended in constructing new works, or in paying back money borrowed in former years, or in interest on such moneys.

Without such drainage rate the drainage works by which the land occupied by the respondent is drained could not be maintained.

Without such drainage works as those just mentioned, the land occupied by the respondent would be under water at certain seasons of the year, and could not be maintained in its present state, and the annual value thereof would be considerably diminished.

In assessing the respondent to the above poor rate, no deduction or allowance whatever was made for or in respect of the said drainage rate of 29*l.* 5*s.* in arriving at the net rateable value. In other respects the respondent admits that the assessment is proper and just. But the respondent appealed against the rate to the justices in special sessions for the petty sessional division of East Retford on the ground that he was entitled to deduct the said sum, and the said justices decided that he was so entitled.

The present appellants then appealed to the Court of Quarter Sessions, upon the ground that no deduction whatever ought to be made for or in respect of the said drainage rate, and the appeal was heard at the adjourned Quarter Sessions for the county of Nottingham, held at Newark, on the 24th day of Oct., 1870, before John Evelyn Denison, Esq., chairman, and a bench of magistrates. The said Court of Quarter Sessions, under the circumstances above mentioned, thought that the expenses of maintaining such drainage works were expenses necessary to maintain the said land in a state to command the rent at which the said land was assessed in the said rate, and gave judgment for the respondent; but granted this case for the Court of Queen's Bench, and ordered that the costs of the appeal and of this case should abide the event.

The question for the opinion of this court is, whether the said drainage rate of 29*l.* 5*s.* ought to be deducted from the gross estimated rental of the said lands.

If the court should be of opinion that the respondent is entitled to the said deduction, the order of sessions to be confirmed.

If the court should be of opinion that the respondent is not entitled to the said deduction, the order of sessions to be quashed.

Cave (with him *Mellor*) for respondent.—The question in this case arises under the Parochial Assessment Act 1836 (6 & 7 Will 4, c. 96), s. 1, which enacts that "no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." By the 62nd section of the local Act, "The tenant or occupier of any lands and grounds embanked and drained, or intended to be embanked and drained by virtue of this Act, is hereby authorised and required to pay such sum and sums

of money, not exceeding half a year's accruing rent, as shall be assessed, taxed, or charged upon the owner or proprietor of any such lands or grounds in his occupation, and to deduct the same out of his rent then due or accruing due; and every tenant or occupier who shall make such payment shall be acquitted and discharged for so much money as the sum he shall so pay shall amount unto, as if the same had been actually paid unto the person to whom his rent was due and payable." This deduction is claimed by the respondent, not as a tenant's rate, but under the last branch of the above section of the Parochial Assessment Act, as expenses necessary to maintain the land in a state to command the rent. The case finds that, without these drainage works, the annual value of the land would be considerably diminished. [Stopped by the court.]

Lawrance and *Horace Smith* argued for the appellants.—All expenses to be deducted from the estimate must be *ejusdem generis* with those which are expressly mentioned in the section. The distinction between these drainage expenses, and repairs or insurance, is that the latter are expenses which a tenant would have to calculate upon as the cost of his holding, additional to the rent, whilst the former is a tax expressly imposed upon the landlord, and payable by him, whether his land is let or not, for the benefit, not of his own land only, but also for the whole district. The tenant's expenses, which are to be deducted from the estimate, vary according to the nature of the tenement and the land in each case, but the cost of drainage to each proprietor depends only upon the quantity of land which he owns. In the case of *Reg.* v. *Vange* (3 Q. B. 242), the appellant had received a grant of land in fee, subject to a liability to keep up an embankment which was necessary to maintain the lands in the neighbourhood in a state to command the rent from a tenant, or to be capable of occupation by the owner; it was held that the appellant was rateable to the poor for the full annual value of his land, without deduction on account of the expense of the embankment. [BLACKBURN, J.—The question there seems to have been whether the whole expense of the embankment ought to be deducted from the appellant's assessment, and not whether he had a right to have his proportion deducted.] Certain deductions were allowed in *Reg.* v. *Hall Dare* (5 B. & S. 785), but the reasons given by the court for allowing them do not apply to this case. The expenses here are analogous to the salary of a curate: (*Reg.* v. *Sherford*, L. Rep. 2 Q. B. 503.) The case of *Rex.* v. *Adames* (4 B. & Ad. 60) is distinguishable from this, in that the sewers' rate there considered was imposed only on some of the lands in the parish.

BLACKBURN, J.—I think this annual cost of draining these lands is one of the "expenses necessary to maintain them in a state to command the rent." From the facts found in the case, it appears that this farm is part of a wet fen, in order to cultivate which it is necessary to maintain these drainage works. By the local Act the cost of the works is apportioned among the landlords of the district, and the Duke of Portland pays his proportion for this estate. Why is not this an expense necessary to maintain the land in a state to command the rent? It is contended that all such expenses must be *ejusdem generis* with those of which the annual costs are expressly deducted in the section; but I am unable to perceive why this expense, which is necessary to keep off water, is not *ejusdem generis* with insurance, which is necessary to keep off fire. It is also said that repairs and insurance are expenses which vary in each particular estate, and that this is an expense which applies in the same way to all the neighbouring farms, which are compelled to club together to defray them in shares proportionate only to their extent. The Legislature has imposed this rate primarily upon the occupiers, but for certainty in the distribution of the burden the owners are liable. This is like the case of *Rex* v. *Adames*, and I do not see why these expenses should not be deducted from the assessment in the same way as the sewers rate was deducted there.

MELLOR, J.—I am of the same opinion. The appellant's argument is, that unless they are incurred for tenant's rates or taxes, no expenses ought to be deducted from the estimated rental. The last part of the section, however, must also be considered; and we should deduct the other expenses upon the lands which are necessary to maintain them in a state to command the rent. These drainage expenses are clearly necessary to command the rent, and it is not material in my opinion whether they are paid by the tenant or the landlord. It seems to me that these expenses are certainly in principle *ejusdem generis* with those expressly mentioned.

Judgment for respondent.

Attorneys for appellants, *Thomas H.* and *A. R. Oldman.*

Attorneys for respondent, *C.* and *J. Allen* and *Son*, for *Newton* and *Jones*, East Retford.

KNARESBOROUGH UNION (apps.) *v.* PATELEY BRIDGE UNION (resps.)

Status of irremovability of a pauper—Breach of residence—Legal right to return.

In June 1868 *a pauper sold off some of her furniture, and removed the rest to a spare room in the house of her brother-in-law, with whom she stayed off and on until Jan.* 1869. *She then went away, and stayed with other relations and at an infirmary in other unions until after September of that year, when she returned to the house of her brother-in-law as before. In May* 1870 *she took a cottage in the same union as that of the house in which she was staying, and put her furniture into it. In the following month she became chargeable to the union.*

The quarter sessions found that the pauper had no legal right to return to the house of her brother-in-law after her departure in Jan. 1869; *and therefore held that she had not acquired a status of irremovability in that union.*

The court sent the case back, in order that the justices might find as a fact whether or not her brother-in-law intended, when she went away, to receive her again as before; and intimated that their judgment would depend upon that fact.

UPON appeal to the Epiphany Quarter Sessions for the West Riding of Yorkshire, held at Wakefield, on the 2nd Jan. 1871, against an order for the removal of Alice Slinger, a pauper, from the Pateley Bridge Union to the Knaresborough Union, the sessions confirmed the order, subject to the opinion of the court on the following case:—

At the trial of the appeal before the sessions it was proved that Alice Slinger, the pauper was

y settled in the Knaresborough Union. The lants then relied on a ground of appeal, ı alleged that Alice Slinger had gained a s of irremovability in the Pateley Bridge n by the requisite residence, actual or con- tive, of one year.

appeared that the pauper, who had previously ed in Leeds, gave up her house in that town me 1868, and sold off some of her furniture. he 22nd of the same month she came to the e of her brother-in-law, Mr. Hainsworth, who rmer residing in Bishop Thornton, a township n the Pateley Bridge union. The remainder r furniture was brought to his house, where s stowed away in a spare room which the er did not occupy, and she lived there till tmas 1868, except during several short ls, which she spent at the houses of her er, Mr. Stead, also of Bishop Thornton, and r. Ellis, of Clint, a township adjoining Bishop ton, and in the same union. As one of the sses said, "she moved about among her ons."

Jan. 1869 the pauper left Mr. Stead's, where vas then staying, and was absent from the for six weeks, on a visit to a nephew, who es at Knaresborough, in the appellant's union, e purpose of keeping house for him, in con- nce of his sister's temporary absence, but ned to Mr. Stead's, at Bishop Thornton, and ned in the union either with Mr. Hainsworth, ith Mr. Stead, or with Mr. Ellis, with rt interval (in which she paid a visit to a e relative at Harrogate, for the purpose of ng her in her confinement) till the end of mber. Owing to an accident she was taken e infirmary at Leeds, without the union, where mained five weeks, after which she stayed in s on a visit to her daughter for a fortnight. st with her daughter at Leeds she applied to mitted into the institution of the Sisters of y there, but did not succeed in her application, ltimately returned to the Pateley Bridge Union, first for a night or two to Mr. Ellis, of Clint, se neither Mr. Hainsworth nor Mr. Stead receive her just then, but afterwards living at Hainsworth's, and partly at Stead's, until l, 1870, when she took a cottage in the same , and removed her furniture to it. She had greement or legal title to live either at Mr. sworth's or Mr. Stead's, but it appeared that as allowed to live with them as a poor relation f charity. On the 20th June 1870, she became eable to the Pateley Bridge Union.

was not contended, on behalf of the respon- , that the pauper had not actually lived iently long in their union to give her a status removability by construction, if she were, r the circumstances, capable of possessing an *animus revertendi* as would give rise to nstructive residence during the periods of ce above set forth. But it was argued that auper, not having before May 1870 had any of her own, or place of residence in the to which she had a right to return, had not d there within the meaning of the Acts ing and defining irremovability, and could ave such *animus revertendi* thither.

e sessions confirmed the order, subject to a

e question for the opinion of the court is ner they were right. If the court should think they were, the order of sessions confirming the order of removal is to stand. If otherwise, both orders are to be quashed.

Maule, Q.C. and *Waddy* appeared for the respondents.—These absences of the pauper from the respondents' union were sufficient to constitute a break of residence fatal to her status of irremovability in that union. In *Reg.* v. *Glossop Union* (13 L. T. Rep. N. S. 672; L. Rep. 1 Q. B. 227), it was held that a pauper's intention to return was immaterial when she had no residence of her own to return to. And in *Reg.* v. *Stourbridge Union* (34 L. J. 179, M. C.; 12 L. T. Rep. N. S. 542), a pauper left a parish in which he had occupied lodgings, intending to return as soon as his trade became better; he did not retain his lodgings, but left some old clothes there in the hands of the landlord, and in his absence his lodgings were not occupied, and he could have had them at any time on his return. After three months' absence he returned. It was held that the pauper was not constructively resident in the parish during the three months, and that the absence formed a break in the residence. [BLACKBURN, J.—The case finds that this pauper had no legal right to return, but it does not state whether her friends would receive her or not.]

Campbell Foster appeared for the appellants, but was not heard.

BLACKBURN, J.—It is not necessarily a legal right to return which constitutes a constructive residence sufficient to create a status of irremovability. It would be monstrous to say that an absence of this kind would be a break of residence, if not only this pauper herself, but the relations whom she left, entertained an intention that she should come back. If, however, her relations had at the time of her last departure in Jan. 1869 no intention to receive her again to live with them as before, she would come within the rule of *Reg.* v. *Glossop Union* and *Reg.* v. *Stourbridge Union*. On this point the case is ambiguous, and must go back to be restated. With this intimation the justices will probably be able to dispose of the matter.

MELLOR, J. concurred.

Attorneys for appellants, *Paterson*, *Snow*, and *Burney*, for *Powells*, Knaresborough.

Attorney for respondents, *John Scott*.

Wednesday, Nov. 15.

SECOND COURT.

GILL (app.) *v.* BRIGHT (resp.)

Wine and Beerhouse Act Amendment Act 1870 (33 & 34 *Vict. c.* 29), *s.* 15—*Seizure and sale of liquors in suspected houses—Right of owner to be heard.*

The Wine and Beerhouse Act Amendment Act 1870, *sect.* 15, *gives a justice power upon information to grant a warrant to seize liquors in a suspected house, and provides that "any liquor seized in pursuance of this section shall be sold in such manner as two justices in petty sessions may direct." Two justices refused to allow the owner of some liquor, seized under this section, to be heard in explanation, or to cross-examine the informer, and ordered the liquor to be sold.*

Held upon a case stated, that the words of the section implied that the owner should have an opportunity

of showing cause why his liquor should not be sold.

THIS was a case stated by two of Her Majesty's justices of the peace in and for the county of Devon, under the statute 20 & 21 Vict. c. 43.

On the 29th April 1871, Richard Bright, a police constable, deposed to an information which he laid before De Castro Fisher Lyne, Esq., a justice of the peace for the county of Devon, under the 33 & 34 Vict. c. 29, of which the following is a copy:

Devon to wit. The information and complaint of Richard Bright, of the parish of Stoke Gabriel, in the said county, police constable, taken this 29th April 1871, before the undersigned, one of Her Majesty's justices of the peace in and for the county of Devon, who saith that he he had reasonable ground to believe that certain fermented, distilled, or excisable liquors or sweets are being unlawfully sold or kept for sale at certain premises in the occupation of one Thomas Gill, jun., at Churston Ferrers, in the said county, and he therefore prays that a warrant may be granted him to enter the said premises, and to search for and seize such liquors which there is reasonable ground to suppose are in such premises or place for unlawful sale contrary to law.

RICHARD BRIGHT.

Taken and sworn before me on the day and year first above written, at Paington, in the said county.

DE CASTRO F. LYNE.

The said De Castro Fisher Lyne, Esq., as such justice of the peace, in the exercise of the discretion given to him by the said Act, thereupon issued his warrant to the said Richard Bright, authorising him to enter and search the premises of the said Thomas Gill the younger, and seize any excisable liquors found thereupon. The said Richard Bright executed the warrant aforesaid on the 29th April last, and there found on the premises of the said Thomas Gill the younger, six pipes of cider, which he then seized and conveyed in safe custody.

On the 3rd May 1871, he, the said Richard Bright gave notice to the said Thomas Gill, the younger, under the hand and seal of Henry Studdy, Esq., one of Her Majesty's justices of the peace for the said county, that he the said Richard Bright would apply for an order for the sale of the said cider on Wednesday, the 10th May 1871, at the court room, Brixham, in the said county, when and where the said Thomas Gill the younger might attend and show cause why the said cider should not be sold, as the law directs.

On the said 10th May, two justices of the peace in petty sessions assembled at the court room at Brixham aforesaid, when the said Richard Bright, hereinafter called the respondent, for whom Mr. F. R. Carter, solicitor, of Torquay, appeared, and the said Thomas Gill the younger, hereinafter called the appellant, for whom Mr. Baker, solicitor, of Newton Abbot, appeared, were present; and the respondent gave the following evidence.

Richard Bright, having been duly sworn, saith:

I am a police constable, living at Stoke Gabriel. I produce the information upon which I obtained the warrant against Thomas Gill the younger. I also produce the warrant. I went to Thomas Gill the younger on Saturday the 29th April 1871, at Churston Ferrers, the place indicated in the warrant. I saw Thomas Gill the younger there, and read the warrant to him. I went into the cellar and found five pipes of cider, which I believe were full. In a sixth pipe a tap was in, and some gallons drawn. There were there also four empty pipes. I went and hired horses and trucks and took the cider to *Churston Court*, Mr. Rendle's farm, where it now is. I *apply to the magistrates* for an order for the sale of the *cider so seized, and to* direct how the proceeds of the sale *may be applied.*

Whereupon the appellant's attorney proceeded to cross-examine the said respondent with a view to impeach the grounds on which the warrant had been granted, and also proposed to call witnesses for the appellant.

To this, objection was made by the respondent's attorney, and on referring to the Act under which they were proceeding, the justices allowed the objection of the respondent's attorney, and refused to permit the appellant's attorney to cross-examine the respondent, or to call his witnesses; and made the order directing a sale of the liquor seized pursuant to the Act, holding that the appellant by the statute had no *locus standi* in the court, and the summons or notice, served on him to appear and show cause why the cider so seized should not be sold, was unnecessary, and not contemplated or provided for by the Act.

Whereupon the appellant, being dissatisfied with this ruling as being erroneous in point of law applied to the justices pursuant to sect. 2 of the 20 & 21 Vict. c. 43, to state and sign a case setting forth the facts, and the grounds of such determination as aforesaid for the opinion of this court.

The questions for the opinion of the court are, whether in point of law the said justices were right in refusing to allow the appellant, on the application of the said respondent for an order to sell the cider so seized, to cross-examine the respondent on the facts on which the justice who granted the warrant had exercised his discretion, or for the alleged purpose of impeaching the proceedings taken by the justice who had granted the warrant aforesaid, or its execution; the justices considering that the cider having been seized under the warrant aforesaid, no further hearing of the case was contemplated by the Act, and that on the application by the respondent in petty sessions as aforesaid, they had no power delegated to them by the statute beyond that of making an order for the sale of the cider.

Collins argued for the appellant.—By the Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29) s. 15, "Where an information on oath is made before any justice of the peace that there is reasonable ground for believing that any fermented, distilled, or exciseable liquors or sweets are being unlawfully sold or kept for sale at any premises or place for the retail whereat of fermented, distilled, or exciseable liquors or sweets no licence is in force, such justice may in his discretion grant a warrant under his hand to any superintendent, serjeant, or other officer or officers of police, by virtue whereof it shall be lawful for the officer or officers named in the warrant at any time or times within one month from the date thereof to enter, and, if need be, by force, the premises or place named in the warrant, and every part thereof, and to search for and seize any fermented, distilled, or exciseable liquors or sweets there found which there is reasonable ground to suppose are in such premises or place for the purpose of unlawful sale at such or any other premises or place; and if any person by himself, or by any other person acting by or with his direction, permission, or consent, refuse or neglect to admit to any part of any such premises or place any officer or person demanding admittance in pursuance of the provisions of this section, he shall be liable, upon summary conviction, to a penalty not exceeding 20*l.* Any liquor seized in pursuance of the provisions of this section shall be sold in such manner as two justices in petty

sessions may direct, and the proceeds shall be applied in the same manner as penalties summarily imposed by the same justices for sale without a licence might be applied." Although this Act does not expressly say so, the last part of this section, the provision that liquor seized shall be sold, must be read as if words were interpolated to the effect "unless cause be shown to the contrary." Although silent on the subject, the Legislature could not have intended that in this matter the justices were to act contrary to the principles of natural justice. The object of the section seems to be to enable justices to seize liquors under suspicious circumstances, before the owner could conceal them; this object would be defeated if the owner had an opportunity to show cause before the warrant was issued. It cannot therefore be said that the proper time for the owner to be heard was at any other stage of the proceedings than that at which the justices here refused to hear the appellant. In *Rex* v. *Simpson* (10 Mod. 250), Parker, C.J., said: "It is more agreeable to the course of the common law that he (the defendant on a penal information) should be summoned." The cases of *Reg.* v. *Benn* (6 T. Rep. 198), and *Rex* v. *the Chancellor of the University of Cambridge* (1 Str. 557), are to the same effect. There is also a more recent case, *Cooper* v. *the Wandsworth Board of Works* (8 L. T. Rep. N. S. 278; 32 L. J. 185, C. P.), where, under the Metropolis Local Management Act 1855, s. 76, a district board of works ordered a house to be demolished, in default of notice by the owner before he commenced building; it was held that the board could not legally do this without giving to the owner an opportunity of showing cause why the house should not be demolished. Willes, J., said: "Every tribunal invested with the power of affecting the property of her Majesty's subjects, is bound to give the parties against whom the powers are to be exercised an opportunity of being heard. This rule is universally applicable." [Stopped by the court.]

No one appeared for the respondent.

LUSH, J.—It is a clear and established rule of law and justice, that no one shall be subject to a penalty either upon his person or property, without an opportunity of being heard, and I think that rule applies to this case. The words of the section necessarily imply that the owner should have an opportunity of showing that the evidence upon which the warrant had been granted was not true, or of giving an explanation of the suspicious circumstances, before the justices make an order to sell.

HANNEN, J., concurred.

Judgment for appellant.

Attorneys for appellants, *Church, Son,* and *Clarke,* for *Francis* and *Baker,* Newton Abbott.

CORE (app.) *v.* JAMES (resp.)

6 & 7 Will. 4, c. 37, s. 8—Conviction for using an adulterating ingredient in bread—Absence of guilty knowledge.

By 6 & 7 Will. 4, c. 37, s. 8, no baker or other person who shall make bread for sale, nor any journeyman or other servant of any such baker or other person shall use any mixture or ingredient as therein provided, upon pain that every such person shall pay a penalty, and it shall be lawful for the magistrates to cause the offender's name to be published in a newspaper. By sect. 9 a penalty is imposed upon any person who shall knowingly sell any such ingredient mixed with meal or flour. By sects. 12 and 13 a penalty is imposed upon a baker having such ingredients on his premises, and a remedy is given to a master against his servant, if the former be convicted in consequence of the fault of his servant.

Held, upon a case stated by magistrates, that a baker could not be convicted under sect. 8 of using an adulterating ingredient in making bread, unless he or his servant had guilty knowledge of such use.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Bolton in and for the borough of Bolton in the county of Lancaster, on the 24th Dec. 1870, before three of Her Majesty's justices of the peace, acting in and for the said borough, James Core, the above-named appellant, was charged on an information laid by William James, the above-named respondent, being the inspector of nuisances and provisions to the local board of health for the borough of Bolton, "for that he the said appellant being a person making bread for sale beyond the limits mentioned and set forth in the Act of Parliament hereinafter mentioned, to wit, out of the city of London and the liberties thereof, and beyond the weekly Bills of Mortality, and ten miles of the Royal Exchange, did on the 16th Dec. instant in a certain shop in Newport-street, in Great Bolton aforesaid, use a certain mixture or ingredient, to wit, alum, in the making of certain bread for sale in such shop, such mixture or ingredient being other than and except such as are mentioned and enumerated in the second section of the statute made in the sixth and seventh years of the reign of his late Majesty King William the Fourth, chapter 37, intituled 'An Act to repeal the several Acts now in force relating to bread to be sold out of the city of London and the liberties thereof, and beyond the weekly Bills of Mortality, and ten miles of the Royal Exchange, and to provide other regulations for the making and sale of bread, and for preventing the adulteration of meal, flour, and bread beyond the limits aforesaid.'"

Evidence was given of the purchase of a loaf of bread in the shop of the appellant, and the appellant also admitted at the time that the loaf was his own making; the evidence in this respect being that when the loaf was bought on the 16th Dec., the witness who made the purchase said to appellant, "I want a two pound loaf of your own making." Further evidence was given that on analysis the said loaf contained 40·97 grains of alum. The appellant also produced his baker, who, being duly sworn, deposed that the bread sold on the 16th Dec. was made by him from a sack of flour in appellant's shop; that he, the baker, did not put any alum in the flour, and that none could have got in without his knowledge; that he was the only person who made the bread; that he made it purely from the flour; and that no other person worked on the premises but himself.

In cross-examination of the analyst by the appellant's attorney, the following were the chief answers elicited by the attorney's questions:

"If the bread was pure and the flour impure, I should say the bread was not the production of that flour. The loaf in question came from impure

flour. The loaf might be impure from pure flour, as impurities might be added. I cannot say whether the alum was in the flour before the bread was made. It might have been in the flour. I can give no opinion as to whether it was in the flour or the bread first."

The appellant's attorney contended that the Act of Parliament being highly penal, the utmost stringency should be exercised in the inquiry, and if the evidence was equally reconcileable with innocence as with guilt, the appellant ought not to be convicted, and, further, that beyond the simple finding of the alum in the loaf of bread in question there was no evidence whatever even of a *primâ facie* character that the appellant had used the mixture, to wit, alum. And that the appellant was ready to give the name of the miller from whom he had, prior to the 16th Dec., the day of the alleged sale by him of the said loaf of bread, purchased wholesale ten sacks of flour, and produce a portion of the whole of what he had still on hand, so that the party really culpable might be reached, pursuant to the provisions of the 9th section of the Act of Parliament under which the appellant was sought to be convicted. The appellant's attorney further contended that the appellant was not a practical baker, and had only recently given up the trade of a tailor, and never took any part whatever in the making of bread.

The justices were of opinion that the appellant did use a certain mixture or ingredient, to wit, alum, in the making of the said bread for sale in such shop, and convicted the appellant in the sum of 5*l.* and costs. The said appellant being dissatisfied with this decision, as being erroneous in point of law, made application in writing within three days to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of her Majesty's Court of Queen's Bench at Westminster; and the said appellant having duly entered into the recognizances required by the said statute, the justices stated the following questions for the consideration of the Court of Queen's Bench:—

1. Whether, supposing the said alum to have been mixed in the said flour previous to the purchase thereof by the appellant, the said appellant was entitled to his acquittal on the ground that he did not mix the said alum in the said flour.

2. Whether the fact of the said loaf of bread being upon the appellant's premises, admitted to be his own making — that is to say, by the appellant admitting to the officer, Ratcliffe, that the bread was of his own making—and containing alum mixed in the bread, was sufficient to ground a conviction "for using a certain mixture or ingredient, to wit, alum in the making of such bread."

The case had, at a previous hearing, been sent back to the justices in order that they should find as a fact whether the appellant knew that alum had been used in making this bread.

The justices amended the case as follows:—

"At the hearing of the case in question no evidence was adduced tending to prove the knowledge of the appellant that alum was used in the bread in question, and we did not find that appellant knew that alum was used in such bread."

Baylis argued for the appellant.—The effect of the case and the amendment is that it must be *assumed that neither* the appellant nor his servant *had any knowledge that* alum was in this bread, *and the question is* whether the appellant can be convicted of using alum without this knowledge on the part of either of them. Sect. 8 of 6 & 7 Will. 4, c. 37, enacts that "No baker or other person or persons who shall make bread for sale beyond the limits aforesaid, nor any journeyman or other servant of any such baker or other person, shall at any time or times, in the making of bread for sale beyond such limits, use any mixture or ingredient whatsoever, in the making of such bread, other than and except as hereinbefore mentioned, on any account, or under any colour or pretence whatsoever, upon pain that every such person, whether master or journeyman, servant or other person, who shall offend in the premises, and shall be convicted of any such offence by the oath, or in case of a quaker by affirmation, of one or more credible witness or witnesses, or by his, her, or their own confession, shall for every such offence, forfeit and pay any sum not exceeding 10*l.*, nor less than 5*l.*, or in default thereof shall, by warrant under the hands and seal of the magistrate or magistrates, justice or justices, before whom such offender shall be convicted, be apprehended and committed to the house of correction, or some prison of the city, county, borough, or place where the offence shall have been committed, or the offender or offenders shall be apprehended, there to remain for any time not exceeding six calendar months, with or without hard labour, from the time of such commitment, unless the penalty shall be sooner paid, as any such magistrate or magistrates, justice or justices, shall think fit and order; and it shall be lawful for the magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, to cause the offender's name, place of abode and office, to be published in some newspaper which shall be printed or published in or near the city, county, borough, or place where the offence shall have been committed, and to defray the expense of publishing the same out of the money to be forfeited as last mentioned, in case any shall be so forfeited, paid, or recovered." This publication is a punishment for something which the Legislature clearly intended to be considered as disgraceful, and although the word "knowingly" is not employed as in the 9th section with respect to selling, the word "use" must be taken to imply with intention. [LUSH, J.—Sect. 13 contemplates a master being punished for the act of his servant.] But it does not, therefore, follow that he should be liable for what was done in the ignorance of both of them. The baker may be liable under sects. 11 and 12 for having ingredients for adulteration on his premises without his knowledge, but the Legislature probably intended to distinguish such a proceeding from that of the innocent use of a mixture supplied to him by other people.

J. Edwards, for the respondent.—There is nothing in the words of the section to render proof of the baker's intention necessary to justify his being convicted for using adulterated flour. This and the other Acts concerning bakehouses and bread were passed to protect the public from imposition by that particular trade, and the Legislature has rendered it compulsory upon the bakers to exercise care in the use of their materials. It is for neglect of that duty the appellant has been convicted.

Baylis was not heard in reply.

LUSH, J.—I am of opinion that this conviction must be quashed. The question for our conside-

ration depends upon the intention of the Legislature in imposing a penalty upon a baker for using a forbidden mixture or ingredient in his bread, according to the 8th section of this Act. By the following section a penalty is imposed upon any person who shall "knowingly sell or offer, or expose for sale, either separately or mixed, any meal or flour of one sort of corn or grain as the meal or flour of any other sort of corn or grain, or any ingredient whatsoever mixed with the meal or flour so sold or offered or exposed for sale." I think these two sections must be taken together; and, so taking them, the user of the 8th section must be with a guilty knowledge to justify a conviction. Sect. 13 gives a remedy to a master against his servant for any wilful act of the servant by which the master may be brought within the provisions of the statute; but I do not think it was contemplated that a baker should be convicted, when both he and his servants were innocent of any intention to use these ingredients. The magistrates have here acquitted the appellant of guilty knowledge, and they seem to me to have also acquitted the servant.

HANNEN, J.—I am of the same opinion. I think the meaning of the 8th section is, that if a baker uses alum or any other adulterating ingredient, and knows that he is using it, or, if he uses it and his servant is aware of it, he or his servant may be convicted; but if there be an utter absence of knowledge on the part of both the baker and his servant, neither of them can be said to use the ingredient so as to render him liable to the penalties imposed. I think a baker cannot be answerable for what may be an accident or the fault of someone over whom he has no control. I am the more inclined to adopt this view in consequence of the provisions alluded to by my brother Lush concerning a master's liability for his servant's acts, and his remedy against his servant; and also in consequence of the penalty of publication imposed upon a breach of this 8th section, which goes far to show that the Legislature contemplated it as something disgraceful.

Judgment for appellant.

Attorneys for appellant, *Chester* and *Urquhart*, for *Taylor* and *Son*, Bolton.

Attorney for respondent, *C. E. Abbott*, for *R. G. Hinnell*, Bolton.

CAUDWELL (app.) *v.* HANSON (resp.).

Metropolitan Building Act 1855 (18 *&* 19 *Vict. c.* 122), *s.* 51—*Owner—Liability for district surveyor's fees.*

The appellant was owner in fee of land within the district of the Metropolitan Building Acts, of which he agreed, in Feb. 1870, ***to give to one Loud, a builder, a lease, from Sept.*** 1865, ***for ninety-nine years, at a peppercorn rent, until June*** 1870, ***and at*** 28*l. a year afterwards. The lease was to be made as soon as certain houses to be built by Loud were covered in, which it was agreed should be done by March*** 1870. ***On the*** 26*th Oct.* 1870 ***the respondent, the district surveyor, sent to Loud his proper bill for fees under sect.*** 51 ***of the Metropolitan Building Act*** 1855 (18 *&* 19 *Vict. c.* 122). ***These fees were not paid, and Loud became insolvent. The respondent, in March*** 1871, ***delivered his bill for fees to the appellant, as owner, and upon his refusal to pay, obtained a summary conviction against him for the amount.***

Held, upon a case stated by the magistrate, that the appellant was not owner of the buildings so erected within the meaning of that section at the time the respondent's fees became due.

THIS was a case stated by one of the magistrates of the police courts of the metropolis, sitting at the Wandsworth police court, in the county of Surrey, and within the metropolitan police district, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with his determination upon the question of law which arose before him, as hereinafter stated, on the 3rd May 1871, at the Wandsworth police court aforesaid, the appellant having duly entered into a recognisance to prosecute the appellant.

Upon the hearing of a certain complaint preferred by the respondent, the district surveyor for the district of North Battersea, in the county of Surrey, within the said metropolitan police district, against the appellant, under sect. 51 of the 18 & 19 Vict. c. 122 (the Metropolitan Buildings Act 1855), for that the appellant did unlawfully neglect and refuse to pay to the respondent the sum of 8*l.* 10*s.*, due to the respondent by the appellant, for the respondent's fees in respect of certain buildings, of which the appellant was owner, within the respondent's said district; a proper bill, specifying the amount of the same, having been duly delivered to the appellant.

The magistrate ordered the appellant to pay to the respondent the said sum of 8*l.* 10*s.*

The following facts were either proved or admitted by both parties:

The appellant is, and was at all the times hereinafter mentioned, seised in fee of an estate within the parish of St. Mary, Battersea, in the county of Surrey, called the Clapham Junction Estate, which he has laid out for building purposes.

The defendant is, and was at all the times hereinafter mentioned the district surveyor for the district of North Battersea, in the said county of Surrey, within which district the said Clapham Junction Estate is situate.

By an agreement dated the 18th Feb. 1870, made between the appellant of the one part and one James Loud of the other part, the appellant, in consideration of the rents, covenants, and agreements thereinafter agreed to be paid and performed, agreed with Loud that when and so soon as he, Loud, should have erected and covered in with slates or tiles the messuage, tenement and outbuildings upon each of the several plots of ground thereinafter described to the satisfaction of the appellant's surveyor for the time being, he, the appellant would demise by separate leases, as thereinafter mentioned, unto Loud or his nominee or nominees four several plots of ground situate on the south side of Livingstone-road, being portions of the said Clapham Junction Estate, delineated in the plan of the said estate and numbered 107, 313, 314, 315; and also the four several messuages or tenements and outbuildings to be erected and built thereon by Loud for the term of 99 years from the 29th Sept. 1865, at the rent of a peppercorn, until the 24th June 1870, and from thence at the yearly rent of 28*l.* during the remainder of the said term, clear of all taxes except property tax. Loud thereby also agreed that he would at his own cost, under the inspection and to the satisfaction of the appellant's surveyor, erect and build upon each of the said several plots of land a good and substantial messuage or tenement, with out-offices, to be

severally erected and roofed in by the 25th March 1870, and completely finished fit for habitation by the 24th June, 1870. The said agreement contained all usual clauses, and is to be taken as forming part of this case for reference if necessary.

Shortly after the date of the said agreement, Loud commenced the erection of the said four houses, and proceeded therewith, but the same were not completed within the time provided by the said agreement, and the appellant extended the time for such completion from time to time.

The said houses were roofed in, in or about the month of Sept. 1870. The same were duly surveyed by the respondent, who delivered to Loud on or about the 26th Oct. 1870, being one clear month after the roofs of the said four buildings respectively had been covered in, a proper bill specifying the amount of his fees in that behalf, amounting to 8*l.* 10*s.*, for surveying the same, pursuant to the statute: but Loud did not pay the same, or any part thereof, and subsequently effected an arrangement with his creditors under the provisions of the Bankruptcy Act 1869.

On or about the 6th March 1871, the respondent duly delivered to the appellant, as the alleged owner of the said four houses, a proper bill, specifying the amount of his fees for surveying the same, which fees the appellant refused to pay.

On the part of the appellant it was contended that Loud was the owner of the buildings so erected by him, and in respect of which the respondent's fees were incurred, within the meaning of the statute, and that the appellant was not the owner.

On the part of the respondent it was contended that the appellant was in the receipt of the rent and profits of the said buildings at the time when the respondent's services were performed, and that he was the owner thereof within the meaning of the statute, so as to be liable to the payment of the respondent's fees in respect thereof.

The magistrate, being of opinion that the respondent's contention was right, gave his determination against the appellant in the manner before stated.

The question of law upon which the case is stated for the opinion of the court therefore is, whether the appellant was the owner of the buildings in respect of which the respondent's fees were incurred, within the meaning of sects. 3 and 51 of the Metropolitan Building Act 1855.

If the court should be of opinion that the appellant is liable to pay such fees as aforesaid, then the said order is to stand; but if the court should be of the contrary opinion, then the said order is to be set aside, and the said complaint is to be dismissed.

Waddy argued for the appellant.—By the interpretation clause, sect. 3, of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), the word "owner" shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will. And by sect. 51, at the expiration "of one month after the roof of any building surveyed by any district surveyor under this Act has been covered in, the district surveyor shall be entitled to receive the amount of fees due to him from the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from the owner or occupier of the building so erected or in respect of which such work has been done or service performed; and if any such builder, owner, or occupier refuses to pay the same, such fees may be recovered in a summary manner before a justice of the peace, upon its being shown to the satisfaction of such justice that a proper bill specifying the amount of such fees was delivered to such builder, owner, or occupier, or sent to him in a registered letter addressed to his last known residence." It was held in *Tubb* v. *Good* (L. Rep. 5 Q. B. 443; 22 L. T. Rep. N. S. 885) that "owner" in this section meant owner for the time being when the fees became due. It appears from the case that these houses were roofed in before the 26th Sept. 1870, and it was not until the 29th of that month that the appellant was entitled to anything more than a peppercorn rent. The case of *Evelyn* v. *Whichcord* (E. B. & E. 126) decided that under this section an owner of land in fee simple who lets it on a building lease at a peppercorn rent is not liable as owner to the surveyor for fees in respect of buildings afterwards erected on such land, a peppercorn rent not being within the meaning of the words "of the whole or of any part of the rents or profits of any land or tenement" in the interpretation clause, sect. 3. Loud was clearly not only the builder but the owner, popularly speaking, of the house. The general words in the interpretation clause are qualified by the particular words in the section. Where a section in the Act deals only with buildings, and does not refer in any way to land, the word "owner," if used in it, must be limited in its application to buildings only. [HANNEN, J.—There is nothing in the case to show that the surveyor's work was done before the 29th Sept.; although he cannot recover his fees until a month after a house is roofed in, he may, it seems, survey the house the day before he sends his proper bill. LUSH, J.—The surveyor's duty is to the public, and he has to inspect all buildings throughout their construction: sect. 39.]

W. B. Cooper for the respondent.—I admit that if a lease had been granted to Lond before the building works commenced, the builder would, upon the authority of *Tubb* v. *Good*, have been the only person who could have been made liable. Here, however, there is nothing but an agreement for a lease upon a condition which the case finds has not been fulfilled. It is not right that the surveyor should have to consider the equities between the parties. The only question is, who was the legal owner? Loud certainly is not and never was. [LUSH J.—It may be that the interpretation clause meant that the "owner" should be the person who was entitled to receive rents and profits, and not necessarily the person who had the legal title.] The appellant being owner of the land was also owner of the houses upon it: in any case, even under the agreement, he was entitled to rent on the 29th September, and it was not until the respondent could deliver his bill that he was entitled to receive his fees.

Waddy was heard in reply.

LUSH, J.—I am of opinion that the appellant is entitled to our judgment. I think he was not at the time when these fees became due the owner "of the building so erected, or in respect of which such work has been done or service performed,"

according to the words of the 51st section. Notwithstanding the extended meaning of owner in the interpretation clause, I think here it is intended to carry with it merely the popular sense. The statute never intended that the surveyor should enter upon an investigation into the title of the land, but that he should have his claim against the person who would be popularly called the owner of the buildings. The interpretation clause seems to exclude with respect to the whole Act the limitation of the word to a mere legal owner; it relates to the person who would be entitled to the rent from an occupier. Loud was, at the time these fees were due to the respondent, the builder, and the owner of the buildings, and he was the only person upon whom the surveyor had any claim.

HANNEN, J.—I think the case is not free from difficulty, but on the whole I agree with my brother Lush.

Judgment for appellant.

Attorneys for appellant, *Ingle, Cooper,* and *Holmes.*
Attorney for respondent, *F. Jacobs.*

WILSON (app.) *v.* THE MAYOR AND CORPORATION OF BOLTON (resps.).

Expenses of works executed by a local board of health—Recovery against owner in a summary manner—Private improvement expenses—Public Health Act 1848***—Local Government Acts*** 1858 ***and*** 1861.

By the Public Health Act 1848, ***ss.*** 69 ***and*** 90, ***a local board of health may, under certain circumstances, execute works in a street, not a highway, and recover the expenses from the owners of houses in the street in a summary manner; or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such from the occupiers of the said houses by a private improvement rate. By the Local Government Amendment Act*** 1861, ***s.*** 23, ***the expenses which have been incurred by any local board of health as private improvement expenses may, by order of the board, be declared payable by annual instalments, and be recovered from the owner or occupier of premises in the same manner as general district rates.***

The respondents made a demand upon the appellant as owner for his proportion of the expenses of work duly executed by them in Jan 1861. ***No payment was made, and nothing further was done in the matter until the*** 25th ***Aug.*** 1870, ***when the respondents declared the amount claimed from the appellant to be private improvement expenses, payable by him in instalments. Magistrates, upon a summons, ordered the appellant to pay the first instalment:***

Held, upon a case stated, that the magistrates' order was invalid. The court, without expressing an opinion as to the period to which a board is limited for the purpose of declaring expenses to be for private improvements, when no demand has been previously made, considered that the respondents could not avail themselves, as they had here attempted to do, of both the alternative modes of proceeding against the appellant, of which the Public Health Act 1848 ***gave them the option.***

THIS was a case stated by two of Her Majesty's justices of the peace in and for the borough of Bolton, in the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for purpose of obtaining the opinion of this court on the questions of law which arose as hereinafter stated.

At a petty sessions holden at Bolton aforesaid, in and for the said borough, on the 25th Feb. 1871, the above named appellant appeared in obedience to a summons duly served upon him in that behalf, the offence alleged in which said summons was in the words and figures following, that is to say,

"Borough of Bolton, in the county of Lancaster, to wit. To Nathaniel Wilson, of Little Bolton, in the said borough and county, gentleman. Whereas complaint hath this day been made before the undersigned, one of Her Majesty's justices of the peace, acting in and for the said borough, for that you, the said Nathaniel Wilson, being now and at the time of the serving of the notice in writing next hereinafter mentioned, the owner of certain premises fronting, adjoining, and abutting upon a certain street to wit, Markland-street, in Great Bolton, in the borough of Bolton aforesaid, the same not being a highway repairable by the inhabitants at large, after notice in writing from the town clerk of the said borough, on behalf of the mayor, aldermen, and burgesses of the said borough, being (by the council of the said borough) the local board of health for Bolton aforesaid in that behalf, dated 3rd July 1858, had been served upon you, requiring you to execute before the 1st Sept. then next the works therein indicated, did not within the time specified in such notice comply therewith by sewering, levelling, paving, flagging, and channelling such part of the said street as fronted, adjoined, and abutted respectively upon the said premises, but therein made default; and that upon such default the said mayor, aldermen, and burgesses of such local board of health, as aforesaid, executed the works mentioned and referred to in such notice, and that the surveyor of the said borough afterwards duly settled the amount of your proportion of the expenses incurred by the said mayor, aldermen, and burgesses, as such local board of health as aforesaid, to be the sum of 13*l.* 6*s.* 8d.: and that the said sum of 13*l.* 6*s.* 8*d.* has been since declared by order of the said local board of health payable by annual instalments of 6*l.* 13*s.* 4*d.*, with interest after the rate of 5*l.* per cent. per annum, during a period not exceeding thirty years, until the whole amount shall have been paid. And that the sum of 6*l.* 13*s.* 4*d.*, one of such instalments as aforesaid, was, on the 15th of Sept. 1870, and still is due and unpaid from you as such owner of the said premises as aforesaid, notwithstanding notice of demand thereof was duly served upon you on the 12th Jan. last, contrary to the form of the statutes in such case made and provided."

The justices heard the evidence tendered on behalf of the respondents, and the arguments of the attorney for the appellant, and upon such hearing the appellant was ordered to pay to the respondents the sum of 6*l.* 13*s.* 4*d.*, being the first instalment in the said summons mentioned, together with the respondents' costs in that behalf. The appellant being dissatisfied with the said determination upon the hearing of the said summons as being erroneous in point of law, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied for a case and entered into a recognizance, as required by the said statute in that behalf.

The said justices in compliance with the said

application, and the provisions of the said statute, stated and signed the following case:—

The respondents are (by the council of the said borough) the local board of health for the district of the borough of Bolton in the county of Lancaster.

The appellant was in the year 1857, and hath since continued the owner, within the meaning of the Public Health Act 1848, of certain premises abutting upon a private street, within the district aforesaid, called Markland-street.

The respondents alleged that the said street, not being sewered, levelled, paved, flagged, and channelled to the satisfaction of the respondents, they, as such local board of health and in force of the Public Health Act 1848, s. 69, gave the appellant and other owners notice in that behalf that the board required them to do such sewering and other works before the 1st Sept. then next.

The magistrate found as facts that such notice was duly served upon the appellant in July 1858, that he made default, that the respondents executed the works, and that the surveyor duly apportioned the costs of such execution among the respective owners, including therein the amount of the appellant's proportion thereof, which was in the whole the sum of 13*l.* 6*s.* 8*d.*

The works were completed by the respondents on the 30th Nov. 1860, and the apportionment on 21st Jan. 1861, and on the last mentioned day the respondents delivered to the appellant an account of his proportion of the said costs, which account was in the words and figures following:

Treasurer's Office, Acre's-field, Bolton, 21st Jan. 1861.
Mr. Nathaniel Wilson, St. George's-road, to the Mayor, Aldermen, and Burgesses of the Borough of Bolton.

Notice,—Unless the amount of this account is paid within fourteen days after delivery, interest at the rate of 5*l.* per cent. per annum will be charged thereon until fully liquidated.

Markland-street.

1860, Nov. 30th.—To proportion of sewering, levelling, paving, flagging, and channelling, viz., 50ft. frontage, at 5*s.* 4*d.* £13 6 8

On the 25th July 1870, the said local board of health resolved and declared that the said amount of 13*l.* 6s. 8d. should be private improvement expenses.

On the 4th Sep. 1870, the respondents, at a meeting of the council, as such local board, under the 23rd section of the Local Government Act 1861, declared that the said expenses should be paid by annual instalments of 6*l.* 13s. 4d.,, with interest after the rate of 5*l.* per centum per annum; the first payable on the 15th Sept. 1870, and the last on the 15th Sept. 1871.

On the 12th Jan. 1871, the respondents caused a demand in writing to be served upon the appellant, requiring him to pay 6*l.* 13s. 4d., the amount of the said first instalment of the said expenses, within fourteen days of such notice.

On the expiration of the said fourteen days, the respondents caused application for the payment of the said 6*l.* 13s. 4d. to be made to the appellant, but he refused to pay, and the respondents then procured the summons hereinbefore set forth to be issued and served.

On the hearing of the said summons it was objected by the attorney for the appellant that, as the works had been completed and the apportionment made so long ago as the years 1860 and 1861, the lapse of time prevented the respondents from now recovering the amount, inasmuch as the 11th section of 11 & 12 Vict. c. 43, deprived the justices of jurisdiction after the expiration of six calendar months from the date of apportionment of the expenses, being the time when the matter of complaint arose; and he also contended that as, if the amount had been sought to be recovered in a summary way, proceedings must have been commenced within six months of the cause of complaint arising, so a similar limitation must be held to apply where, under the same section, the local board elected to treat the amount as private improvement expenses.

The said appellant, by his attorney, also objected that the statutes of limitation would also be a bar to the recovery of this claim.

Considering that it was competent to the said board to declare the aforesaid expenses private improvement expenses on the 20th Aug. 1870, and that the Statute of Limitations did not apply, the justices overruled both these objections, and made an order for payment by the appellant to the respondents of 6*l.* 13*s.* 4*d.*, the amount of the said first instalment. Subject, however, to the opinion of this court as to whether such judgment was thereby erroneous in point of law on any of the grounds hereinafter stated.

The questions for the opinion of the court are, whether it was competent to the said local board on the 25th Aug. 1870, to declare the said expenses private improvement expenses, although the works were completed in the year 1860; whether the justices were bound to dismiss the said complaint on the ground of the Statute of Limitations barring the said claim.

Baylis argued for the appellant.—The Public Health Act 1848 (11 & 12 Vict. c. 63) s. 69, enacts "That in case any present or future street or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled, to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided for by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided." The local board may adopt either of these two modes of enforcing their claim; if, however, they exercise their option to proceed in a summary manner (according to sect. 129), as I contend they have done here, their proceedings must be subject to Jervis's Act 1848 (11 & 12 Vict. c. 43), which provides, by sect. 11, that "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Par-

ts relating to each particular case, such aint shall be made, and such information e laid, within six calendar months from the hen the matter of such complaint or infor n respectively arose." It has been held, in b v. *Dodgson* (3 B. & S. 461), that as the has, by the Local Government Act 1858 22 Vict. c. 98, s. 63), a right to dispute pportionment during three months after of the amount settled upon him by the or, the board may, within six months from piration of the said three months, take pro- gs before justices for the recovery of the it. The notice of the proportion settled the appellant was given on the 3rd July and the summons was issued in Feb. 1871; r, therefore, even with the extra three s allowed by the Act of 1858, the board proceed summarily. Again, with respect other alternative mode of proceeding at option, viz., by order declaring the expenses private improvement expenses, sect. 90 of t of 1848 enacts, "That whenever the local of health have incurred or become liable for penses which by this Act are, or by the said oard shall be declared to be, private improve- expenses, the said local board may if they think fit, make and levy upon the occupier premises in respect of which the expenses ave been incurred, except in the cases here- provided, in addition to all other rates, a r rates, to be called private improvement of such amount as will be sufficient to rge such expenses, together with interest n at a rate not exceeding 5*l.* in the hundred, h period not exceeding thirty years, as the cal board shall in each case determine." ection clearly requires that a rate should be and according to the case there has been no Further, in sect. 62 of 21 & 22 Vict. c. 98, t proviso is, "In all summary proceedings local board for the recovery of expenses ed by them in works of private improve- the time within which such proceedings e taken shall be reckoned from the date service of notice of demand." Even, re, if these are private improvement ex- , the respondents ought to have taken out mmons at the latest within nine months of mand of the 21st Jan. 1861. [Stopped by rt.]

dwards for the respondents.—I admit that no s been made, but by the Local Government lment Act 1861 (24 & 25 Vict. c. 61), s. 23, "The es which have been incurred by any local of health as and for private improvement es under the Public Health Act 1848, as e expenses stated in the 62nd section of the Government Act 1858, to be a charge upon emises, with interest after the rate of 5 per er annum, may by order of the local board lth be declared payable by annual instal- with interest after the rate aforesaid during od not exceeding thirty years, until the amount be paid; and any such instalments terest, or any part thereof, may be recovered e owner or occupier of such premises in the anner as general district rates, and may be ed from the rent of such premises in the roportions as are allowed in the case of improvement rates under the 91st section Public Health Act 1848." On the 25th Aug. 1870 the board declared these to be private improvement expenses, and by this section they can now proceed as if they had made a rate. [LUSH, J.—The matter of complaint, as the board originally considered it, arose three months after the notice of the 21st Jan. 1861; and the question is whether, after the expiration of six months from that time, during which they might have proceeded summarily, they could change the nature of the claim, and by calling it something different from that which they had originally considered it, adopt another plan for collecting it. It would be a grievous wrong, in the case of a change of owners, if the board could thus saddle a new owner with charges they had neglected to collect from his predecessors.] The case does not state whether these proceedings were intended to be according to the provisions for recovery in a summary manner, or whether they were an application for a warrant under the 23rd section of the Act of 1861, as if a rate had been made. Now this notice of the 21st Jan. 1861 was not a demand at all; it was merely a notice to enable the owner to dispute the apportionment, and cannot be said to be the time from which the period of limitation was to be counted, according to sect. 62 of the Act of 1858. Besides, under the Act of 1861 these expenses may be recovered in the same manner as general district rates, and it has been held that Jervis's Act does not apply to rates. [LUSH, J.—What have you to say, Mr. Baylis, with regard to this 23rd section of the Act of 1861?]

Baylis in reply.—The intention of the Legislature appears to have been that a board of health might recover by either of the two alternatives given in the 69th section of the Act of 1848. I say they have here adopted one of these modes of proceeding, and have dropped it; they cannot now go back and begin with the other. [Stopped by the court.]

LUSH, J.—I am of opinion that the appellant is entitled to our judgment. These works were completed in the year 1860; and on the 21st Jan. 1861, a notice, which is set out in the case, was delivered to the appellant. It is now contended by the respondents that this notice did not constitute a demand for payment, but it is on the face of it a notice that interest will be charged unless the amount there mentioned is paid, and it states that the amount is the appellant's proportion of the expenses incurred by the board the year before. I certainly consider the document to be such a demand as that provided for in sect. 62 of the Act of 1858. No payment was made upon that demand, and no further proceedings were taken in the matter until the order was made by the corporation on the 25th Aug. 1870, that the amount they claimed from the appellant should be private improvement expenses. By the 69th section of the Act of 1848, the board had the option in 1861 either of proceeding summarily, or of making an order declaring this amount to be private improvement expenses; in the latter case, according to sect. 90 the board may levy the expenses by a rate upon the occupiers, part of which, by the following section, the occupiers may deduct from their rent. The Act of 1861, by sect. 23, seems to dispense with a rate, and the question is, as there was no rate here, at what time were the respondents bound to exercise their option? It is not necessary to say how they might have been limited, if no demand had been made upon the owner. Here there

was a demand of payment on the 21st Jan. 1861, and according to Jervis's Act and the 63rd section of the Act of 1858, the respondents might, for nine months after that date, have proceeded summarily against the appellant. Neither is it necessary to say whether, during those nine months, the respondents could have revoked their notice, and proceeded otherwise; in this instance they did not do so. From the expiration of the nine months after the demand which the respondents made, these Acts of Parliament clearly disabled them from taking any proceedings whatever. They cannot revive a claim which they have lost by declaring that it shall be paid by instalments. I think the order made by the justices is invalid.

HANNEN, J.—I am of the same opinion. Whatever right the respondents might have to declare these to be private improvement expenses even at the time they did, I think they cannot adopt both the alternative modes of proceeding which were at their option. I agree with my brother Lush that this notice in Jan. 1861, was a demand for payment upon the owner. I think that this demand upon the owner showed an adoption on the part of the respondents of an intention to recover the money by summary proceedings. They cannot now convert the claim they then made into another of an entirely different character.

Judgment for appellant.

Attorneys for appellant, *Chester* and *Urquhart*, for *Taylor* and *Son*, Bolton.

Attorneys for respondents, *C. E. Abbott*, for *R. G. Hinnell*, Bolton.

Wednesday, Nov. 8, 1871.

WEBLEY *v.* WOOLLEY.

Gunpowder—Keeping in unlicensed place—23 & 24 Vict. c. 139, *s.* 6—*Manufacturing—Cartridges.*

23 & 24 Vict. c. 139, *s.* 6, *enacts that certain regulations shall be observed with regard to the "manufacture and keeping of ammunition," one of which is that no "ammunition containing 5lb. of gunpowder shall be kept in any place not licensed for that purpose. . ."*

An information preferred against the appellant, a gunmaker, who bought and kept ready-made cartridges to sell by retail, but did not manufacture them, alleged that he did unlawfully keep certain ammunition, to wit, 50,400 cartridges, containing 5lb. weight and upwards of gunpowder, to wit, 80lb. of gunpowder, in a certain place without a licence. . ." He was convicted under the above section and sect. 7 *(penalty clause), fined and adjudged to forfeit the ammunition, in excess of the quantity which might be lawfully kept.*

On a case stated:

Held, that sect. 6 *of 23 & 24 Vict. c.* 139, *applies only to manufacturers of explosive compositions keeping the same, and that, therefore, the conviction under it of the appellant, who was not a manufacturer of the ammunition he kept, was wrong.*

CASE stated by justices under 20 & 21 Vict. c. 43.

This was an information preferred by Robert Woolley, inspector of nuisances duly appointed for the borough of Birmingham, against Philip Webley of the said borough, gunmaker, for that he the said Philip Webley, on the 13th Feb. 1871, at the said borough, did unlawfully keep certain ammunition (to wit) 50,400 cartridges, containing 5lb. weight and upwards of gunpowder (to wit) 80lb. weight of gunpowder in a certain place there, without such licence for that purpose as is required by the statute in that behalf, contrary to the statute; and after hearing the parties, and the evidence adduced by them, we, the undersigned (being two of Her Majesty's justices of the peace in and for the said borough of Birmingham), did thereupon convict the said Philip Webley of the said offence in the penalty of 10*l.*, together with the costs of obtaining the said conviction, amounting to the sum of 9*s.* 6*d.*, and did order and adjudge that the ammunition so kept as aforesaid, should be forfeited to the Queen. And the said Philip Webley, alleging that he is dissatisfied with the said determination as being erroneous in point of law, did, within three days thereafter, apply to us, the said justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Court of Queen's Bench at Westminster.

Therefore, in pursuance of the statute in such case made and provided, we hereby state and sign the following:

CASE.

The appellant having appeared upon summons before us, the undersigned, to answer to the said information, it was thereupon proved in evidence, and admitted between the said parties on the hearing before us, aforesaid:

That the said Philip Webley was a gun and pistol manufacturer, in the said borough of Birmingham, and a dealer in cartridges purchased from the makers, and retailed by him to customers, but not otherwise a manufacturer of any of the articles mentioned in sect. 6 of the Gunpowder Act 1860, nor a dealer in gunpowder or manufacturer of cartridges or other articles mentioned in sect. 18 of the said Gunpowder Act 1860, save in so far as the cartridges dealt in by the said Philip Webley, as aforesaid, severally contained small quantities of gunpowder.

It was also proved and admitted, as aforesaid, that on the 13th Feb. last, the said Robert Woolley, then being such inspector as aforesaid, visited the premises of the said Philip Webley, in the said borough of Birmingham, and then and there found therein 50,400 loaded metal cartridges, made by Eley Brothers, of London, of various sizes, and severally containing small quantities of gunpowder varying according to the size, from 6 grains each to 19 grains each, and in the whole containing upwards of 50lb., to wit, 80lb. weight of gunpowder, and that the said Philip Webley had not obtained and was not in possession of any licence for making or keeping ammunition or gunpowder, as provided by the said Gunpowder Act 1860.

Wherefore we the said justices did adjudge and determine that the said Philip Webley did keep ammunition (to wit) 50,400 loaded metal cartridges in a place where it was not then and there lawful under the Gunpowder Act 1860 to keep ammunition, and we did adjudge that the ammunition so kept as aforesaid and exceeding the quantity that might lawfully be kept in the said place, should be forfeited, and that in addition to such forfeiture the said Philip Webley should forfeit the sum of 10*l.*(*a*)

(*a*.) 23 & 24 Vict. c. 139, s. 6.—"The following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, ... or other preparations or compositions of an explosive nature. No such articles as

It was contended on the part of the said Philip Webley that, under the circumstances before stated, a licence under the said Gunpowder Act 1860 was not required by him for the keeping of ammunition as aforesaid.

If the said court should be of opinion that such licence was required for keeping such ammunition as aforesaid, then the conviction shall be confirmed. But if the court shall be of a contrary opinion, then the conviction shall be quashed.

Given under our hands this 21st April 1871 at the borough aforesaid.

SAMUEL THORNTON.
HENRY MANTON.

Field, Q. C. (with him *Chandos Leigh*) for the appellant.—The question is whether keeping cartridges is keeping gunpowder within the terms of the section under which this conviction took place, sect. 6, sub-sect. 2. [He referred to sects. 10 and 15.] The fair construction of sect. 6, is that it provides against a manufacturer who carries on a dangerous process, having in the vicinity of his works a quantity of gunpowder. And that section applies only to manufacturers. [COCKBURN, C. J.—Then there is no limit to the number of cartridges which may be kept by a person not a manufacturer, and sect. 18 will not touch him?] The argument must go to that length. It is founded on sect. 18, and on the apparent anomaly of prohibiting the keeping of 5lb. of gunpowder in small cartridges when the same person may lawfully keep 50lb. loose. If this conviction is good every gunmaker in England will be liable. [HANNEN, J.—It is supposed that a dealer or manufacturer would have proper premises.] A person employed in the perilous operation of filling cartridges may by sect. 6 sub-sect. 7, have 50lb. of powder loose beside him. [MELLOR, J.—But the place must be licensed—that imposes some check. COCKBURN, C. J.—And even when he has made the cartridges he is limited to 5lb.]

J. O. Griffits contra.—Sect. 2 relates to keeping and making gunpowder only. Sect. 18 touches gunpowder and cartridges, and sects. 6 and 7 are applicable to both. There are, however, no other sections applying to ammunition. [COCKBURN, C. J.—Is not the whole of sect. 2 intended to regulate the places wherein gunpowder shall be manufactured? MELLOR, J.—It only means "keeping" as incidental to manufacture.] It does not relate to other than a manufacturer. But sect. 18 applies to manufacturers and others—one may keep 200lb., the other 50lb.—and there is no reference to a licence. Sect. 2 was designed to protect the public against the danger of a large accumulation of combustible material. [COCKBURN, C.J.—There is a manifest distinction between danger in making cartridges and the danger of keeping them when made.] The object of the Legislature was to prevent the storing of a quantity of gunpowder in an unlicensed place for sale. Sect. 6 applies to the keeping of ammunition by any person whether a manufacturer or not.

COCKBURN, C.J.—It is quite unnecessary to decide in the present instance whether such a case as this falls within the 18th section of the Act. That may be a matter for further consideration; but we are of opinion that the case does *not* fall within sect. 6, and, consequently, that the conviction is wrong. I think the distinction made by Mr. Field in argument is sound, and manifestly presents itself as the true and proper view to be taken of sect. 6. That section relates to manufacturing and keeping of things manufactured, and I do not think it would be expedient or prudent to extend the provisions of the clause to anything not properly within it. This appellant is not a manufacturer, and therefore the section which, in my construction of it, applies to that which a person keeps after he has manufactured it does not apply to him; for although he may be said to have kept what is within sect. 6, yet he did not manufacture it. Hence it follows that the conviction must be quashed.

MELLOR, J.—I am of the same opinion. I think that what Mr. Field suggested is the clear distinction to be observed; and I am satisfied that sect. 6 applies to *manufacturers*, and does not affect persons who are not manufacturers keeping a quantity of cartridges. I will reserve any opinion as to sect. 18 until a question shall arise upon it.

HANNEN, J. concurred.

Attorneys for appellant, *Burton, Yeates*, and *Hart*, for *W. S. Allen*, Birmingham.

Attorneys for respondent, *Sharpe, Parkers*, and *Co.*, for *Hayes*, Birmingham.

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aforesaid, except percussion caps, exceeding the respective quantities hereinafter mentioned and set opposite to the descriptions of the respective articles (that is to say)

Ammunition containing five pounds of gunpowder . . . . shall be kept in any place not licensed for that purpose as hereinafter mentioned, and no such articles shall be kept in any place so licensed in excess of the respective quantities specified in the licence in that behalf.

Sect. 7 enacts that all ammunition made or kept in any place where under the Act it is not lawful to make or (as the case may be) keep ammunition, and any quantity of ammunition kept in a place where, under the Act, it may be lawful to keep such ammunition, exceeding the quantity which may be lawfully kept, there shall be forfeited; and every person making or keeping ammunition contrary to the Act shall, for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 10*l*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

Monday, Nov. 20, 1871.

TYSON *v.* LORD MAYOR OF LONDON.

Lands Clauses Consolidation Act 1845 (8 *Vict. c.* 18, *s.* 121) *London (City) Improvement Act* 1847 (10 *& 11 Vict. c. cclxxx.*)—*Notice to treat under local Act—Before whom compensation to be assessed—Tenancy more than one year—Interest to be calculated from time of notice.*

The corporation had given the plaintiff six months' notice, as required by the City Improvement Act, of their intention to take his premises, and the notice to quit also included a notice to treat.

The plaintiff was entitled to the residue of an unexpired term of a lease at this time, but at the time of the expiration of the six months' notice his interest would be for less than a year.

If the plaintiff's interest was greater than that for a year he was entitled to go before a jury; if not, his compensation was to be assessed under the 1st section of the Lands Clauses Consolidation Act.

Held that, from the date of the notice, the corporation could not refuse to proceed with the purchase, and that the period from which the plaintiff's interest was to be calculated, for the purpose of determin-

ing what compensation was to be paid him, was from the date of the service of the notice, from which time the lands were bound, and not from the expiration of such notice.

SPECIAL CASE.

This was an action of *mandamus* brought to compel the defendant to issue his precept for the assessment of compensation claimed by the plaintiff, and to take all the necessary steps to have such compensation duly assessed, and for damages for his having made default in the issuing of such precept and in the taking of such necessary steps, and by the consent of the parties and the order of M. Smith, J., dated the 7th Dec. 1870, a special case was stated for the opinion of the court, without pleadings.

The plaintiff was, on Jan. 25, 1867, tenant of the whole and occupier of a portion of a house and premises forming No. 14, Black Horse-alley, in the parish of St. Bride, London, for the remainder of a term exceeding one year, under and by virtue of an agreement dated 24th June 1867; and such agreement provided for a term of three years from Midsummer day 1867, and for a yearly tenancy after the expiration thereof at the same rent and subject to the six months notice to quit.

Upon the 25th Jan. 1869, the Corporation of London, as promoters of the Holborn Valley Improvement (Additional Works') Act 1867, served on the plaintiff a notice to treat for the said premises. The notice stated that it was the intention of the mayor, aldermen, and commons in common council assembled to take and use the plaintiff's house, shop, and offices, with the appurtenances belonging. It further stated that the mayor, aldermen and commons were willing to treat and agree with the plaintiff for the purchase of his estate and interest in the premises and for compensation to be made for the injury and damage sustained on account of the execution of the Act. It further stated that it gave the person or persons in possession or occupation of the premises or any of them or any part thereof, notice, and required them at the expiration of six months from and after the giving of such notice, peaceably and quietly to deliver up possession of the same; and the notice also required the plaintiff within the expiration of one month from its date to deliver at the office of the Comptroller of the City, a statement in writing of the particulars of the estate and interest to which he claimed to be entitled and of the amount of the sum of money he would be willing to receive in satisfaction or recompense for the value of such estate and interest, and as compensation for any improvements or fixtures, and for any injury or damage that he might sustain on account of the execution of the Act, and of the manner in which such amount of money had been computed; and in case that plaintiff should have a greater interest in the premises than as tenant at will, and should claim compensation in respect of any unexpired term or interest under any lease or grant of the premises so required, then he was further required to produce the lease or grant in respect of which such claim was made.

Upon the 19th Feb. 1869, the plaintiff sent to the corporation a statement of the amount of his claim and the nature of his interest in the said premises. The plaintiff was in the occupation of the premises at the date of the commencement of the action. The necessity for a formal demand on the defendant to perform his duty was waived before action, and it was agreed that no objection of form should be taken on either side.

The question for the opinion of the court was whether the plaintiff at the date of the issuing of the writ was entitled to maintain this action.

If the court should be of opinion in the affirmative then judgment with the costs of suit was to be given to the plaintiff that a writ of *mandamus* do issue to the defendant to issue his precept in respect of the said lands, pursuant to the statutes, and to do all acts, and take all necessary steps for the purposes of having the compensation to be paid assessed by a jury. If the court should be of opinion in the negative, the judgment with costs of suit to be entered for the defendant.

The plaintiff's points of argument were: first, that the plaintiff is entitled to have the value of his interest assessed by a jury, and to a *mandamus*; secondly, that the plaintiff had at the time of the service of the notice to treat a greater interest in the said house and premises than as tenant from year to year; thirdly, that the notice to treat bound the lands, and that the respective rights of the parties must be determined according to the state of things at the date thereof; fourthly, that it was the duty of the corporation upon such notice to treat being given, to take the necessary steps to have the amount of compensation assessed, and that any neglect to perform that duty was actionable; fifthly that the defendant ought not to be allowed to set up any difference in the amount of the plaintiff's interest at the time of action brought, and the time when the notice to treat was given, which would be to take advantage of their own laches.

The points on which the defendants argued were: First, that inasmuch as at the date when the six months' notice by the corporation to the plaintiff expired, his term of three years in the premises had less than a year to run, and at the date of the commencement of the action such term had expired by effluxion of time, the plaintiff is not entitled to have a jury summoned to assess compensation to him; secondly, that the plaintiff's right to compensation, if any, is enforceable only under the 121st section of the Lands Clauses Consolidation Act 1845; thirdly, that at the date of action brought, the plaintiff was not entitled to have a jury summoned; fourthly, that he was not entitled to claim a writ of *mandamus*.

The Holborn Valley Improvement (Additional Works) Act 1867 incorporates the London (City) Improvement Act, which incorporated portions of the Lands Clauses Consolidation Act. It is provided by the 13th section of the London (City) Improvement Act 1847 (10 & 11 Vict. c. cclxxx.) that for the purposes of this Act it shall be lawful for the mayor, aldermen, and commons, and they are hereby authorised and empowered to take and use, or cause to be taken and used, any lands, and pull down and remove, or cause to be pulled down and removed, any houses or buildings which they may deem necessary or expedient to take, use, or pull down and remove for the purposes of this Act, at any time at the expiration of six months after notices in writing from the mayor, aldermen, and commons, or their agent duly authorised, of the intention to take or use the same, shall have been left at the principal office of business, or given to the principal officer of the corporation interested in or entitled to, or by this Act enabled to sell and convey any such lands,

houses, or buildings, or to the person who shall be the owner and occupier thereof, or have been left at his usual or last known place of abode or business, or with the tenant or occupier of the same lands, houses, or buildings, or have been affixed upon some part of such lands, houses, or buildings. And by the 34th section it is enacted, that all persons in the actual possession of any lands to be taken or purchased by virtue of this Act, as owners, leaseholders, tenants at will, or lessees for a year, or for any shorter time or otherwise, shall, at the expiration of six months from and after notice in writing from the mayor, aldermen, and commons, or their agent duly authorised, shall have been left at or affixed upon the premises, or so soon after as they shall be required so to do, peaceably and quietly deliver up the possession of the said premises to the mayor, aldermen, and commons, or the person authorised by them to take possession thereof; and in case any such persons shall refuse to give up such possession as aforesaid, then it shall be lawful for the said court of mayor and aldermen to issue their precept to the sheriffs of the said city of London to deliver possession of the premises to such person as shall in such precept be nominated to receive the same; and the said sheriffs are hereby required to deliver such possession accordingly of the said premises, and to levy such costs as shall accrue from the issuing of such precept on the person so refusing to give up such possession as aforesaid, by distress and sale of their goods, but no such possession shall be delivered up until such payment or deposit of purchase or compensation money shall have been made as it is directed by the Lands Clauses Consolidation Act 1845.

W. G. Harrison, for the plaintiff.—If the plaintiff had no greater interest than one from year to year, the amount of his compensation is to be settled by two justices, under the 121st section of the Lands Clauses Consolidation Act 1845; but if the plaintiff had a greater interest than that of a tenant from year to year, then he is entitled to have a jury summoned, and to go before them in the usual manner to assess the value of his unexpired term or interest in his premises. Here the plaintiff had a greater interest than a tenant from year to year, for the agreement was for three years from the 24th June 1867, and at the time when notice to treat was given, which was on the 25th Jan. 1869, Tyson had an equitable interest in the premises greater than three years. We must look at and examine the equitable interest, for, whereas the agreement for a lease gives an actual occupation for three years, the equitable interest gives an occupation for four years at least: *Sweetman* v. *Metropolitan Railway Company* (1 H. & M. 543; 10 L. T. Rep. N. S. 156). That which is to be valued under the Lands Clauses Consolidation Act is not what the plaintiff has, but what he claims to have. It was held in *The Marquis of Salisbury* v. *The Great Northern Railway Company* (17 Q. B. 840) that a notice by a railway company to a landowner, served in pursuance of the Lands Clauses Consolidation Act 1845, requiring the lands for the purposes of the company, is a sufficient exercise of the powers of compulsory purchase to place the parties in the position of vendor and purchaser, and Lord Campbell there states "that the contract may be considered as mutual, it being in the landowner's power to compel the company, after the expiration of the period prescribed for exercising their compulsory powers, to complete the purchase." He subsequently goes on to say, "It seems to me that the intention of the Legislature was, that the contract of purchase should be complete as soon as the notice has been given by the company." The amount of compensation here is to be assessed with reference to the value of the plaintiff's interest in the premises, and not with reference to its value to the corporation.

Stebbing v. *Metropolitan Board of Works*, L. Rep. 6 Q. B. 37; 23 L. T. Rep. N. S. 530;
Morgan v. *Metropolitan Railway Company*, L. Rep. 3 C. P. 553; 18 L. T. Rep. N. S. 568; in error, L. Rep. 4 C. P. 97.

The quantum of the plaintiff's interest in the land is from the date of the notice, and the premises are, for the purposes for which they are required, virtually in the hands of the corporation from such date, and from that time the plaintiff's interest must be calculated.

Thesiger for the defendants.—The only real question is whether the date from which compensation is to be assessed was the time when the six months' notice was given, or whether it was the time when the six months' notice expired. If the expiration of the six months is the time, then the plaintiff would have less than an interest of a year; but if the date of giving the notice is the time, he would have an interest in the premises greater than that of a tenant from year to year. The quantum of interest must be in respect of the value of interest in the premises. Under the 18th section of the Lands Clauses Consolidation Act notice to treat is to be given to the parties interested, and under the 21st section the parties are to state their claims within twenty-one days. If the quantum of value be under 50*l.*, they must go before two justices of the peace, even if the interest which they possess in the premises is greater than that of a yearly tenant, but if the interest is greater than 50*l.* they may go before a jury. I admit that when notice to treat is given a contract is created between vendor and purchaser: (*Sparrow* v. *Oxford, Worcester, and Wolverhampton Railway Company*, 9 Hare, 436). But the power to take the lands is not at the date of the notice but six months after, at its expiration: (*Morgan* v. *Metropolitan Railway Company*, in error L. Rep. 5 C. P. 97.) In that case the railway company had given the plaintiffs notice of their intention to take their premises at the expiration of six months, and the plaintiffs accordingly had taken other premises, and, the six months having expired meanwhile, the former premises remained upon their hands. The Lord Chief Baron said, that, in consequence of the notice given to them by the company, the plaintiffs were not only entitled to a *mandamus*, but to an action for damages also. He goes on to say, that the company were bound to give the plaintiffs a notice to treat within a reasonable time after the expiration of the six months from which notice to take was served upon them, but he does not say that compensation is due from the time of the first notice. So the interest which the corporation are entitled to take is the interest at the expiration of the notice. The premises are bound from the time of notice to treat, but if the tenant has sustained any costs or losses by removing before the expiration of the term, he would be entitled to compensation.

Willes, J.—We are not satisfied upon the argument that the plaintiff's interest in the premises was less than that of a year, nor are we satisfied that any distinction ought to be drawn in favour of the Lord Mayor from the time of notice to quit and notice to treat, both which notices were embodied in one document in the present case. Taking the two notices together, and bearing in mind the decision in *Morgan* v. *The Metropolitan Railway Company* (L. Rep. 4 C. P. 7; 18 L. T. Rep. N. S. 568, I think Mr. Thesiger is right in saying the notices compel the defendants to treat for the premises, or, following the opinion of the Lord Chief Baron, that they are to take them as an obligation. As the case comes before us, the notice to treat has relation to the time when given, which is at the same time as the notice to quit. The land was to be taken according to the provisions of the Act of Parliament, which has a binding effect on the premises from the time of the notice, as at the expiration of the six months. It means, "We have made up our minds to take your lands, and we give you notice." The giving the first notice is the period to which all questions of compensation for injury, damage, or losses of any kind must be referred, and if such is the case for one purpose, why not for all purposes? The six months' notice was intended for the tenant's benefit that he should leave without incurring useless expenses. In applying the 121st section of the Lands Clauses Consolidation Act 1845, apart from the 34th section of the London (City) Improvement Act, there is no doubt you must take the estate of the tenant at the time of the notice. There is no doubt in this case that at the time of such notice the plaintiff had more than a year's tenancy, and proceedings would have been taken against him under the provisions of sect. 21, where his estate was freehold or leasehold. The 13th section of the Local Act gives a power to take houses and lands, but not to purchase them, while the 34th section is not especially directed to the case of tenants from year to year, but to all classes of persons, whether tenants at will, by the year, or in fee. It is framed for the benefit of the city, and enacts that all persons in the actual possession of any lands to be taken or purchased by virtue of the Act, as owners, leaseholders, tenants at will or lessees, for a year or for any shorter time or otherwise, shall, at the expiration of six months from and after notice, in writing, from the mayor, aldermen, and commons, or their agent duly authorised, shall have been left on the premises, or so soon after as they shall be required so to do, peaceably and quietly deliver up to the mayor, aldermen, and commons, or the person authorised by them to take possession thereof, and in order to remove all doubt the section ends, "but no such possession shall be delivered up until such payment or deposit of purchase or compensation money shall have been made as is directed by the Lands Clauses Consolidation Act 1845." The statute deals with the case of possession where possession exists without regard to the estate, and I am of opinion that the plaintiff is entitled to compensation, and in such a manner as is more expensive to the corporation, namely, by the verdict of a jury.

Keating, J.—I am of the same opinion. The period of time when the tenant's interest determined was when notice to quit was given. Here the two notices, one the notice to quit, the other the notice to treat, were combined in one. The six months merely relates to the time when the corporation will require possession. Mr. Thesiger argues that the period was at the expiration of the six months, but they are bound to take the lands from the date of the notice. The notice means, We take your lands, and at any time after the expiration of six months you must deliver up possession and have compensation assessed.

Brett, J. The question of possession in sect. 34 leaves every question to be dealt with according to the Lands Clauses Consolidation Act.

Collier, J.—The 21st section of the Lands Clauses Consolidation Act gives the tenant twenty-one days to consult his interest and to state particulars of his claim. Here the time is simply extended to six months, but as the provisions are not altered, that makes no possible difference on the principle on which compensation is to be assessed.

Judgment for the plaintiff.

Attorney for plaintiff, *Blewitt.*
Attorney for defendants, *Nelson.*

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

(Before Kelly, C.B., Byles, J., Pigott, B., Lush, J., and Hannen, J.)

Reg. v. Manning and Rogers

Arson—Building—Unfinished house—24 & 25 Vict. c. 97, s. 6.

An unfinished dwelling house of which the external and internal walls were built, and the roof covered in, and a considerable part of the flooring laid, and the walls and ceilings prepared for plastering, is a building within 24 & 25 Vict. c. 97, s. 6, the unlawfully and maliciously setting fire to which is a felony.

Semble, that it is a question for the jury, whether the structure in question is a building.

Case reserved for the opinion of this Court by Martin, B.

The following is a copy of the indictment:

Lancashire to wit.—The jurors for our Lady the Queen, upon their oath, present that William Manning and John Rogers, on &c., at &c., feloniously, unlawfully, and maliciously did set fire to a certain building of one John Rhodes, there situate, against the form of the statute in such case made and provided.

It is obviously framed upon the 24 & 25 Vict. c. 97, s. 6.

The prisoners were members of a society or union of hand-made brickmakers.

The building set fire to was one of seven built in a row, intended for dwelling houses, and which were built in part of machine-made bricks. On the night of the 25th June last the prisoners (and some others who escaped) set fire to it by means of paraffin oil. All the walls, external and internal, of the house were built and finished; the roof was on and finished; a considerable part of the flooring was laid; the internal walls and ceilings were prepared ready for plastering. The house was in a forward state towards completion, but was not completed.

At the conclusion of the case for the prosecution, it was objected by the learned counsel for the prisoners that the erection set fire to was not a building within the meaning of the statute, because it was not completely finished.

against the objection, but it was stated
ı, J. in a similar case had expressed his
to reserve the point for the opinion of
t of Criminal Appeal, and at the re-
the counsel I assented to take the same

the opinion of the jury, whether, as a
of fact, the erection was a building, and
d that it was. The prisoners were found
l sentenced, and are undergoing punish-

st the opinion of the Court upon two
First, was the question concluded by the
the jury? Secondly, if it was not, was
tion made by the learned counsel for the
a valid one? SAMUEL MARTIN.
unsel appeared to argue for either

C.B.—We regret that we have not had
ance of counsel, because the point re-
a new and important one. Looking at
stated in the case, I am of opinion that it
en correctly left to the jury as a question
hether the erection was a building, the
the jury that it was is conclusive to
this was a building within the meaning
tute. The question turns upon the true
ion of the 24 & 25 Vict. c. 97, s. 6,
acts "whosoever shall unlawfully and
ly set fire to any building, other than
e in this Act before mentioned, shall be
elony." The point therefore is, whether
ture was a building other than such as
Act before mentioned. The 3rd section
es the buildings before mentioned re-
in sect. 6, and they are "house, stable,
use, outhouse, warehouse, office, shop,
house, hopcast, barn, storehouse, granary,
d, fold, any farm building, any building
n used in farming land or in carrying
trade or manufacture, or any branch
Now the argument which may be
to the buildings enumerated in sect.
they would appear to be complete build-
on reading the 3rd section narrowly,
be found to contain descriptions of
which are not in themselves complete
but which may form parts of complete
, *e.g.*, office and shop. Suppose a house
t, and that an office therein is completed,
ıe house unfinished: or suppose a house
d the shop completed and opened for
while the upper part of the house is
lt, in these cases the office and shop would
ling within sect. 3. Sect. 3 therefore re-
uildings which may be complete or in-
I think that the ruling of the judge at
was correct, and that the question was
ury. I give no opinion as to whether an
l building of which only the external
complete is a building within the mean-
is section; but where a house has ad-
the state in which this house was, I
is a building within the meaning of the

J.—I am of the same opinion. I abstain
mpting to define the exact meaning of
"building" in this section. It is suffi-
ıy that the structure now in question was
within its meaning.

B.—I am of the same opinion. The jury
nnd that this *structure was a building*, though not complete, I think it was a building within the meaning of sect. 6.

LUSH, J.—I am of the same opinion. To constitute a building within the meaning of sect. 6, it is not necessary that the structure should be completed for its intended purpose; it is sufficient if it has advanced so far as to have acquired the character of an entire building. I think that an unfinished house of which the walls had only been built 4ft. high, would not be a building within the section: Here all the walls, external and internal, being complete and the roof covered in, I think this was a building within the section.

HANNEN, J.—A house, I think, means a building sufficiently advanced to be ready for the habitation of man, and a structure may be a building otherwise than a house within sect. 6, though it was only advanced so far as the one in question.

Conviction confirmed.

Saturday, Nov. 18, 1871.

REG. *v.* STENSON AND HITCHMAN.

False pretences and conspiracy—Evidence.

S. and H. were jointly indicted on counts for false pretences and a general count for conspiracy. S. was convicted on the counts for false pretences, and both on the count for conspiracy.

The evidence was, that they were ostensibly carrying on business as publishers under the name of B. and Co., and that H. was the author of a book published by them. To force the sale of the book, S. got M. to write letters purporting to come from a titled lady ordering a copy of the book, and to address them to country booksellers. These letters were delivered by M. to S., and found their way by post to different country booksellers, and inclosed with them was a printed circular from the firm, offering reduced terms for an order of seven copies or more. At the trial two witnesses produced a number of such letters, some of which had been given to them by the booksellers (other than those named in the indictment) who received them, and some came to them from such booksellers by post. There were no counts in the indictment alleging any intent to defraud these particular booksellers. It was also proved that H., after the frauds charged, had represented himself as B. and Co.:

Held, that the letters were admissible in evidence, without calling the booksellers who actually received them.

Held, also, that the representations of H. after the frauds charged were admissible in evidence.

CASE reserved at the sessions of the peace for the county of Middlesex, on the 12th Sept. 1871, by Mr. Serjeant Cox, the deputy-assistant judge.

The defendants were charged with obtaining money by false pretences, and also for a conspiracy to defraud.

The indictment contained nine counts.

The first count charged that the prisoners "did send to and caused to be received by one Charles Pope Chapple a certain manuscript letter or paper, on which was stamped, printed, and embossed an earl's coronet, in coloured relief, and purporting to be written by a person rightfully using the title and designation of Lady Scott," and that the defendants "by so sending and causing it to be received, as aforesaid, the said letter," &c., did falsely pretend to the said Charles Pope Chapple that a lady of rank lawfully bearing the name of

Lady Scott, entitled by law to use and display a coronet, was then desirous to purchase a copy of a certain work called "Sunshine and Shadow," and then asked the said Charles Pope Chapple to procure for her a copy of the said work entitled, &c., in time for her return from town, and also that the said letter was a true and genuine letter of a lady of rank; and also that the order in the said letter contained was a true and genuine order for goods, to wit, for the said book, entitled, &c.; and also that a certain Lady Scott desired to become a customer of the said Charles Pope Chapple; and also that a certain Lady Scott had then recently gone from Ilminster to London, and was about to return from London to Ilminster, and then required to be purchased for her the said book entitled, &c., and upon her return would call at the shop of the said Charles Pope Chapple and pay for the said book, by means, &c., the said defendants did obtain from the said Charles Pope Chapple a certain valuable security, to wit, an order for the payment of the sum of 2*l.* 7*s.* 3*d.*, with intent, &c.

The second count charged a similar false pretence to R. W. Hetherington.

The third, fourth, fifth, sixth, seventh, and eighth counts charged the like false pretences to Alfred Lambert, Henry Bailly, James Ensor, William Morley, Thomas Weller, and Barnard Valentine.

The ninth count charged that on the 1st day of June, 1871, the said defendants, "together with others, whose names are to the jurors unknown, unlawfully did conspire, combine, confederate, and agree together by divers false pretences and fraudulent and indirect means and devices to obtain from and acquire to themselves the moneys of certain dealers in books, to wit, Charles Pope Chapple (and the seven other persons, named in the eight counts charging false pretences) and others, and to cheat and defraud the said dealers in books of their said moneys against the peace, &c.

The evidence for the prosecution was that the defendants were carrying on business ostensibly as publishers under the style of Hamilton and Co. The defendant Hitchman had published a book entitled "Sunshine and Shadow," of which he professed to be the writer, in the assumed name of the Viscount de Montgomery. This book was published and sold at the publishing offices conducted by the defendants. For the purpose, as it was alleged, of procuring a sale for the book, they caused to be sent by post to a great number of booksellers in the country a letter purporting to be from one Lady Scott, stating that she (the writer) desired to purchase a copy of the work entitled "Sunshine and Shadow" (a prospectus of which was enclosed, containing extracts from numerous eulogistic criticisms), and requesting the bookseller to procure a copy of it for her, which she would call and pay for on her return from town. The prospectus enclosed with this letter stated that if a bookseller would order seven copies at once a larger discount would be allowed, and he might return unsold copies.

The effect of this letter was proved by some of the booksellers in question to have been that, believing it to be the genuine order of a Lady *Scott, they* had ordered the book through their *usual London agents*, who proved that they had *procured the volumes* from the defendants' office, paying for them there the wholesale price at which books are sold by publishers to booksellers; and one of the country booksellers (Chapple), induced by the offer in the prospectus of the seven copies at a larger discount, sent an order and a cheque for 2*l.* 7*s.* 3*d.* for seven copies, which were duly forwarded to him by the defendants.

It was proved that all of these letters purporting to be from Lady Scott were written by a lady named Maniate, whose evidence was as follows:

I am a teacher of languages at Brompton. I answered an advertisement in the *Times* for a lady wanted to copy letters. The defendant Stenson called on me. He brought a quantity of note paper with a coronet upon it, and the form of a letter which I was to write. It was the Lady Scott. (Letter now produced.) I wrote a great number of them, and gave them to the defendant. He also brought me some envelopes and a directory containing the names of country booksellers, and directed me to address the envelopes to them. I did so, and gave them to the defendant. All the letters and envelopes before me (those produced by the booksellers named in the indictment, as also those produced by Abraham Gould and by Mr. Miles) are in my handwriting, and were some of those I wrote by the direction of Stenson and gave to him.

There was no evidence to connect the defendant Hitchman with this proceeding of Stenson.

There was no direct evidence that the letters were sent out by the defendants or one of them. They were not proved to have made them up or to have posted them. The jury were asked to infer that they did so from the fact proved that they were written and addressed by Mrs. Maniate by direction of one of the defendants (Stenson), who was proved to be ostensibly carrying on, with the other defendant, Hitchman, the business of Hamilton and Co., at whose offices the book ordered by the supposed Lady Scott was published.

There was no evidence to prove that the letters were not sent by a Lady Scott, but the jury were asked to infer the non-existence of any Lady Scott entitled to use a countess's coronet, from the evidence of Mr. George Harrison, a Windsor herald, who proved that he was acquainted with the crests of the nobility; that the crest on the letters produced was a countess's coronet; that there were several Lady Scotts, but none of them was a countess, or entitled to use the crest upon the letters.

The existing Lady Scotts were not called.

It was contended for the prosecution that it might be inferred from the fact that Mrs. Maniate had written all the letters and addressed all the envelopes for defendant Stenson, that they were not sent out by any Lady Scott, but by the defendants, or one of them; and further, that this might also be inferred from the printed prospectus of the book having been enclosed with the letters.

The object of this false pretence was alleged to be to induce the country booksellers to order the book, whereby the defendants obtained a sale, and consequently the money, for a book that would not have been bought by the booksellers but for the false pretence contained in the Lady Scott letter.

In the course of the trial the following questions were raised:

First, the booksellers named in the indictment were called to prove the receipt by them of, and to produce the Lady Scott letter received by them through the post.

Then Abraham Gould said:

I am an advertising agent. I knew Hitchman eleven years ago as Montgomery. Knew Stenson at the latter part of last year. I went about to collect evidence for this prosecution. I produce five letters which I received from booksellers in different towns. Three of them were given to me by themselves when I called upon them, and two came to me by post.

Cross-examined:

I will not be quite positive how many came by post, or how many were given to me by the booksellers. They told me when they gave them to me that they had received them by post. (Question objected to.)

These letters were copies of the Lady Scott letter, and were identified by Mrs. Maniate as having been written and addressed by her for the defendant Stenson.

They were addressed to other booksellers than those named in the indictment, and were put in by the prosecution under the count charging a conspiring to defraud the booksellers there named "and others."

It was objected for the defendants—first, that a false pretence that formed part of the charge could not be proved by the mere production of letters by a witness who had received them from the parties; secondly, that the evidence must be limited to the charges of false pretences made to the persons named in the indictment.

I so held.

It was then contended for the prosecution that under the ninth count (for conspiring to defraud the said booksellers and others) it was competent to the prosecution to prove similar frauds on other booksellers than those named in the indictment.

It was replied for the defendants, that even if this were so, letters alleged to have been received from booksellers in the country by the witness personally, or coming to him by post, are not admissible on mere production by the recipient, and that they could be made evidence only by calling the booksellers themselves to prove how and when they had come to them.

I was of opinion that the letters so produced were inadmissible both to prove the counts for false pretences and the count for conspiracy, but counsel for the prosecution strongly urging that if the evidence was wrongly rejected there would be a miscarriage of justice without redress, while the defendants would have a remedy if the prosecution was wrong, I consented to receive them, and reserved the point.

Secondly. Later in the course of the trial, counsel for the prosecution proposed to put in evidence as proof of conspiracy under the ninth count certain acts of the defendant Hitchman, done after the date of the offence. It was objected on the part of the defendants, that acts done after the alleged fraud was completed could not be admissible evidence of a conspiracy to commit that fraud. I admitted the evidence, reserving this point also for the consideration of the court.

Witnesses were then called to prove that defendant Hitchman, after the date of the frauds charged in the indictment, had called himself by the name of Hamilton, and represented himself as of the firm of Hamilton and Co.

Thirdly. Subsequently Mr. Miles, a partner in the firm of Hamilton, Adams, and Co., publishers, having their business near to that of the defendants, produced a quantity of letters which he stated had come to the office of Hamilton, Adams, and Co., by mistake *for Hamilton and Co.*

Mrs. Maniate was recalled to prove that all the letters and envelopes so produced by Mr. Miles were some of those she had written by direction of defendant Stenson. It appeared that they were not addressed to the booksellers named in the indictment.

On the part of the defendants, it was objected that they could not be received, first, as the evidence must be limited to the specific charges in the indictment; and, secondly, as there was no sufficient evidence that these letters had ever been sent to or received by the persons to whom they were alleged to be addressed.

For the prosecution, it was contended that they were admissible under the count for conspiracy charging the attempt to defraud the booksellers named "and others," and that one of the defendants having directed them to be written made them evidence, without further proof of whence they came.

I reserved this point also for the opinion of this Court.

I withdrew from the jury the case as against Hitchman on the first eight counts of the indictment (charging false pretences), but I left to them the question as to him (Hitchman) on the count for conspiracy, and as to the defendant Stenson on all the counts.

The jury found the defendant Hitchman guilty on the count for conspiracy only, and the defendant Stenson guilty on all the counts except the first.

Sentence was deferred, and the prisoners remain in custody.

The opinion of the Court is requested on the three points above stated; first, if in all or either of them the evidence was wrongly admitted; secondly, if so, whether such wrongful admission invalidates the conviction, first of Stenson under the counts for false pretences, and second of both the defendants under the count for conspiracy.

EDWARD WM. COX,
Deputy-Assistant Judge.

Montagu Williams for the prisoner Stenson.—The letters produced by Gould and Miles were inadmissible, without calling the country booksellers to whom they were addressed to show in what state and under what circumstances they received them. [LUSH, J.—Maniate wrote the letters and addressed them, and then gave them to Stenson; and then they are found in different country towns. He gave her a directory to copy the names and addresses of the country booksellers. If the letters had been altered, Maniate might have been questioned upon that. It was for you to show if anything else had been put into the letters. KELLY, C.B.—The simple question is, whether Stenson sent the letters? It is possible that some one else may have done so. PIGOTT, B.—You might have shown how Stenson got rid of them. LUSH, J.—The letters were last traced to his hands, and it is a fair inference that he sent them.] There was no evidence who sent them or who received them.

Straight (*H. Browne* with him) for Hitchman.—The statements by Hitchman, made after the frauds charged, that he represented the firm of Hamilton and Co., were not admissible to connect him with the frauds or the conspiracy. [KELLY, C.B.—Is it possible to imagine that the partner most deeply interested in the book could be ignorant of the proceedings taken by the other partner to sell

and get rid of the book? Lush, J.—The statement in the case, "that the defendants were ostensibly carrying on business as partners under the style and firm of Hamilton and Co., and that Hitchman had published the book of which he professed to be the writer," shows a previous connection between the prisoners.]

Besley, for the prosecution, was not called upon.

Kelly, C. B.—In this case, which is a peculiar one, there are only two questions substantially. The first is, whether the letters produced by Gould and Miles were admissible in evidence? It appears that the prisoner Stenson induced the witness Maniate to write a number of fabricated letters, purporting to be written by a Lady Scott, ordering one copy of a book called "Sunshine and Shadow." The letters were in such terms as to indicate that the book was a work of great merit, and to induce persons to purchase it. A number of these letters, and also envelopes addressed to country booksellers, were written by her, and the whole of them were delivered over to Stenson. The evidence was, that these letters were received by the country booksellers through the post. The letters, together with a circular, stating that, if a bookseller would order seven copies at once a larger discount would be allowed, emanating from the defendant's establishment, carried on under the name of Hamilton and Co., found their way into the hands of the country booksellers. A witness, Gould, produced five of such letters. Some were given to him by the booksellers to whom they were addressed by Maniate, and some he received by post from booksellers in different towns. Upon this the question was raised, whether the letters were admissible in evidence, without calling the booksellers themselves. I am of opinion that they were admissible in evidence as soon as the foundation was laid that a number of similar letters were written by Maniate for Stenson and placed in his hands, and evidence was given that they had been transmitted to country booksellers by post. We come then to the charge of conspiracy. Surely there was evidence of an intention to defraud the trade in general. In addition to those letters, there was evidence that a number of others produced by the witness Mills were prepared at Stenson's instance and delivered to him by Maniate, and that they somehow or other had got into circulation. This was evidence against him on the count for conspiracy. The next question is, whether these letters were evidence against the other prisoner, Hitchman? He was a partner in the establishment carried on by him and Stenson, and he was the author of the work which it was the object of these fabricated letters to circulate and to sell. I therefore think the letters were some evidence against him on these counts. As soon as evidence was given that a conspiracy had been the means of these letters coming into existence, any evidence which would connect the other prisoner Hitchman with the general intent and objects of a conspiracy was evidence against him. And then arose the second question, viz., whether declarations by the prisoner Hitchman, after the date of the frauds charged, that he had called himself by the name of Hamilton, and represented himself as Hamilton and Co., were admissible against him? There can be no doubt that anything done at any time, even as late as the day before the trial, which shows that a person had been at a former time a party to a conspiracy, is admissible in evidence against such person. Here not only were the declarations made by him, but it was shown that he had the strongest motives as a member of the firm and the author of the work, to sell and circulate it, and therefore they were admissible against him on the count for conspiracy. Both on the counts for false pretences, as well as on that for conspiracy, I think the evidence was admissible, and that the conviction must be affirmed.

Byles, J.—I also think that the conviction should be affirmed.

Pigott, B.—I am of the same opinion. The evidence was clearly admissible, it is sufficient to say, upon the count for conspiracy, but I also think it was admissible upon the charge of false pretences. The letters were written by order of Stenson, and delivered to him, and found their way into the hands of country booksellers. It is a fair inference to draw that Stenson sent them to the booksellers. As to the declarations of Hitchman, after the frauds charged in the indictment, I cannot see any doubt that they were evidence to connect him with what he did before. They clearly connect him with the conspiracy.

Lush, and Hannen, JJ., concurred.

Conviction affirmed.

Reg. v. Holmes and Furness.

Indecent assault—Evidence—Contradiction of prosecutrix.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with S.

Held that S. could not be called to contradict her upon this answer.

This rule applies to cases of rape, attempts to commit a rape, and indecent assaults, in the nature of attempts to commit a rape.

Case reserved for the opinion of this Court.

At the General Quarter Sessions of the peace holden in and for the county of Surrey on Tuesday, 17th Oct. 1871, Henry Holmes and Joseph Frederick Furness were tried upon an indictment charging them with indecently assaulting one Sarah Palmer.

The prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it.

The prisoner's counsel called the said Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the counsel for the prosecution objected on the authority of *Reg.* v. *Cockroft* (11 Cox. C. C. 410), and the court refused to allow the question to be answered, but reserved the point whether such answer ought to have been allowed to be given, for the decision of the Court for Crown Cases Reserved.

The jury found both prisoners guilty, and the court sentenced the said Henry Holmes to six calendar months' imprisonment with hard labour, and the said Joseph Frederick Furness to four calendar months' imprisonment with hard labour, both at the House of Correction at Wandsworth, in the said county, but respited the execution of the said sentences until the decision of the Court for Consideration of Crown Cases Reserved should be known, and committed the prisoners to the

custody of the governor of the common gaol at Newington in the said county in the mean time.

E. Richards Adams, Chairman.

The case was remitted by this court to the sessions for the purpose of having a copy of the evidence stated, which was returned as follows:

Sarah Palmer, single woman, in service at Mrs. Essex, 4, Blythe-terrace, South Lambeth-road:

On Tuesday night, Sept. 5, my mistress gave me permission to go out and take tea with some one. Both my arms have been burnt, this prevents me from using my arms properly. At 6 p.m. I left home and took tea at the corner of Myers-street. I left at 8 p.m. to return home. I went past the house in which Holmes lives; it is at the corner of Water-street. I called at my mother's; she was not in. I left, and was going home. I saw Holmes and Furness at the door of Holmes's house. I spoke to Holmes; Furness was there. I said, "Holmes, have you seen my mother?" He said, "No, Sarah; I have not seen her." I left him, and walked towards home. Holmes and Furness came running after me to the corner of South Lambeth-road. Holmes said, "Sarah, your mother wants you." I said to Holmes and Furness, "Is it true?" They both said, "It is quite true." I walked by the side of them down to where they said mother was. We passed a public house called the Canton Arms. We walked straight down. It is a very dull street. I went down because they said mother was in a public house there. When I was in this road, Holmes said [Witness then described the indecent assault in which Holmes was the actor and aiding Furness]. I met a gentleman and complained to him. This gentleman went home with me. I did not know him. My mistress was at home. I was to have been home by nine o'clock. It was ten o'clock when I got home. I was crying. I made a complaint to my mistress. They went for my mother; she came, and I complained to her. I mentioned two names to my mother.

Cross-examined by counsel for Holmes:—

I am sixteen. I have known Holmes before about twelve months. He had been very friendly with my mother. I have been to his house sometimes two or three times in a week. On this evening I did not go into Holmes's house. It was about a quarter-past eight when I passed Holmes's house. This was in the South Lambeth-road. There are houses on both sides of the road. The road is lighted. The bricks were a good distance round. I have walked out with Holmes; my mother and Mrs. Stafford were with us. Two gentlemen were looking on and watching while this was going on. The bricks were piled up. Both of them (H. and F.) pushed me The hole is a very large one, deeper than my knees. I did not go down the whole time. There was a third young man; he left us; he left me against my own house. Both the prisoners undid their trousers. I did not hear anyone pass by. This occupied about half an hour. Mrs. Essex lives a long way from the bricks. I knew a Mrs. Stafford and Robert Sharp three and a-half years. He has been a sweetheart of mine. I have not said to Charlotte that I would not have said anything about it unless my mistress had seen the dirt on my back. My mistress saw the dirt on my back, and found fault with me for being so late. Mrs. Stafford said, "He has done nothing to you, don't go against "Harry." I said, "I won't if I can help it, he would have done wrong if he could." I have been familiar with Holmes and with Sharp. No connection has taken place between me and Sharp. I told Charlotte that I went to be examined, but they said it was no use, I ought to have been examined the same day.

Cross-examined by counsel for Furness:

I never had connection with any man whatever. On the same Sunday Charlotte asked me if I was in the family way. I did not tell Sharp that there was some yellow on my gown from the brick. Charlotte asked me if I was in the family way by Bob Sharp. I have seen Furness before; he has spoken to me two or three times. I did not know his name. I said to my mother Holmes and another young man. I was in their company from a quarter past eight till ten. I was not alone with Furness that evening. I screamed as loud as I could. Holmes had his arm on my mouth. I believe *two gentlemen* did go by; they could not see me. There was no lamp where I was. I was in the back kitchen at Holmes's on Wednesday week. Holmes said, "Sarah I am truly sorry for what I have done to you, will you ask your father to make it up before you go into court." Mrs. Stafford was present. I went there about nine. I drank beer with them. It was a wet evening.

Re-examined:

No man had ever done anything improper with me before. Mrs. Keightly is Sharp's sister. It was after this evening that Mrs. Keightly spoke to me; this was after the first hearing before the magistrate. She said, "Has Bob done anything to you?" I said, "No; he has not." I saw Sharp last Sunday week. He was in the public-house when I went to get some ale. He, Sharp, said, "I want to speak to you, I will come outside to you and leave my ale." I was going home, he said, "Sarah, I know no harm of you, I will take my oath of that. I will take off my coat and pawn it before I go against you. Do not go against Holmes. Make it up with him," I said, "I can't make it up, I must leave it to father." He said, "Don't go against him, he has no mother nor father." Mrs. Stafford said, "kiss Holmes," and I did, and shook hands with him. I saw a third man before I spoke to Holmes. When this took place no other man was present but Holmes and Furness. This took place in a street leading to South Lambeth-road. It led to Albert-square. It is a new street. There are houses on both sides of the way. The bricks were between the path and the houses. The pile was on the footpath. It led down as if you were going into the kitchen. The two men looking on seemed very respectable. They were on the other side of the road. I was not got into the hole.

Fanny Essex, 4, Blocke-terrace, South Lambeth-road:

Prosecutrix has been in my service five or six months. She was so in the month of September and is now. She has conducted herself in every way as I could expect. Her arms have been burnt previously to her coming into our service. Her hands are a little contracted. On the 5th Sept. I gave her leave to go to a tea party. She left about six and should have returned at nine, but did not till ten o'clock. I saw her as soon as she came in. Her things appeared to be in a disordered state. She was very confused. She appeared as if she had been crying. She made a complaint, and in consequence I sent for her mother. Her mother came in about half an hour, I was present when the girl saw her mother, she made a complaint, and a name was mentioned.

Cross-examined:

I complained to her about being late. There was a mark of dirt on her jacket. We had on one or two occasions to find fault with her for being long on errands.

Eliza Palmer, mother of prosecutrix:

I live at 24, Water-street. My daughter will be seventeen next April. On Tuesday, 5th April, I received a message. I went to the house of Miss Essex about half past ten, p.m. I saw my daughter. She made a complaint, and was crying bitterly. She mentioned a name—only one. She referred to another person.

Cross-examined:

I have known Holmes about twelve months. He is respectable decent young man. He has been friendly with us. I do not know that my daughter was six months ago keeping company with Sharp.

George Palmer, father of the prosecutrix:

Prosecutrix is my daughter. Before I was examined at the police court, I saw the two prisoners the evening before they were both together. Holmes said — Furness was present — "I am very sorry, Palmer, to have done what I have done; I hope you will try to make it up." I said "I do not know whether I can or not; I have left it in a gentleman's hands to carry the job through." Furness said, "I was with your daughter, Mr. Palmer, the evening before this occasion." Holmes said, "It is of no use your saying we were not there, for we were there." I never had to find fault with my daughter, except for playing in the street.

Cross-examined:

When I gave Holmes in charge, he said "I shall lose

my work." I once gave my daughter a smack on the head.

William Kempster, Div. W.:

On the 8th Sept. I took Holmes into custody. He was at Kennington-cross. I told him he was charged with indecently assaulting Sarah Palmer, at South Lambeth, on Tuesday, 5th Sept., with another one. He turned to the father, who was present, and said, "Palmer, can't we settle this? It will throw me out of my situation if I am locked up." Palmer said, "No, I shall charge him." I was present on the first examination on 8th Sept. Furness was not then in custody. There were four examinations. Furness was taken into custody on the 29th. He came to the police court on behalf of Holmes. I know the place where the alleged assault took place. The street leads from South Lambeth-road to Albert-square. It is about 200 yards to the square. Houses are being built. On the opposite side some houses are occupied, and some are empty. The street is twenty or thirty yards wide. There is a stack of bricks on the footpath close to where there is a hole. Prosecutrix told me she clung to the scaffold poles and the bricks.

For the defence, Louis Elizabeth Keightley:

My husband is a corporal in the Royal Artillery, and I live at 17, Spring-place, Wandsworth-road, South Lambeth, near the residence of Palmer, the father and mother. I do not know anything of Holmes and Furness. I have known prosecutrix. I never had much conversation with her till Sunday night subsequent to the first hearing. She stopped me in Spring-place, I spoke to her. She told me the young man had not had connection with her that night. She said she was two months gone in the family way. She said she should not have told her mistress if she had not seen her clothes disordered and dirt on her back; this was after the first hearing. I believe it was on 10th September.

Cross-examined:

Robert Sharp is my brother. He never told me she was his sweetheart. I was never intimate with her. I live in the same house with my brother. I did not know anything about this charge till she spoke to me about it. On Sunday night I went to the father and mother to know about it. I could not understand what the girl said or what she meant. I did not ask her any questions. She said she had been examined by two doctors. I never put any questions to her except how her mistress found it out. She told me she had been examined, but whether at her father's house or at the hospital I cannot say. I never saw Holmes.

Elizabeth Stafford, wife of George Stafford:

Holmes lodged in my house. On the 5th Sept. I first heard of this charge. On the 27th Sept. I met prosecutrix. We went into the Prince of Wales and had something to drink. I have seen Holmes and Furness together. Prosecutrix put her hand where she ought not. Prosecutrix said "He has not done anything to hurt me." I have seen her kiss him lots of times; she always kissed him first.

Cross-examined:

I saw her put her hand where she ought not in a passage as she was coming back. It was some few weeks ago, not many before this charge was made, only a small time before he was locked up; it was between eight and nine in the evening. There was a lamp on the kitchen mantelpiece which threw a light. He was going to kiss her, and she was going to kiss him. She threw her hand like this (showing how). I told Mrs. Tyler I had forgotten to mention before the magistrate about her putting her hand where she should not. Every one said I should have to mention it. I was only examined once. I was asked whether I had seen anything more; I said no.

Robert Sharp:

I am nineteen years old. Q. Have you ever had connection with Sarah Palmer?

Question objected to. Objection allowed.

Straight for the prisoners.—The authorities on this question are conflicting. The only defence *raised at the trial* was the consent of the prosecutrix to the alleged indecent assault. The evidence was material to the issue because it went to her credibility. The cases of *Rex* v. *Hodgson* (Russ. & Ry. 211), and *Reg.* v. *Cockroft* are decisions against the admissibility of evidence to contradict the prosecutrix; but *Rex* v. *Hodgson* was decided at a period when a more extensive protection was allowed to witnesses than now. In that case the prosecutrix was told she need not answer the question—whether she had had connection with a named man? on the ground that the answer might tend to criminate her, and she declined to answer, so that the question now raised did not arise. The question here is, the prosecutrix having denied having had connection with any other man whatever, can a man be called to contradict her, and prove that he has had connection with her? In this case the prosecutrix stands in a peculiar position in relation to the charge, and great latitude is allowed as to evidence affecting her general character. In *Reg.* v. *Eyre* (2 F. & F. 579) Byles J. held in a case of rape that not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, was receivable. So Martin B. in *Reg.* v. *Arnall* (6 Cox. C. C. 439) admitted on a trial for rape evidence of a conversation between two persons in relation to the charge made in the presence of the prosecutrix. The credibility of the prosecutrix is to a very great extent mixed up with the charge. The case of *Reg.* v. *Robins* (2 Moo. & Rob. 512) is a direct authority in favour of the admission of the evidence. In that case the prosecutrix denied having had connection with a man named. And Coleridge J., after consulting with Erskine J., said that neither he nor that learned judge had any doubt on the question, and that it was not immaterial to the question whether the prosecutrix had had this connection against her consent to show that she had permitted other men to have connection with her, which, on her cross-examination, she had denied. In *Rex* v. *Barker* (3 C. & P. 588), evidence of the general looseness of character of the prosecutrix was admitted, but Park J. doubted whether particular acts of intercourse could be proved. In *Rex* v. *Martin* (6 C. & P. 562) Williams J. allowed evidence to be given of the previous intercourse between the prosecutrix and one of the prisoners, but not between her and other men. In *Reg.* v. *Cockroft* the prosecutrix declined to answer the question whether she had had intercourse with other men, and so the question did not arise.

Oppenheim for the prosecution.—It is submitted that the proposed contradiction is not relative to the issue upon the indictment. Before the Common Law Procedure Act 1854, s. 24, the cross-examining counsel was bound by the answer of a witness to the question whether he had been convicted, but that section enables him to prove the fact by the production of the certificate of conviction in case the witness denies it. Evidence of a previous connection with the prisoner may be shown, but not with other men; for that is not relevant to the issue, as a rape may be committed on a prostitute. So, too, general evidence of lightness of character on the part of the prosecution is admissible. In *Rex* v. *Clarke* (2 Stark. Rep. 241) Holroyd, J. admitted evidence of the prosecutrix's loose character, but refused to allow evidence of particular acts.

Kelly, C. B.—The question in this case is of very great importance, and if we had entertained a substantial doubt upon it, we should have desired the case to be re-argued before all the judges: but,

to the principle of evidence and the authoon it, it seems impossible to entertain a doubt that the evidence tendered to conthe prosecutrix was inadmissible. On the an indictment for a rape, or an attempt to a rape, or for an indecent assault, which may amount to an attempt to commit a the prosecutrix is asked whether she has connection with some other man named, denies it, we are clearly of opinion that an cannot be called to contradict her. The principle is, that when a witness is exas to a collateral fact, the answer must be er better or worse, and he cannot be cond as to that by a third person. If the providence were receivable, the prosecutrix e cross-examined as to the whole history life, and one, ten, or even fifty persons e called to contradict her on various points vidence, and she be totally unprepared to e evidence of contradiction of any one . On principle, therefore, I am of opinion party cross-examining on such collateral ust be bound by the answers, otherwould lead to a multiplication of colsues, and would be attended with great ience and injustice to the prosecutrix. e authorities, the ground for the rejection idence is still stronger. *Rex* v. *Hodgson* ision that the prosecutrix is not bound er the question whether she has not had on with another man named, and that could not be called to show that she had connection. That case, which is a direct y, was confirmed by the twelve judges. re is the case of *Reg.* v. *Cockroft*, in which B. and Willes, J. distinctly held that the rix was not bound to answer such quesd that if she did, witnesses could not be contradict her answers. We are now pon to overrule those decisions, on the y of *Reg.* v. *Robins*, where Coleridge, J., sulting Erskine, J., admitted evidence to ct. With regard to *Rex* v. *Peake* the really amounted to this, that the prosecus the associate of common prostitutes, evidence of general loose character has n held to be admissible in cases of this and so in *Rex* v. *Martin*. Such evidence ect bearing on the issue of consent or non on the part of the prosecutrix. No doubt e originally a difference of opinion on this , but in the last case the evidence was in accordance with the decision of the dges in *Rex* v. *Hodgson*, and we have the pinion of Coleridge, J. to the contrary. t, therefore, declare our opinion that the was inadmissible.

J.—I am of the same opinion. The quesbether the prosecutrix, who denied having ection with a particular man, can be con by the man who is produced as a witswear that he had connection with her. ot a contradiction material to the issue, pe may be committed upon a common e. I have had the opportunity of conay brothers Willes and Keating, JJ. and of the same opinion as they have already on, that the evidence of contradiction is issible. If the evidence is inadmissible se of rape, *à fortiori* it is inadmissible in of an indecent assault.

PIGOTT, B.—I think that such evidence of contradiction is not relevant to the issue, and would lead to injustice in many cases if it were receivable. The prosecutrix would be taken by surprise, and unprepared to rebut it.

LUSH, J.—I am of the same opinion. For a time I was inclined to a different opinion, but now I am quite convinced that the judgment of the court is right, and that such evidence is too remote from the issue. The collateral issue has no bearing on the real one, whether or no the particular act complained of was done with the consent or against the will of the prosecutrix.

HANNEN, J.—I think there is no distinction between the cases of rape and indecent assault, so far as regards this question, the same reasoning is applicable to both. It may be regarded as a matter going to the general character of the prosecutrix; but still I think the issue of connection with a named person is inadmissible. It would be impossible for the prosecutrix to be prepared for such a contradiction, and the alleged intercourse might have been under similar circumstances to that under investigation.

Conviction affirmed.

V.C. MALINS' COURT.

Reported by G. I. F. COOKE, and T. H. CARSON, Esqrs., Barristers at-Law.

Nov. 13 *and* 14, 1871.

BRUTTON v. THE PARISH OF ST. GEORGE, HANOVER-SQUARE.

Metropolis Local Management Act—25 & 26 *Vict. c.* 102, *ss.* 75, 107—"*Line of buildings*"—*Order to pull down*—*Service on occupier or builder*—*Delay.*

The occupier of a house contracted with a builder for the erection of a conservatory over the portico. The framework was erected on the 24th Aug. 1869, *but the building was not finally completed until the 20th Sept. On the 26th Aug. the vestry of the parish in which the house was situate had notice of the erection of the building, and on the 4th March* 1870, *claiming to act under the Metropolis Local Management Act* (25 & 26 *Vict. c.* 102) *s.* 75, *they issued a summons, not to the occupier, but to the builder, to appear before the magistrate to show cause why the building should not be pulled down as constituting an offence within the Act. The builder having previously left the country did not appear, and an order was made for the demolition of the building. The* 107*th section of the Act requires that any complaint under the Act must be made within six months after the commission or discovery of the offence:*

Held, first, that the summons was too late, the offence having been committed on the 24th Aug., and discovered on the 26th; secondly, that it should have been served on the occupier and not on the builder, who was not "engaged in" the work within the meaning of the 75*th section.*

IN Aug. 1869, the plaintiff, William Courtenay Brutton, being the tenant and occupier of a house, No. 12, Queen-street, Mayfair, in the county of Middlesex, a corner house with a portico projecting into the street, entered into a contract with a builder named Rudkin to erect a conservatory upon the portico for the sum of 129*l.* The framework of the conservatory was erected on the 24th Aug.,

but the building was not actually finished until the 29th Sept. On the 25th Aug. a person connected with the vestry of St. George's, Hanover-square, called at the house, inspected the works, and took down the names and addresses of Rudkin and the plaintiff. The plaintiff then went to the clerk of the vestry, and stated that if they made any objection to the proposed erection on the ground of its being contrary to the provisions of the Metropolis Local Management Acts Amendment Act (25 & 26 Vict. c. 102) he should fight the question with them, and requested them to state their intentions before he proceeded further with the works. The vestry, however, made no communication whatever to the plaintiff before the following March.

Some time after the completion of the conservatory, the architect to the Metropolitan Board of Works sent in his certificate to the vestry, stating that the building extended beyond the "line of buildings," and was therefore an infringement of the Act.

On the 4th March 1870 the vestry took out a summons against Rudkin, who had in the meantime given up his business and gone away to Australia, requiring him to appear before the magistrate on the 11th March, to show cause why the conservatory should not be pulled down. A copy of the summons was left at Rudkin's former place of business, and was afterwards, on the 10th March, brought to the plaintiff by Rudkin's successor. The plaintiff immediately communicated with the solicitors of the vestry, stating that Rudkin could not be found, and at his request the hearing of the summons was adjourned. The summons was ultimately heard on the 22nd April, when the plaintiff attended, but the vestry objected to his appearing on the summons, as he was not served, and the plaintiff accordingly instructed counsel to appear for Rudkin. After hearing counsel, the magistrate himself inspected the premises, and intimated his opinion that the building created no nuisance, but was rather an ornament; but as the builder was technically wrong, he, at the instance of the vestry, made an order upon Rudkin to pull down the conservatory, but stated that he would willingly grant a case for the opinion of the Court of Queen's Bench as to the law upon the subject. There was, however, some delay in settling the case, and ultimately the magistrate signed the order, after which no case could be submitted to the Superior Court of law.

The plaintiff then having received notice from the defendants that they would proceed to demolish his conservatory on the 3rd Aug., on the 2nd Aug., filed the present bill, and on the 3rd obtained an interim injunction to restrain the demolition until the hearing.

The cause now came on for hearing. It appeared that the tenant of the house next to the plaintiff's, so far from complaining of the building, wrote him a letter expressing his approval of it.

The 75th section of the Metropolis Local Management Act, under which the vestry took the proceedings, enacts:

> That no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, . . such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate, to cause to be made a complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable; and shall also make an order for the payment of the costs incurred up to the time of hearing; and in default of the building or erection complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates, and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same, as they think fit; and all expenses incurred by the said vestry or board in carrying out the said order, and in disposal of the said materials, may be recovered by the said vestry or board from the owner or occupier of the said premises, or the builder or person engaged in the work, either by action at law or in a summary manner before a justice of the peace, at the option of the said vestry or board, in manner therein provided as to the recovery of penalties.

And by the 107th section it is enacted:

> That no person shall be liable for the payment of any penalty or forfeiture under the said recited Acts or this Act, or any bye-law made by virtue thereof, for any offence made cognizable before a justice, unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence.

Cottrell and *Hume Williams* (of the Common Law Bar) for the plaintiff.—The proceedings of the vestry have been altogether irregular. If the building constituted an offence within the meaning of the Act, which we deny, the complaint should have been made before the justice within six months after the commission of the offence. The offence was committed on the 24th Aug. 1869, when the framework was completed, and was discovered on the 25th or 26th, but the summons was not taken out until the 4th March, 1870. Again, the wrong person was served, for the occupier was the proper person to serve, and not the builder, who had finished the building and had gone away and been paid. The Act says that the notice must be given to the occupier, or *builder engaged*, that is, actually engaged at the time, not who had been engaged. The reason why the Act provides for service on the builder is, that while the building is in course of construction, he is at law presumed to be acting under the authority of the owner or occupier. The decision of the architect to the Board of Works as to what is the "line of buildings" is not conclusive. It was monstrous to make the order for demolition without giving the plaintiff, the person most affected, proper notice. Whether the building constituted an offence or not, it is now too late for the vestry to take fresh proceedings under the Act. They cited

Cooper v. *The Wandsworth Board of Works*, 14 C.B. N. S., 180; 8 L. T. Rep. N. S. 278;

Simpson v. *Smith*, L. Rep. 6 C. P. 87;

And the following Metropolitan Local Management Acts:

18 & 19 Vict. c. 120, s. 220;

18 & 19 Vict. c. 122, ss. 38, 39, 45, 105;
25 & 26 Vict. c. 102, ss. 75, 107.

Schomberg, Q.C. and *Streeten* (of the Common Law Bar), for the defendants.—The vestry had the power of proceeding either against the owner, occupier, or builder, as they chose to select, and in serving the notice on the builder they were perfectly regular. The six months required by the Act did not commence to run until the actual completion of the building on the 20th Sept. 1869; therefore, the notice of the 4th March was not too late. The vestry could not have proceeded until they had received the report of the architect to the Board of Works. The plaintiff commenced erecting this building without complying with the provisions of the Acts of Parliament, and therefore cannot now ask for relief. The "line of buildings" as fixed by the architect must be taken as correct. They cited

Bauman v. *The Vestry of St. Pancras*, L. Rep. 2 Q. B. 528;

Biddulph v. *The Vestry of St. George, Hanover-square*, 8 L. T. Rep. N. S. 558; 33 L. J., N. S., 411, Ch.;

St. George, Hanover-square v. *Sparrow*, 16 C. B., N.S., 209; 33 L. J., N. S., 118, M. C.; 10 L. T. Rep. N. S. 504;

The VICE-CHANCELLOR said that it was a fair question which was the front line of the houses in the street, but that in his view the portico must be taken as the front line. At all events, the plaintiff was justified in contesting the question with the vestry, and if they intended to persist in their objection to the erection of the conservatory, their proper course would have been to have given the plaintiff notice to that effect as soon as they discovered what was being done, instead of waiting till the work had been completed. It was clear that the offence, if offence it was, commenced on the 24th Aug., when the framework of the conservatory was erected, and it was admitted that the summons might have been taken out that evening, or on the morning of the 25th. The six months allowed by the Act then began to run on the 24th, the day when the offence was committed, and expired on the 24th Feb. following. At all events, the vestry were aware of the offence on the 26th Aug., and was it to be said that they were entitled to lie by until the 4th March 1870, and allow the offence to be committed without taking steps to prevent it? On the 4th March 1870 they took out a summons, not against the occupier, but against Rudkin, who had finished the work and gone away to Australia, and they left the notice at his place of business, it being his place of business no longer, and, but for the accidental circumstance of a workman sending the notice to the plaintiff, the farce would have been gone through on the 10th March of making an order upon Rudkin in Australia to pull down part of Brutton's house in London, and it might have been pulled down by the parish officers without any previous notice whatever to the occupier. It was most remarkable that such an absurd proceeding should have been possible. The question now to be decided was, had the vestry acted within the powers of the Metropolis Local Management Act? It was true that it was for the public benefit that the uniformity of streets should be maintained, and persons who infringed upon the provisions of the law for that purpose ought no doubt to be brought to justice; but when such large powers were possessed by a public body, it was most important that they should be reasonably and rationally exercised, and that the parties affected thereby should have an opportunity of being heard. Now the vestry contended that they were right in serving the notice upon the builder, and that his liability continued for six months after the completion of the work. The case turned on the 75th section of the Act, which said, that the notice was to be served upon the "owner or occupier of the premises, or the builder, or person engaged in" the work. What was the meaning of that section? Rudkin, the builder, was not the "person engaged in" the work. He had gone away and been paid, and had no further connection with the building. Nothing could be more absurd than that the vestry should think that serving the notice on Rudkin was equivalent to serving it on the occupier. There could be no doubt whatever that where there was a known occupier, he was the person to be applied to, but if the occupier was not known, then the notice was to be served upon the builder actually engaged in the work, not upon a builder who had some time before been engaged in the work. The builder while engaged in the work was the agent of the occupier, and had an interest in it, but directly he had completed his work and gone away, what interest had he? He was therefore of opinion that the notice of the 4th March was a void notice altogether. Nothing could be more irrational than the conduct of the vestry in thinking that a notice on Rudkin, who had no interest in the question, was a sufficient notice on the plaintiff; and there was no body of rational men in the world who would not have shuddered at the idea of destroying the property of one man by a notice served upon another, whose interest in the property had altogether ceased. He therefore decided that the notice to Rudkin was a nullity. It was said by way of excuse for the delay that no proceedings could be taken before the architect of the Metropolitan Board of Works had made his report, but he was of opinion that the vestry were not bound to wait for his report. First, then, he decided that the offence commenced on the 24th Aug. 1869; secondly, that the notice on Rudkin was a mere nullity, he being the wrong man to serve. The next question then was, were the proceedings taken in due time? The 107th section of the Act directed that the complaint should be made within six months after the commission or discovery of the offence. But the summons was not taken out until after the six months had expired. That summons was therefore too late, and a nullity also. The Act provided only one way of proceeding—namely, by summons; personal remonstrance would not do; letters would not do; it must be by summons, and the summons here was too late. It was not pretended that this conservatory was calculated to injure a single human being. The only person who could have been annoyed by it was the plaintiff's next door neighbour, who, so far from saying that it was a nuisance, said that he thought it an improvement. Under these circumstances, what excuse was there for these parish officers? In spite of all the remonstrances of the plaintiff and his solicitor, they made this order for the demolition of this conservatory, and the plaintiff's only remedy was to come to this court, otherwise they would undoubtedly have demolished it. The plaintiff had done perfectly right in appealing to this court for protection, and the parish officers had been irrational,

unreasonable, and wrong in every step they had taken in the matter. If the building erected by the plaintiff was not lawful from the commencement, time had made it lawful, and the plaintiff had established his right to a perpetual injunction from interfering with it, as prayed by the bill, and the defendants must pay the costs of the suit.

Solicitor for the plaintiff, *Boydell.*

Solicitors for the defendants, *Capron, Dalton,* and *Hitchins.*

V.C. WICKENS' COURT.

Reported by EDWARD WIBLOW, Esq., Barrister-at-Law.

Thursday, Jan. 11, 1872.

Re THE ENDOWMENT CALLED THE MEYRICK FUND; *Re* THE ENDOWED SCHOOLS ACT 1869; *Re* THE CHARITABLE TRUSTS ACT 1853.

Endowed Schools Act 1869 (32 & 33 *Vict. c.* 56)—*Educational endowment — University exhibitions — "Meyrick's Fund"—Motion to enforce information as to—Jurisdiction of commissioner.*

A. by his will, in 1712, *after bequeathing a certain portion of his property to trustees to provide annual exhibitions for scholars of Jesus College, Oxford, to be selected from the principality of Wales, and to be resident at the college, left the residue of his estate for the purchase of advowsons to be held by the exhibitioners, and to which the governing body of the college were to have the right of presentation. The exhibitions were provided for, and the residue of the estate had been applied by the governing body of the college in the purchase of livings which were held by former exhibitioners.*

Held, that the Endowed Schools Commissioners had, for the purposes of a scheme, power under the Endowed Schools Act 1869, *to call upon the college to furnish information as to the endowment.*

THIS was a motion on behalf of the Endowed Schools Commissioners that the bursar of Jesus College, Oxford, being the person having the actual possession or control of the documents concerning the above endowment, or the property thereof, might be committed for contempt of court, as after mentioned, and that a suit of sequestration might be ordered to issue against the property and effects of the principal, fellows, and scholars of the said college, as being the corporate body acting or concerned in the administration of the said endowment, its property and income, and in receipt and payment of the moneys thereof, and being the depositories of the funds of the same, for a like contempt, such contempt consisting in the refusal of the said bursar and of the said principal, fellows, and scholars of the said college, to comply with requisitions made to them by the said commissioners, under the authority of the above Acts, to render certain accounts and statements, and answers to inquiries relating to the said endowment, and the property and income thereof. The facts of the case were these:—

The Rev. Edmund Meyrick, by his will dated the 25th March 1712, after stating that he had always intended to bestow a good part of what God should please to bless him withal, for the encouragement of learning in Jesus College, Oxford, and for the better maintenance of six of the junior scholars who were scholars of the foundation of the college out of the six counties of North Wales, gave and devised and bequeathed a certain portion of his estate to trustees, in trust to give to each of the said scholars the annual sum of 10*l.* during his residence in the college. The testator then proceeded to make a provision for the maintenance and settlement of six exhibitioners in the college, who were to be natives of the six counties of North Wales, giving a preference to his own kindred, and to each of these he directed his trustees to give the annual sum of 8*l.* during his residence in the college. And the testator gave and devised the residue of his estate to his trustees in trust for purchasing advowsons to be held by the said exhibitioners and scholars, and to which the principal and fellows of the said college were to present; and he appointed the Bishop of Hereford, Dr. Jonathan Edwards, then principal of Jesus College, Dr. H. S. Scannon, and Dr. J. Wynn, trustees of his will.

After the testator's death the sums bequeathed to the scholars and exhibitioners were regularly paid, and the residue of the estate, amounting to about £900 a year, and which was called the Meyrick fund, was applied by the governing body of the college in the purchase of livings, which were presented to former scholars and exhibitioners.

Shortly after the Endowed Schools Act 1869, came into operation, the commissioners called upon the principal, bursar, and fellows of the college to answer the following requisitions in reference to the fund. (a) An account of the property belonging to the endowment. (b) An account of the receipts and expenditure for the four years ending the 31st Dec. 1870. (c) A list of the persons holding exhibitions under the foundation. (d) A list of the trustees in whom any portion of the endowment is legally vested. (e) A list of the managing trustees, if different from those who now hold the property. (f) A statement of the scheme, statutes, or ordinances, which now govern the endowment. The authorities of the college, however, considering that the endowment was not within the meaning of the Endowed Schools Act, declined to answer the requisitions.

Thereupon these proceedings were taken, under the 49th sect. of the Endowed Schools Act, which gives to the commissioners the same powers of demanding information as are given to the Charity Commissioners by the 16 & 17 Vict. c. 137 s. 11 and by 8 & 9 Vict. c. 124, ss. 6 and 9, and under which last clause the penalty for refusing information is the liability to be committed for contempt of court. The arguments mainly turned upon the construction of the 5th section, and the 4th clause of the 14th section of the Act of 1869. The 5th section defines an "educational endowment" as "an endowment, or any part of an endowment which, or the income whereof, has been made applicable, or is applied for the purposes of education at a school of boys and girls, or either of them, or of exhibitions tenable at a school or university, or elsewhere." The 4th clause of the 14th section provides that nothing in the Act shall authorise the making of any scheme interfering with the constitution of the governing body of any school, or with any exhibition (other than one restricted to any school or schools, or district), forming part of the foundation of any college in Oxford or Cambridge, unless the college assent to the scheme." By the interpretation clause the term "exhibition" is

d as meaning any exhibition, scholarship, or like emolument.

motion, though formally for a committal or sequestration, was stated to be brought the court merely to try the question of any intention of asking for the enforcement penalties being expressly disclaimed at the

Roundell Palmer, Q.C., and *Lindley* for the n contended that upon the construction of ct the commissioners were entitled to the dis- they sought. The Meyrick Fund was an tional endowment, tenable at a university the meaning of the 5th section of the ved Schools Act. The mere fact of its being l in trustees did not affect the question. er, even if the commissioners had no power ke a scheme operative without the assent of llege they were entitled to the discovery ought, in order to enable them to frame a scheme, to be submitted to the college eir approval.

orne Morgan, Q.C. and *Greenside*, for the e, argued that there was great doubt whether nd could in any sense be considered an en- ent; but, even if it were, its objects, though tional, could hardly be called scholastic. The ved Schools Act was intended to apply to s, not to the Universities, or to such endow- as the present. The mischief that the Act tended to remedy was that, before the passing there were large endowments founded for nefit of schools, but which had been scanda- misappropriated. If the Act could be held ly to University endowments, the commis- s might remodel and reconstitute the Ireland, rd, and Craven scholarships, or interfere to xtent with the property of the different col- This was clearly not the intention of the Further, it could not be said that the princi- of Wales was a district within its meaning. x counties to which the scholarships referred tuted the old and independent principality les, and unless the court was prepared to England, Scotland, and Ireland to be each ts, the term could not be properly applied to

VICE-CHANCELLOR.—It is argued on behalf commissioners in this case that the Endowed ls Commissioners have the power of making eme with regard to this fund, and if they hey are entitled to the discovery which they It has been further argued that even if they o power to make a scheme operative without sent of the college, still they are entitled to scovery, which would enable them to frame t scheme for the purpose of seeing whether llege would concur in it or not. In the view I take of the first point it is not necessary to decide the latter. It is also unnecessary ide whether this fund is or is not a part of undation of Jesus College—a point which to me of considerable doubt. I prefer to the case upon a broader ground. Mr. ne Morgan may or may not be justified in that even if this case is within the Endowed ls Act, it is so by inadvertence and not in- nally. If the words of the Act, on a fair con- ion, clearly bring the fund within the jurisdic- f the commissioners, I must give them effect. may suggest that nothing could be more mable to the apparent intention of the Act than that in a case where, for example's sake, an endowed school existed in a particular parish, and exhibitions were founded for the use of the parishioners, whether connected or not with the school, that the commissioners should have power to deal with both together. However, I think if the 5th and 14th sections of the Act receive their natural construction, the words cover the point. Universities being expressly referred to in those sections, it is said that the Act refers to districts, and that the principality of Wales is not a district; but it is quite as much so as the counties of Durham, York, or Middlesex, although perhaps the Act contemplated much smaller districts. It is also said that the commissioners might make a scheme, which will not be a proper one, having regard to the nature and origin of the fund; but, if that is so, there is a remedy. Upon the whole, I hold that the commissioners have the jurisdiction which they claim, and that, therefore, they are entitled to the discovery which they seek to obtain. The motion must be allowed with costs.

Solicitors, *Farrer, Ouvry* and *Co.; Frederick Clarke.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-law.

Saturday, Nov. 18, 1871.

THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION (LIMITED) (apps.) *v.* THE ASSESSMENT COMMISSIONERS OF ST. GEORGE'S UNION (resps).

Tenements structurally divided—Control of outer door—Kind of tenancy—Rateability.

The appellants were owners of the Westminster Chambers, consisting of seven blocks of building, each with an entrance door and a staircase. They contained altogether 117 *sets of rooms, structurally divided, each with an outer door on to the staircase, and having no other communication with each other. The street door to each block was kept locked at night, and a porter, who was hired by the appellants, resided in each block, and had a key of and access to all the sets of rooms in the building for the purpose of a general superintendence, and as the servant of the occupiers. The form of agreement between the appellants and occupiers, contained the usual clauses in the lease of a separate house—such as power to the landlord to enter and paint, and to enter and see repairs carried out, &c.:*

Held, that each set of rooms ought to be separately placed upon the valuation list of the parish, and each occupier separately rated to the relief of the poor.

SPECIAL case stated for the opinion of the Court of Queen's Bench, pursuant to an order of the Court of General Assessment Sessions, holden under and by virtue of the Valuation (Metropolis) Act 1869, at the Guildhall, Westminster, on the 4th March 1871.

The Mutual Tontine Westminster Chambers Association (Limited), hereinafter called the appellants, had objected before the assessment committee of the St. George's Union to the valuation of certain buildings, known as and hereafter called "The Westminster Chambers," as made in the valuation list of the parish of St. Margaret and St. John, Westminster, of which the ap-

pellants were the owners; and being aggrieved by the decision of the said assessment committee thereon, they duly appealed against the same to the Court of General Assessment Sessions, on the ground (amongst others) that the Westminster Chambers were erroneously assessed in the said valuation list as 117 hereditaments, and should have been assessed as seven hereditaments only.

The Westminster Chambers consist of seven blocks of building, having seven principal entrances. Each of these blocks is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance. These blocks of buildings are structurally divided into one hundred and seventeen different suites or sets of rooms, which are quite distinct from each other, like chambers in the inns of court, and are in some instances let and occupied, and are in every instance capable of being let and occupied separately as residences or offices; each suite or set of rooms has an outer door, opening on to one of the said internal staircases, and also an inner private hall or passage, a water-closet, and a lavatory. There is no means of communication between these suites or sets of rooms except the said internal staircases.

The form of agreement hereafter set out, with the memorandum and schedule, shows the terms upon which the rooms are let, and such agreement is to be taken as forming part of this case.

The outer or street door to each block of building is kept locked at night, and a porter, who is hired by the appellants, resides in a distinct set of rooms in the basement of each block of building, and has a key of and access to the suites or sets of rooms in such building, for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he is in some cases employed and paid for looking after the rooms.

The Westminster Improvement Act, 1853 (16 & 17 Vict. c. 176), s. 69, applies to the appellants, and enacts:—

That where any house erected on land of the commissioners shall be occupied, or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors or assigns, may, if they shall think fit so to do, demise or sell any set of apartments separately from the rest of the said house.

The appellants provide gas for the staircases and passages, and water for the entire buildings, and pay all rates and taxes in respect thereof, charging their tenants higher rents in consequence.

Upon the same facts, the commissioners of assessed taxes had, under the 48 Geo. 3, c. 55, stated a case for the opinion of her Majesty's judges, as to whether the assessment of the Westminster Chambers to the house duty should be on seven blocks of building, or on each suite or set of rooms, as distinct properties, according to the 14th Rule of Schedule B of that Act; and the judges had decided that the Westminster Chambers should be assessed in seven blocks.

The appellants contended that the Westminster Chambers ought to be assessed in the said valuation list as seven hereditaments only, relying on the decision of the judges above mentioned. The respondents contended that that decision had no bearing on this case, and that the Westminster Chambers were correctly assessed in the said valuation list, by treating each of the said suites or sets of rooms as a rateable hereditament.

The Court of General Assessment Sessions decided that the Westminster Chambers ought to be assessed as seven hereditaments, and ordered that the said valuation list be altered, by striking out the separate valuation of each suite or set of rooms, and inserting in lieu thereof a separate valuation of each of the said seven blocks of building, subject, nevertheless, to a case for the opinion of the Court of Queen's Bench, on the question whether the Westminster Chambers ought to be separately valued in the said valuation list in suites or sets of rooms, as distinct, separate, rateable hereditaments, or in seven blocks of building.

The said court further ordered that the question of value be heard and determined after the decision of the case by the Court of Queen's Bench, and that the costs of the appeal remain subject to the order of the Court of General Assessment Sessions.

If the court is of opinion that the decision of the sessions is right, the valuation list is to be amended accordingly, otherwise to remain as approved of by the assessment committee; in either case subject to the decision of the sessions on the question of value, and the costs of the appeal.

The following is the form of agreement before alluded to:—

An agreement made and entered into the day of 18 between the Mutual Tontine Westminster Chambers Association (Limited), by George Sands Sidney, their secretary, hereinafter called the lessors of the one part, and hereinafter called the lessee of the other part. The lessors hereby let, and the lessee hereby takes, all that rooms numbered and being on the floor of the building, and numbered of the chambers belonging to the association, called the Westminster Chambers, situate in Victoria-street, in the city of Westminster, together with the use of the water closet and washing closet attached thereto, and also the use in common with other tenants of the entrance hall, and stairs, and lift leading to the same premises, for the term of year from the day of 18 , and so on from quarter to quarter, but determinable at the end of the first quarter, or of any subsequent quarter, by either of the parties giving to the other of them three calendar months previous notice in writing for that purpose, and under the quarterly rent of *l.*, payable on the usual quarter days, free from all deductions whatsoever, the lessors hereby agreeing to pay all taxes, rates, assessments, and impositions, parliamentary, parochial, or otherwise, charged or to be charged on the premises, but if the premises shall be rendered uninhabitable by fire not originating therein, and not occasioned by the lessee, his executors, administrators, or assigns, or his or their servants, the rent shall be suspended until the premises are rendered habitable. And the lessors and lessee hereby mutually agree, &c.

Then came the usual agreements in the lease of a house, and at the end was added—

Memorandum.—The premises are taken by the lessee, subject to the regulations made by the lessors with respect to the duties of the porter, the supply of coal, and other matters for the general convenience of the tenants. These regulations are set forth in the schedule to this agreement, and are to be considered as forming part. The lessors, however, reserve to themselves the right of altering and modifying these regulations from time to time, as the convenience of the tenants or other circumstances may render desirable.

In the schedule referred to were—

THE REGULATIONS.

Memorandum of regulations made by the directors in respect of supply of coals, cleaning rooms, &c.

There are seven entrances to the building, and the care of each entrance, and the rooms connected therewith, will be in the charge of a resident porter, appointed and removable by the directors. There are duplicate keys to the outer door of every set of chambers, one of which is to be always in the hands of the porter, the other in the case of the tenant, while the rooms are in use. The tenants have

the right, free of charge, to the general services of the porter, within the scope of his general duties, as hereinbefore defined. Tenants have the right to the special services of the porter, as hereinafter defined, upon the terms hereinafter mentioned. Coals are supplied by the directors at a charge of 3½d. per measure of 900 cubic inches, and wood at 1d. for each fire lighted, and gas is brought to the entrance of each set of rooms, and may be laid on by the tenants at their own expense, if desired. Tenants are not allowed to have stores of coals in their rooms. The general duties of the porter, and which are to be performed free of charge to the tenants, are as follows:—To be constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant. To cleanse every morning, before nine o'clock, A.M., the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein. To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving for the night. To attend to the regular and proper supply of coals to the several apartments. The special services of the porter which he is bound to render to the several tenants, if required, at a charge of 1s. 6d. per week for each room, comprise the cleansing and arrangement of each such room, and the lighting of the several fires, whenever required. Any extra services required of the porter by the tenant, and which are not inconsistant with his general duties, are to be the subjects of special arrangement. Any services, whether special or extra, so rendered by the porter, will be rendered as the servant of the tenant, and for which, or the consequences thereof, the association will not be responsible.

Poland argued for the appellants that the respondents were wrong, and the Court of General Assessment Sessions were right. The general superintendence of the chambers, reserved by the appellants through the porter of each block, renders the occupation that of mere lodgers, who ought not to be separately assessed to the relief of the poor. By the registration cases which have been decided under the different Acts concerning the representation of the people, the test for separate rating has been not the structural severance of the tenement only, but also the reservation by the landlord of the control of the outer door:—

Hewetts v. *Booth*, 15 C. B., N. S., 500;
Pitt v. *Smedley*, 7 M. & G. 85.

Manisty, Q. C. and *Streeten* appeared for the respondents, but were not heard.

COCKBURN, C. J.—There is no occasion to call upon the other side. The case is a very clear one. There can be no doubt that each occupier of the hundred and seventeen sets is separately rateable to the relief of the poor, and consequently there should be a valuation of each in the assessment list. The alteration in the original list by the Court of General Assessment Sessions, was, therefore, an error, and must be set right. The question in these cases always is, whether the occupier has a distinct and separate habitation, or is a mere inmate with the landlord. Sometimes it is not easy to say which he is, but one of the tests adopted is whether the landlord reserves to himself the control of the outer door, so that although liable, perhaps, upon the contract between them, yet the tenant cannot maintain trespass against the landlord for entering his rooms. Here, I conceive, in accordance with that rule, these occupiers would have been mere inmates if the appellants had reserved the control of the outer door of each block of buildings. To decide whether they have done so, I look at the agreement between them and the occupiers. I find in the agreement all the characteristics of a lease, and in the clauses all the provisions of a tenancy under a lease. The landlord has no right to enter the premises which are to be occupied by the tenant. There is to be a porter in each block appointed by the appellants, but he is only for the convenience of the inhabitants, not to secure for the landlord a control over the rooms, or a right to enter them. It is stipulated that the porter may take care of the keys in the absence of the occupiers, but he is bound, as their servant, to give them up when asked for them. There is nothing in the agreement to prevent a man from going out and taking his key in his pocket. It seems, therefore, to be a plain case, for the agreement fails to show such a control over the outer door in the landlord, as to enable him to exclude the tenant from entering without being liable for trespass.

BLACKBURN, J.—I am of the same opinion. In this case it is the duty of the overseers of every parish to make a valuation list of their parish, and it is the duty of the assessment committee to revise the valuation lists, in accordance with the statutes. If, therefore, each set of these rooms is liable to the poor rate, and each occupier is rateable, the committee ought to put each set in the list. No doubt, in point of law, a landlord may agree to let a portion of his house upon any terms he pleases, but the rateability of the tenant must depend upon the agreement containing the terms of the tenancy, if there be one, or upon the facts concerning his occupation, if there be no agreement. I think it will be found that all these registration cases come to this,—when there is no demise in writing, it becomes of importance to consider the control of the outer door; but when there is a lease or an agreement before the court, from which the nature of the tenancy may be gathered, it is not of so much consequence what control the landlord has over the door. In the case of *Reg.* v. *Smith* (30 L. J. 74, M. C.; 2 L. T. Rep. N. S. 437), the question was whether the appellant had exclusive occupation of the whole of his house, and the ground upon which the judgment of Hill, J. and myself was given in favour of the exclusive occupation, was the substance of the agreement, by which we considered that the appellant had retained possession of all the rooms, although he had agreed to allow another person to have the occupation of some of them. The substance of the agreement was, too, the ground of our decision in *Roads* v. *Trumpington* (L. Rep. 6 Q. B. 56; 23 L. T. Rep. N. S. 821). Now, look at this agreement, and say whether it can be maintained that the lessor did not intend to part with the control of the various rooms to the occupiers. It seems to me that such an assertion would be monstrous. It is clear that each tenant has the exclusive occupation of his rooms, and ought to be rated separately. It is suggested in the case that our decision in this way is opposed to that of the judges who have decided concerning these same premises with respect to the inhabited house duty; but there each tenement must be a distinct property, and that point is of no authority with regard to the present question.

MELLOR, J.—I am entirely of the same opinion. The stipulations of this agreement are ordinarily found in the lease of a house, about which there is no doubt of its distinct rateability. The usual powers of re-entry contained in it would be unnecessary if Mr. Poland's contention were right. All the clauses go to show a separate tenancy, and

it is a mistake to say that the porter is in any way the representative of the appellants; he is provided by them, but that is an arrangement for the convenience of the tenants. There is no duty upon his part inconsistent with the separate and distinct tenancy of each of the occupiers. They can employ him in any way they like. There may be nice points as to the amount of control a landlord has over the outer door, but upon this agreement there can be no doubt the occupiers should be rated separately.

Judgment for the respondents.

Attorneys for appellants, *Burchells.*

Attorneys for respondents, *Capron*, *Dalton*, and *Hitchins.*

Nov. 8 *and Dec.* 16, 1871.

THE VESTRY AND PARISH OF ST. MARY, NEWINGTON (apps.) *v.* JACOBS (resp.)

Right of owner of land dedicated to public use—Highway—Access to property—Highway Act (5 *&* 6 *Will.* 4 *c.* 50) *s.* 72—*Metropolis Local Management Act*) 18 *&* 19 *Vict. c.* 120) *ss.* 96, 98.

The owner of land, who dedicates a portion of it to public use as a highway, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the public of a part of the street to one kind of passage, and of another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public.

The provisions of the Highway Acts and the Metrolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner.

Where, on a summons against the respondent under the Highway Act for doing damage to a highway, it appeared that the respondent, the owner and occupier of premises adjoining a public highway, used the premises for the deposit of heavy machinery, which he conveyed to and from the premises across the flagged pavement or footway in front of them, in trolleys or waggons which injured the pavement, and it was found by the magistrate that the premises in question could not be reasonably enjoyed without access across the footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare, it was

Held that the magistrate was not bound to convict, and was justified in dismissing the summons.

THIS was a case stated by one of the metropolitan police magistrates under 20 & 21 Vict. c. 43.

The appellants are the vestry of the parish of St. Mary, Newington, to whom, by sect. 96 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), the powers and duties of surveyors of highways and the property vested in such surveyors are transferred.

The respondent is the occupier of premises abutting towards the west on a highway in the parish called Newington Causeway, such highway consisting of a foot pavement and a roadway. *The respondent's* premises also abut on Tiverton-*street, in the east,* and part of them are arches, *over which is the* London, Chatham, and Dover Railway. Adjoining the pavement is the dead wall of the railway arches, extending about 60ft. along the pavement.

This respondent is the tenant of the railway company, and is, for the purposes of this case, to be treated as standing in the position of the railway company, the freeholders.

The footway of Newington Causeway is a flagged pavement, about 27ft. wide, and extending from King's place to the corner of the New Kent-road, having on that (the east) side only four roads or carriage ways intersecting it—namely, at Rockingham-street, at Mead's-place, the entrance to the Surrey Sessions House, and at Horsemonger-lane—all narrow ways. On the west side of the road, facing Newington Causeway, are many crossings and carriage ways; and that side is in the parish of St. George the Martyr, Southwark, and its use as a highway is not nearly so ancient as that of the east side. The Causeway was originally a foot and bridle way. Until the year 1865, when the London, Chatham, and Dover Railway was formed, under parliamentary powers, from Ludgate-hill to Victoria, there was one continuous and unbroken line of shops from Rockingham-street to the entrance of the Surrey Sessions-house, such shops being used for the display of goods. Within that distance there was no break of flag pavement, and no road for carriages and horses across it, there being no premises to which such access was required. The pavement for some length of time has been a promenade for the south side of London, and the keepers of shops abutting upon it, have paid higher rates and rents, in consequence of the very large number of purchasers frequenting it on foot.

For sixty years and upwards the inhabitants of St. Mary, Newington, wishing to have access to these premises across a footway, have always applied to the highway board, and, since that board has been abolished, to the vestry, for permission to do so, and there is no instance of a refusal recorded in the parish books, although there are entries of such concessions upon terms.

The respondent became the tenant of the railway company in June 1870, and subsequently by deed dated the 31st Sept. 1870, of the premises in question, which consist of a yard, building, and railway arches, with a gateway opening on to the pavement. In consequence of the railway arches and wall the premises are unfit for dwelling-houses, and they are used by the respondent as a deposit for new and second-hand machinery, engines, boilers, and other implements of the heaviest description, some single pieces weighing as much as seven or eight tons. Sometimes four, five, or six horses, have been required to draw in the carriage or trolleys on which such pieces were placed, and it was impossible to turn a team of horses of that length from Tiverton-street into the premises of the respondent, so that practically the only access for such goods to his premises was across the pavement of Newington Causeway. At first, the respondent, instead of using horses for the purpose, unloaded from the carriage or trolleys in the roadway at Newington Causeway, and by the aid of rollers and levers slowly moved the huge machinery, &c., across the pavement into his premises. This occupied much time and caused an obstruction of the pavement which was alleged to be a nuisance, and was the subject of complaint

by the shopkeepers aforesaid as injurious to their trade.

In the month of June 1870, the respondent applied in writing to the appellants for leave at his own expense to take up the flag pavement in front of his gate, and to lay down paving stones, so as to form a carriage entrance from the roadway to his premises on the same level as the present flagged footway. The application was fully considered and discussed, and by a vote of the majority of the vestry was refused.

It was proved that in the months of Nov. and Dec. 1870, the respondent proceeded to drive carriages or trolleys laden with machinery across the pavement, and that by reason of the extraordinary weight of the machinery, &c., the flags became broken and crushed, and damage had thereby been done to the pavement to the amount of 3*l.* 12*s.* A demand of payment was made by the vestry clerk, and refused by the respondent. The respondent was then summoned, under 5 & 6 Will. 4, c. 50, s. 72, for causing injury or damage to be done to the highway.

It was contended on the part of the respondent that he was entitled to take goods into his yard or premises, and that to do this he must cross the pavement with them; that it occupied less time and far less obstructed the traffic if he drew them across upon wheels and with horses; that the damage was not wilful, but a necessary result of the refusal of the board to permit him to replace the flags with hard materials, and that therefore he was not responsible under the summons.

On the part of the appellants this contention was traversed, and it was contended that there had been a special dedication by all the adjoining owners of land of this pavement as a pavement for foot passengers only, and that as it had been acquiesced in for more than sixty years all antagonistic rights of user had been forfeited and foregone by each individual freeholder; that the public had by undisturbed user for more than sixty years acquired an indefeasible right to have the pavement used as a footway only, and it was not competent for the London, Chatham, and Dover Railway Company to let the land for the purposes in question, as it would create a public nuisance, and was in contravention of their statutory obligation requiring them to keep on one side of their line eight feet at least uncovered and unbuilt upon, and that the London, Chatham, and Dover Railway could not so use the land themselves.

The opinion of the police magistrate was that the injury or damage was not wilfully done to the highway, that the freehold property in question could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and of the public might be jointly exercised there quite consistently with the general welfare; and the magistrate dismissed the summons.

The question for the court was whether the magistrate was right in dismissing the summons. If he ought to have convicted the respondent the case was to be remitted to him to adjudicate upon.

Manisty, Q. C. (with him *E. Clarke*), for the appellants.—The case finds a dedication of the highway to the public, and no user can be permitted or is lawful which is inconsistent with that dedication. The dragging across this footway of heavily laden waggons, which injured the pavement, is inconsistent with a dedication of this pavement as a public footway. *As to the* respondent's contention that the damage done to the pavement was not wilful, but was a necessary result of the refusal of the board to permit him to replace the flags with hard material, it is enough to answer that the word "wilful" does not occur in the 72nd section of the Highway Act in connection with injuries or damages done to highways, but only in regard to riding upon any footpath or causeway.

Metcalfe (with him *R. Browne*) for the respondent.—No doubt it is not necessary to show that the act of the respondent was done wilfully, but it must be shown that it was unlawful. But the respondent had a right to make the use he did of the footway, for such user was not inconsistent with the dedication of the highway to the public. The magistrate finds expressly that the respondents' property could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and of the public might be jointly exercised there quite consistently with the general welfare. There was practically no other access to the premises than across this footway; and provided the respondent did not keep his trolleys an unreasonably long time on the footway he does not commit any offence. "A cart or waggon," says Lord Ellenborough, C. J., in *R.* v. *Jones* (3 Camp. 231), "may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house: the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." So in *Rex* v. *Cross* (3 Camp. 227) the same learned judge says, "a stage coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time." *Reg.* v. *Longton Gas Company* (2 E. & E. 651) was also referred to.

Manisty, Q. C. in reply.

Cur adv. vult.

Dec. 11.—The judgment of the court (Cockburn, C.J., Mellor and Hannen, JJ.), was now delivered by

MELLOR, J.—In this case the question submitted to us by the magistrate is whether, upon the facts stated and found by him, he ought to have convicted the respondent. We consider the question to mean, Was he bound to convict the respondent? We are of opinion that he was not so bound, and that he therefore was justified in dismissing the summons. The appellants are the vestry of St. Mary, Newington, who, under the provision of the Metropolitan Local Management Act (18 & 19 Vict. c. 120), exercise the functions of surveyors of highways and are, by sect. 98 of that Act, enabled from time to time to cause the streets within their district to be paved and repaired, and to cause the ground or soil thereof to be raised and lowered. The vestry, as surveyors of the highways, complained of the acts of the respondents as falling within section 72 of the 5 & 6 Will. 4, c. 50, by "causing injury or damage to be done" to the highway termed Newington Causeway. There is no doubt that had the acts in question been done by a stranger, or by an ordinary passenger, they would have fallen within the section referred to, and in such case the appellants, in their character of surveyors of the highways within the parish, would have been the

proper persons to prosecute the complaint. The appellant is, however, the owner of premises contiguous to Newington Causeway, and the acts complained of were done by him in the carrying on of his ordinary business in such premises, and upon that part of the footway which lies immediately in front thereof. The vestry had previously refused permission to the respondent to take up the flags, and make a proper paved carriage access across the Causeway to his premises, which premises he was in the habit of using for storing up machinery of a very weighty sort. The respondent having applied the premises to this purpose, conveyed the machinery across the Causeway by means of rollers and levers, but, this mode of proceeding necessarily occupying considerable time, it was objected to by the police as causing an undue obstruction of the thoroughfare. Thereupon, as the only alternative to the entire abandonment of the use of the premises before referred to, and which it appeared was the only use to which, owing to the peculiar character of the locality they could be put, the respondent, in the exercise of his right as owner, adopted the course of conveying the machinery to and from his premises in the trolleys or waggons across the flagged footway. It was in so doing that the damage was done which formed the subject of the present complaint. The right of the respondent depends upon the nature and extent of the rights acquired by the public over the footway in question, either at common law or under the Highway Acts, or the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 98. The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith, and the application made to, and adopted by, the public of a part of the street to one kind of passage, and another part to another does not deprive him of any rights as owner of the land not inconsistent with the right of passage by the public. If this were not so the owner of a large estate, having dedicated a portion of his land to the use of the public as a roadway, and they, or the persons representing them, having raised a footpath on one side or on both sides of such roadway, for their own more convenient use thereof, would, after the lapse of time, be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway without being liable to be convicted under the provisions of the Highway Act. If this were really the law the result would be most serious to owners who have dedicated or may dedicate roadways to the public, and in towns would, to a great extent, prevent the owners of houses and buildings from changing their character and use to any purpose of business which could not be accomplished without the use of a horse, or cart, or carriage. That such is not the law appears to us to be the result both of principle and authority, and we think that the provisions of the Highway Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount right reserved by the owner. We do not deny that the owner cannot derogate from the grant of roadway made by him *to the public*, and cannot do anything which *would really and substantially* interfere with the right of passage by the public. So far as we are aware, no case is to be found in the books which conflicts with the view of the law above expressed, notwithstanding the numerous instances which must have occurred in which an owner rebuilding or changing the character of his houses or other buildings, has made crossings of the footpath, in order to carry into effect some object of convenience or business. The case of *Sir John Lade* v. *Shepherd* (2 Stra. 1004), is a strong authority in favour of our view. In that case the plaintiff, being owner of land, built a street upon it, which had become a highway. An owner of other land contiguous, but separated from it by a ditch, laid a bridge over the ditch, the end whereof rested upon the highway. The plaintiff brought an action of trespass against the defendant, who insisted that the plaintiff, by making it a street and dedicating it to the public, was precluded from suing him as for a trespass to his private property, although he might be liable to an indictment for a nuisance. But it was said by the court, "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it was never understood to be a transfer of the absolute property in the land." That the property of the soil and freehold in a highway is in the owner or the representative of the dedicating owner, subject to an easement for the benefit of the public, was also decided in *Dovaston* v. *Payne* (2 H. Bl. 527), and is supported by the authorities cited in the notes to that case in Smith's Leading Cases, vol. 2. The same doctrine is clearly stated by Lord Campbell in *Reg.* v. *Pratt* (4 E. & B. 860), which was the case of a conviction of the appellant under 1 & 2 Will. 4, c. 30, for committing a trespass by being in the day time on land in the occupation of B., in search of game. Pratt was, in fact, on a public highway in pursuit of game, the land on both sides being the property of B., and the court held that he was rightly convicted, as the road was land in the occupation of B., subject only to the right of way of the public; and Lord Campbell, in giving his judgment, thus expressed his opinion of the law as applicable to that case: "He" (the appellant) "was, beyond all controversy, upon land, the soil and freehold of which was in the owner of the adjoining land, that is Mr. Bowyer. It is true that the public had a right of way there; but, subject to that right, the soil, and every incident to the ownership of of the soil, was in Mr. Bowyer." And the other judges in their judgments limit the right of the public to the use of the way for the purpose of passing and repassing thereon. Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway, and, inasmuch as the magistrate in the present case has expressly found that the freehold property in question could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare, we think that he was justified in dismissing the summons. Our judgment will therefore be for the respondent.

Judgment for the respondent.

Attorneys for appellants, *H. F.* and *C. Chester.*

Attorneys for respondent, *Lewis* and *Sons.*

Wednesday, Jan. 17, 1872.

GUILDFORD UNION (apps.) *v.* ST. OLAVE'S UNION (resps.)

Status of irremovability—Break of residence—Stay in a hospital—Animus revertendi.

A pauper lived in the respondent's union before the 25th March 1867 *long enough to obtain a status of irremovability. On that day he was admitted into the respondent's workhouse, and he remained there until the* 27*th Aug.* 1868, *when he voluntarily took his discharge, and on the same day became an inmate of a hospital in another union. On the* 31*st Dec.* 1868 *he was discharged from the hospital, and took a lodging in the respondents' union, where he remained until the* 20*th Jan.* 1869, *when he was again admitted into the respondents' workhouse.*

Held, that, independently of the exception by 9 *&* 10 *Vict. c.* 66, *s.* 1, *of time spent in a hospital, the pauper had a constructive residence in respondents' union during his temporary absence, although he had no specific lodging or house to return to, and therefore his status of irremovability was not destroyed, and an order for his removal to the place of his last legal settlement was bad.*

THIS was an appeal to the Surrey Easter Quarter Sessions 1871, from an order of justices as to the removal of William Duke, a pauper, from the respondents' to the appellants' union, and by consent of the parties and by order according to the Statute 12 & 13 Vict. c. 45, s. 11, the following case was stated for the opinion of this court.

The order, which is the subject of this appeal, was made on the 8th Dec. 1870 by two justices of the peace for the county of Surrey, for the removal of William Duke, hereinafter called "the pauper," aged fifty years (then and now being an inmate of the Saint Olave's Workhouse, in the respondents' poor law union), to the appellants' poor law union, on the ground that the parish of Godalming, in the county of Surrey (being one of the parishes comprised in the said appellants' union), was the place of his last legal settlement.

The pauper has a settlement by birth in the said parish of Godalming, and the order of removal is admitted to have been proper, unless the pauper at the date of the said order, had acquired a status of irremovability under the circumstances hereinafter stated.

For fifteen years, immediately preceding the 25th March 1867, the pauper resided in the parish of St. Olave's (being one of the parishes comprised in the said respondents' union), and during the last ten of the said fifteen years he lodged at the same house and never slept out of the said parish, and during the whole of the said fifteen years he was a breaksman in the employ of Messrs. Nicholson, Besley, and Co., who carried on business in the said parish, and during that period he never received parish relief.

On the said 25th March 1867, the pauper was admitted into the St. Olave's Workhouse, being disabled from following his employment in consequence of disease in his legs, and he remained in the said workhouse until the 27th Aug. 1868.

On the said 27th Aug. 1868, having previously received from a son of his late employers a letter of admission to St. Thomas's Hospital, in the parish of St. Mary, Newington, in the St. Saviour's Union, and not having been received into such hospital, the pauper received from *the same* person a letter of admission into the hospital at Guildford, in the county of Surrey, a hospital for the reception of patients suffering from curable diseases, together with the sum of 5*s.* to pay his travelling expenses; and the pauper voluntarily took his discharge from the said St. Olave's Workhouse, and went direct to the said hospital at Guildford, where he was admitted on the same day, the respondents' union having nothing to do with his so entering the said hospital.

The pauper remained at the said hospital at Guildford from the said 27th Aug. 1868 until the 31st Dec. 1868, when he was discharged uncured.

Upon being so discharged from the said hospital on the 31st. Dec. 1868, the pauper went direct to London, and took a lodging in the said parish of St. Olave's, and resided there for about a fortnight, when he took another lodging in the same parish, at which he resided until the 20th Jan. 1869. The pauper's means of subsistence during the said period between the 31st Dec. 1868 and the 20th Jan. 1869 was a sum of 4*l.* 6*s.*, part of which had been received by him while in the hospital at Guildford, and the remainder of which he received on his return to London out of a fund which had been established by his said late employers.

On the 20th Jan. 1869 the pauper was again admitted into the said St. Olave's workhouse, and he has remained there down to the present time.

The pauper never slept out of the said parish of St. Olave's (except in the said hospital at Guildford) from the date of his discharge from the said St. Olave's Union on the said 27th Aug. 1868 until his readmission into the said union on the said 20th Jan. 1869.

The court is requested to draw inferences of fact if necessary.

The question for the opinion of the court is whether, under the circumstances hereinbefore set forth, the said pauper, Wm. Duke, at the date of the said order of removal, was irremovable from the said parish of St. Olave's.

If the court should be of opinion in the affirmative, then the appeal is to be allowed with costs against the respondents.

If the court should be of opinion in the negative, then the appeal is to be dismissed with costs against the appellants.

E. Clarke for the respondents.—This was a sufficient break of residence to destroy the pauper's status of irremovability in the respondents' union. By *Reg.* v. *Glossop* (L. Rep. 1 Q. B. 227) "There must be both a place which he (the pauper) has a right to return to, and an intention to return, to constitute a constructive residence; and where a man has gone away and left no residence, though he means to return at a future time, the *animus revertendi* is immaterial." [BLACKBURN, J.—Those certainly are the words attributed to me, but I never intended to lay down that there could never be a constructive residence, unless the pauper continued to have a house or lodging in the place where his status of irremovability had existed. COCKBURN, C. J.—The contrary was distinctly held in *Reg.* v. *St. Leonard, Shoreditch* (L. Rep. 1 Q. B. 21.] In that case the decision was upon the ground that the pauper never ceased to reside, although she slept away during the night. According to the judgment of Cockburn, C. J. in that case, the onus of proof at all events is cast upon

those who set up the irremovability, that the pauper has the intention of returning.

Thesiger for the appellants.—The statute which creates irremovability after residence of a certain time, 9 & 10 Vict. c. 66 provides in sect. 1, "That the time, during which such person shall be a prisoner in a prison . . . . or shall be confined in a lunatic asylum . . . . or as a patient in a hospital, shall for all purposes be excluded in the computation of time hereinbefore mentioned." It has been held, with regard to one of these exceptions upon evidence of intention to return, similar to that in the present case, that the time during which a pauper has been in prison cannot be taken into computation for the purpose of making up or for the purpose of breaking a residence: (*Hartfield* v. *Rotherfield*, 17 Q. B. 746.)

COCKBURN, C. J.—We need not trouble you further. In the first place, this case, with respect to a hospital, is concluded by that just cited with respect to a prison; secondly, and independently of that authority, a mere temporary absence of this kind under the circumstances of this case is no break of the status of irremovability. It is not necessary in order to constitute a constructive residence that the absent pauper should retain possession of a specific place of residence to which he may return. Both on authority and on principle I think our judgment should be for the appellants.

BLACKBURN, J.—I think so also. By the statute the period spent in the hospital does not count in the computation of irremovability, and independently I think there was in this case no break of residence, because I do not agree with the inference which has been drawn from my words in *Reg* v. *Glossop*, that a pauper must have had a legal claim to some house or lodging in the place to which he intended to return, in order to continue his status of irremovability during a temporary absence. I meant merely that his right to a place of residence should form part of the facts upon which the consideration of his intention to come back should turn, and upon which his status of irremovability should be decided. The fact that a man has no house or lodging is not ground for saying that he resides nowhere.

MELLOR and QUAIN, JJ. concurred.

Judgment for appellants.

Attorney for appellants, *F. F. Smallpeice.*

Attorney for respondents, *C. Wellborne.*

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

Friday, Nov. 17, 1871.

REGISTRATION APPEAL.

TOWNSEND *v.* THE OVERSEERS OF ST. MARYLEBONE.

Description of nature of qualification—Joint tenant—Dwelling-house—Representation of the People Act (30 & 31 *Vict. c.* 102)—*Reform Act* 1832 (2 *Will.* 4, *c.* 45), *s.* 27.

Under the description "dwelling-house," a qualification as for a house may be proved under 2 *Will.* 4, *c.* 45, *or an occupation of a dwelling house under the Representation of the People Act.*

A person claimed a vote for the borough of M., who occupied a house as joint tenant with another, the value of such house being much more than enough for a qualification under the Reform Act 1832. *The nature of the qualification was described in the list as "a dwelling-house."*

He was thus entitled to a vote under the Reform Act, but not under the Representation of the People Act.

He was accordingly objected to, on the ground that a description of the nature of a qualification "dwelling-house" under the Representation of the People Act could not confer a vote under the Reform Act.

The revising barrister struck out the word "dwelling."

Held, per Willes, Keating, and Collier, JJ. (*dissentiente, Brett, J.*), *that the revising barrister was right in allowing the vote, although it was unnecessary to strike out the word "dwelling."*

Per Brett, J., that the 3*rd section of the Representation of the People Act has given a new qualification, and that, as the error was in the nature of the qualification, the revising barrister ought not to have amended.*

AT a court held at Marylebone, for the purpose of revising a list of the voters for that borough, the vote of James Blackman was duly objected to. The case stated that

1. James Blackman had occupied, jointly with another person, the premises in respect of which his name had been inserted by the overseers of the said parish in the list of persons entitled to vote in the election of members to serve in Parliament for the said borough of Marylebone.

2. The said James Blackman had so occupied the said premises during the twelve calendar months next previous to the last day of July last; had been rated in respect of the said premises for all rates for the relief of the poor in the said parish made during the time of his occupation; had duly paid all the poor rates and assessed taxes which had become payable from him in respect of such premises previously to the 6th April then next preceding, and had resided for six calendar months next previous to the last day of July last, within the said borough.

3. The clear yearly value of the said premises so occupied by the said James Blackman and another, was of an amount which, when divided by the number of the joint occupiers of the said premises, gave a sum of much more than ten pounds for each such occupier.

4. In the said parish of St. Marylebone the overseers make out only one list of all persons entitled to vote in the election of members to serve in Parliament for each borough, including in such list as well those entitled to vote in respect of the occupation of premises of the clear yearly value of not less than 10*l.*, under 2 Will. 4, c. 45, as those entitled to vote as inhabitant occupiers, as owners or tenants of any dwelling-house within the said borough, under the Representation of the People Act 1867.

5. In the list so made out by the said overseers, the qualification in respect of which the name of James Blackman was inserted in the list was described in the third column as a dwelling-house; the house in fact was originally constructed, and is now used, as a shop, with dwelling rooms above.

6. The names of thirty-three other persons, whose names, together with that of the said James Blackman, are set out in schedule hereunto attached, were objected to under similar circumstances.

7. It was objected that inasmuch as the qualification, in respect of which the name of James Blackman had been inserted in the list, as made out by the said overseers, was described as a "dwelling house," his title to have his name inserted in such list could only be under the 3rd section of the Representation of the People Act 1867, and as it was by that section provided that no man should under that section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling house, that therefore the said James Blackman was not entitled to have his name inserted in the said list. The barrister held that if the nature of the qualification was insufficiently described, he had power to amend the description of the qualification for the purpose of more accurately defining the same, and he did so by substituting "house" for "dwelling house" as the nature of the qualification, and retained the name of the said James Blackman and of the said thirty-three other persons in the said list, and he ordered the appeals in all the above mentioned cases to be consolidated.

The question upon which the judgment of the court is requested is whether or not the said barrister did or did not rightly decide that the said James Blackman and the said thirty-three other persons whose names are set out in the schedule hereto were entitled to have their names inserted in the register of voters for the said borough of Marylebone. If the court be of opinion that his decision was wrong, the names of the said James Blackman and the said thirty-three other persons are to be removed from the register of voters for the said borough of Marylebone.

Gorst for the appellant.—The claimant was an occupier of sufficient value if the nature of the qualification had been "house" instead of "dwelling house." The term "dwelling house" appears for the first time in the 3rd section of the Representation of the People Act, and it is there stated in the proviso to the section, that no man shall have a vote by reason of his being a joint occupier of any dwelling house. I do not deny that he might still vote as a joint occupier for the same premises, had they been properly described, but the proviso to the 3rd section takes away his right to vote as a joint occupier for a dwelling house. The 6 Vict. c. 18, s. 40 does not give the barrister a power to amend unless the qualification is sufficiently described. There is nothing in the case to show whether the claimant resided in the house or elsewhere. If he claims under the old Act it is immaterial whether he resides in the house; but that is not so under the Representation of the People Act. The 56th section shows that the new franchise is to be in addition to any old franchise and this Act is to be construed as far as it goes with the old Acts; it also says that the forms shall be as they were formerly. The case is the same as if the proviso to the 3rd section had been written into the Reform Act 1832 (2 Will. 4, c. 45).

No counsel appeared to represent the respondent.

WILLES J.—I am of opinion that the revising barrister was right in allowing the franchise, although it is unnecessary to say whether the precise course he took in turning dwelling-house into house was right. The claim in respect of a dwelling-house was sufficiently made by showing that the person claiming the franchise was entitled to a dwelling-house in fact, coupled with the proof that that which he described as a dwelling-house fell within the requirements of the Act of 1832, or within the conditions to be fulfilled in the Representation of the People Act as a dwelling-house. The Act of 1832 gave the right to vote as to a house, notwithstanding the number of terms, such as warehouse, counting-house, shop, which were coupled with it. You have there a house containing a dwelling-house, and a house which is not a dwelling-house, and if it had been necessary to state the qualification more fully, the answer would be in the description of the house—viz., a dwelling-house. If the objection was made out under the Act of 1832, the claimant could show he had a dwelling-house; then, having established it as a house and as a dwelling-house, he could show that the conditions of the Act of 1832 had been complied with, and that the house was of sufficient value to give him the franchise under the 29th section of that Act. Matters so standing, the Representation of the People Act was passed to enlarge the franchise, and assist voters who had previously been excluded. If the argument of counsel be correct, what would be the effect of that Act? Why, of defeating a claim to the franchise which would be good under the Act of 1832, and the reduction of the franchise would absolutely defeat the vote. He further argues that the Representation of the People Act gives a new franchise in respect of a dwelling house, and that a claim to a dwelling house means a claim to a dwelling house under the Act of 1867, and excepts the claim under the Act of 1832, and that sect. 29 of the Act of 1832 should be read with the proviso in the Act of 1867. But the answer to his argument lies in the fact that the claim is not obliged to be made under the Representation of the People Act; but the claim may be made in respect of a dwelling house under the 27th and 29th sections of the Reform Act 1832, or under the Representation of the People Act. It is merely an expansion of the franchise in respect of a dwelling house, and the claim is as formerly. He may claim under either Act; if he fails under the latter, he may claim under the former, or *vice versâ*, for the nature of the qualification and the description are the same. I reject the notion that the Representation of the People Act indirectly takes away any right the claimant would have had under the Reform Act of 1832. I think the revising barrister was right on the whole, but that no amendment was necessary.

KEATING, J.—The Representation of the People Act in terms leaves untouched the franchise under the old Reform Acts. It is conceded that under the old Act he might have proved, and have a vote; but it is said the Representation of the People Act does away with that, because it gives the franchise to a quality of dwelling house which would not have had the franchise before. If so, it would be a strange result, and one I should be sorry to agree to, unless under very great pressure. I think no amendment was required.

BRETT, J.—I regret that I cannot come to the same conclusion as the rest of the court in this case, and as the parties are entitled to my opinion I give it accordingly, and state that I think the revising barrister was wrong. The qualification described was in the third column, which states the nature of the qualification, and there it was described as a dwelling-house. Under the old Reform

Act of 1832, the 27th section gave the different qualifications house, warehouse, counting-house, shop, or other building. A house may include a warehouse, and I apprehend a warehouse and shop is a house, yet in the interpretation of the Act of Parliament, if he described himself by one he could not prove for the other, and if he described as for a shop and proved for a house he would lose his vote. The Representation of the People Act has given, in my opinion, a new qualification in respect of a dwelling-house, and it is expressly enacted by the 59th section that it shall be construed as one with the Acts for the time being in force, and it appears to me that the new qualification with the proviso ought to be read in with the 27th section of the Reform Act. It is said that the construction of the 3rd section takes away the right to vote, but it only does so because the claimant is misdescribed. The court ought to be as careful of the rights of the objector as of the rights of the voter.

COLLIER, J.—I am of opinion the revising barrister was right, and that no amendment was required. The claimant was entitled, under sect. 27 of the Reform Act. I do not think he ought to be deprived of his vote because he described a house as a dwelling-house, and thereby imposed a greater proof than was necessary upon himself. This was not a description of a new qualification. Under the new Act, a man must be an inhabitant occupier of a dwelling house, and he does not describe himself as so entitled.

Judgment affirmed.

Attorney for the appellant, *A. Beddall*, 27, Lombard-street.

Friday, Nov. 17, 1871.

REGISTRATION APPEAL.

CALVER *v.* ROBERTS.

Parliamentary election—Notice of objection—Mistake in "place of abode" of objector—Change of residence—Reform Act 1832, 6 *&* 7 *Vict. c.* 18, *s.* 7.

A notice of objection pursuant to the 6 *&* 7 *Vict. c.* 18, *s.* 7, *schedule A, No.* 5, *signed by the objector, with the address of his former place of abode, is insufficient, although his residence is so near the former that it stands upon part of the garden belonging to the former residence.*

AT a court held at Brentwood, to revise the lists of voters for the southern divivision of the county of Essex, the vote of Thomas Davis, whose name appeared upon the copy of the register relating to the hamlet of Brentwood, was objected to by James William Calver, a person on the register for the time being for the said division of the said county. The said James William Calver appeared before the barrister and proved that he had, within the time required by the Registration Acts, duly served upon the overseers of the said hamlet, and upon the said Thomas Davis, notices of objection to the vote of the said Thomas Davis, which notices were in all respect, except as to the statement of the abode of the said objector, in compliance with the Registration Acts.

In the said notices the objector had described himself as "James William Calver, of Pembroke-road, Walthamstow, E.," on the register of voters for the parish of Walthamstow, in the southern *division* of the county of Essex.

It appeared that for some years previously to the month of August, 1871, the said James William Calver has resided in a house in Pembroke-road, Walthamstow, and that his place of abode was so described in the register for the time being. In the said month of August, however, and a few days before his signing the said notices of objection, he had removed to a house known as 1, Grosvenor-park-terrace, Grosvenor-park-road, Walthamstow, and he had let his house in Pembroke-road to a tenant who was in occupation of it at the time of the signing of the said notices.

At the time the objector had originally come into occupation of his house in Pembroke-road, he had occupied therewith a garden, which garden extended backwards from his house in Pembroke-road to a road called Wingfield-road, which ran parallel to Pembroke-road. The said garden extended on one side to a road called Grosvenor-park-road, which ran at right angles to Pembroke and Wingfield-roads. Some few years ago a strip of land fronting the Grosvenor-park-road had been taken from this garden, and upon this strip of land a row of six houses fronting to Grosvenor-park-terrace had been built.

The houses now numbered 4, 5, and 6, which were the houses nearest to Pembroke-road, had been built about three years, but the house now numbered 1, which occupied the angle formed by Grosvenor-park-road and Wingfield-road, had only been just completed in Aug. 1871, when the said James William Calver removed into it. The distance from his former house in Pembroke-road along that road to the corner of Grosvenor-park-road was 50yds., and the distance from that corner along Grosvenor-park-road to the new house was about the same distance, or rather more.

After his removal the objector continued to occupy the residue of the garden which he had occupied when in his former house, which garden, however, did not in any part abut upon Pembroke-road, but was situate at the back of the houses in Pembroke-road. To this garden he obtained access by a back door in the wall of his new house. The door of communication from the old house to the garden was kept fastened after the new tenant took possession of the house, but it might have been opened if it had ever been required.

It did not appear that Pembroke-road was the name of any district in Walthamstow, or that any houses but those fronting to Pembroke-road were known as "Pembroke-road;" Grosvenor-park-road was quite as well known as Pembroke-road.

After the removal the said James William Calver, he had received letters (some of which were produced in court) which had been addressed to him at Pembroke-road, and especially he had received certain notices of objection signed by him in the same manner as those above mentioned, which he had returned to him through the Dead Letter Office, in consequence of the persons to whom they were addressed not having been found.

It was contended, on behalf of the objector, that no one could have been misled by his place of abode being given as Pembroke-road instead of Grosvenor-park-road, because the two houses were so close together that any person inquiring for him in Pembroke-road would have been at once told where to find him. It was also contended that the site of the house in Grosvenor-park-road having once formed part of a plot of land occupied

with the house in Pembroke-road, it could properly be described as Pembroke-road.

The revising barrister was of opinion that the case was undistinguishable from *Melbourne* v. *Greenfield* (R. & G. 261; 7 C. B., N. S., 1; and 1 L. T. Rep. N. S. 93), and was satisfied, from the evidence of the objection, that in describing himself as of Pembroke-road, "he had intended to describe his former house, and not that to which he had removed," and the barrister therefore thought, for the reasons given by Erle, C.J. in that case, that the 101st section of the Registration Act (6 Vict. c. 18) was inapplicable. He also thought that the case was distinguishable from *Thackeray* v. *Pilcher* (36 L. J. 73, C. P.; L. Rep. 2 C. P. 100) (which was quoted on behalf of the objector), or other similar cases, because in the present case the objector had not given, as in that case, a mere imperfect description of his abode by referring to some large district in some part of which it was really situate, but had given an incorrect description by referring to a particular place—Pembroke-road—where he did not reside at the time in question. He thought that the fact that the objector had removed a short distance only, and that the site of his new house had once formed part of the garden of the old, could not affect the principle laid down in *Melbourne* v. *Greenfield*, which he understood to be that an objector must actually describe his real abode, and that it is not sufficient for him to describe a place at which his real abode may be ascertained, however readily that might be done.

But for the case of *Melbourne* v. *Greenfield*, the barrister stated that he should probably have held the notice good as he did not think that any person so objected to could be practically inconvenienced by the misdescription.

Being however of opinion that the case was in point, he held that he was bound to follow it, and, moreover, thought that the said Thomas Davis (and the other persons objected to as hereinafter mentioned) might have been induced, by the law laid down in that case, to neglect the notice of objection they had received.

For the purposes of this case the revising barrister found the following facts: That the description of himself as "of Pembroke-road" given by the objector was intended as a description of the house mentioned as his place of abode on the register and not of the house in which he really resided at the time of signing the notice. That it is not a description which anyone would think of giving of the new house or which would be understood as applicable to the new house, and if the said James William Calver had been a stranger in the neighbourhood at the time he went to reside at No. 1, Grosvenor-park-terrace, Grosvenor-park-road, he could not have been found with reasonable facility by the description given of him as "of Pembroke-road."

He also found that the said James William Calver, not being a stranger in the neighbourhood, but well known in Pembroke-road by reason of his former residence there—he might, in fact, have been found by a party objected to without difficulty, because upon a personal inquiry in Pembroke-road the inquirer would either have been informed at once of the removal, and have been directed to the new house, or else have been rected first to the old house and thence to the w one, which was close by; while, if the inquiry ad been made not personally, but by letter, addressed to Pembroke-road, the letter would have been delivered to the objector. Thus, although the objector had not described his true place of abode, he had given the information practically required for his identification by describing himself as of a place in the immediate neighbourhood of his abode, and at which it might have been readily ascertained.

For the reasons mentioned above, the revising barrister considered that he ought to hold the notices of objection insufficient, and he expressed an opinion to that effect; but understanding that a large number of persons had been objected to in the same form, with a view to facilitate an appeal from his decision, he reserved his formal decision as to retaining or expunging the name of the said Thomas Davis (who did not appear to prove his qualification), and adjourned the further consideration of the case and also the court at which the same came before him from time to time and from place to place within the said division of the county, pursuant to the statute, in the meantime hearing and deciding upon the merits of the cases of all persons so objected to by the said James William Calver, who chose to appear before him in answer to the objection and to prove their qualification.

At a court held at the town hall, Stratford, within the said division, by appointment, for the revision of the lists of certain parishes, and by adjournment of the court held at Brentwood, and of other courts, he finally decided to retain on the list the name of the said Thomas Davis, without requiring him to prove his qualification, on the ground that the said notices of objection were insufficient, and that he was not at liberty, as a matter of law, to take into consideration all the facts stated in the case when he presented it for the opinion of the court.

The said James William Calver gave due notice of appeal against this decision, and the barrister thought proper that the appeal should be allowed.

At the same court he decided for the same reasons to retain on the various lists, without proof of their qualifications, the names of all the persons contained in the schedule which accompanies this case, who had all been objected to by the said James William Calver in the same form and under the same circumstances as above stated, and who all failed or declined to appear before him to prove their qualification in answer to the said objections. It appeared to him that his decision so to retain all the said names depended upon the same point of law as the case of Thomas Davis, and notice of appeal having been given, he declared that the appeals were to be consolidated, and thereupon he named Thomas Nicolles Roberts, of 2, Torrington-street, Russell-square, London, a person interested and consenting to be respondent in the consolidated appeal.

The question for the opinion of the court was whether upon the facts stated above the revising barrister was right in holding the said notices of objection to be bad on the ground above stated.

If the court decide that the revising barrister was right then all the names in the schedule are to remain on the register.

If the court decide that he was wrong, the register is to be amended by expunging therefrom the names in the schedule.

E. Clarke for the appellant.—The address of the objector was put down by mistake as Pembroke-road, instead of Grosvenor-park-road. The objection is that the former residence of the objector is

described instead of the present abode. The notice was given pursuant to the 6 Vict. c. 18, s. 7.(a) And the revising barrister states he should have considered the place of abode sufficiently explicit had he not been pressed with the case of *Melbourne* v. *Greenfield* (1 L. T. Rep. N. S. 93; 7 C. B., N. S., 1). The "place of abode" means the place of abode which is named on the register, and this view was taken by Maule, J., in *Knowles* v. *Brooking* (2 C. B. 226), although it was true that he dissented from the opinion of the rest of the court. He says the Act of 6 Vict. c. 18, requires the objector to describe himself as on the register or list of voters, and to refer particularly to the parish on the register or list. The object of these alterations was to identify the persons mentioned in the list more completely, so as to enable those whom it concerned to know easily and certainly who the persons named were, and to enable the party objected to, by referring to the list or portion of the register mentioned in the notice, to ascertain whether the objector has a right to object; here the objector was well known to all the inhabitants of the neighbourhood. He cited *Wollett* v. *Davis* (4 C. B. 115), when he was stopped by the court.

Hugh Shield, for the respondent, was not called upon to argue.

WILLES, J.—The learned counsel for the appellant has done all in his power to induce us to overrule the case of *Melbourne* v. *Greenfield*, which we, sitting as we do here, are unable to do, nor should we desire to do so if we could. The statute says that the objector shall leave at the place of abode of the party objected to a notice which is described in the schedule to the Act, and which is to contain the place of abode of the objector at the time at which he objects. In the present case the objector had ceased to live in the residence which he gave as his place of abode, and, moreover, he had let the former house, which he described himself as occupying. Had he been a stranger no one could have found him out, and it cannot be that a difference is to be made because he happened to be well known in that particular locality. The description of his place of abode was intended by him to be the description of his place of abode, as it appeared on the register, instead of his present residence, and the question is much the same as that discussed in *Knowles* v. *Brooking* (2 C. B. 226), where, notwithstanding the dissentient opinion of Maule, J., the court held the notice of objection sufficient, which was signed by the objector from his real place of abode, although not corresponding with that on the register. And the law was further pronounced in *Melbourne* v. *Greenfield* that the objector should date from his actual place of abode, and not from that on the register. We see no reason why the revising barrister should have wished the case of *Melbourne* v. *Greenfield* to be overruled; and we think that he was quite right in following that case rather than his own judgment, for it would have been impossible to say that a sufficient description of the right place of abode has been inserted in the notice of objection.

KEATING, J.—I am of the same opinion. The decision of the revising barrister must be affirmed.

BRETT and COLLIER, JJ. concurred.

Decision affirmed.

Attorney for appellant, *Wragg*.

Attorneys for respondent, *Wyatt*, *Hoskins*, and *Harvey*.

(a) The 6 Vict. c. 18, s. 7, provides that in every year every person who shall be on the register for the time being for any county may object to any other person upon any list of voters for such county, as not having been entitled on the last day of July then next preceding, to have his name inserted in any list of voters for such county; and every person so objecting (save and except overseers objecting in the manner hereinbefore mentioned) shall on or before the 25th Aug. in such year, give, or cause to be given, to the overseers of the poor of the parish or township to which the list of voters containing the name of the person so objected to may relate, a notice, according to the form numbered (4) in the said schedule (A), or to the like effect; and the person so objecting shall also, on or before the said 25th Aug., give, or cause to be given, to the person so objected to, or leave, or cause to be left at his place of abode, as described in such list, a notice, according to the form numbered (5) in the said schedule (A), or to the like effect; and every such notice of objection shall be signed by the party so objecting as aforesaid; and wherever the place of abode of the person objected to, as described in the said list, shall not be in the parish or township to which such list may relate, and the name of the occupying tenant of the whole part of the qualifying property, together with his place of abode, shall appear in such list, the person so objecting shall also, on or before the same day, give to or leave, or cause to be given or left, at the place of abode *of any such occupying* tenant, a duplicate notice, signed *as aforesaid.*

Friday, Nov. 17, 1871.

REGISTRATION APPEAL.

BENDLE *v.* WATSON.

Parliamentary election—County vote—Description of qualification—Erroneous number to house—Power to amend—Insufficient qualification—6 & 7 Vict. c. 18, *s.* 40.

Where the description of the property of a voter is erroneous, the revising barrister has power to amend, under 6 & 7 Vict. c. 18, *s.* 40, *as an "insufficient description of the property."*

The claimant's qualification for a county vote was described as a "freehold house and shop," No. 4, English-street, Carlisle. After his name had been so put on the register, the local authorities altered the number of his house to 9. *There was another No.* 4, *English-street. The claimant's vote was objected to and disallowed by the barrister, as he considered he had no power to amend.*

Held, that the barrister had power to amend.

Per Brett, J., that the barrister not only had power, but was bound to amend.

AT a court held at the city of Carlisle, in the county of Cumberland, to revise the list of voters in the election of knights of the shire for the county of Cumberland, the name of John Spiers Baker was objected to.

The name of John Spiers Baker appeared on the register in the following form:

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in the parish, and number of house (if any), where property is situated.
John Spiers Baker.	Town-villa, Sutherland, near Liverpool.	Freehold house and shop.	4, English-street, Carlisle.

It was proved that the premises in question are now and have for six years previously been numbered 9, English-street.

It was proved that at one time the said premises had been numbered as 4, English-street, but that six years ago the number had, by competent local authority, been changed from 4 to 9, and had remained 9 ever since.

The said John Spiers Baker was proved to have been on the register for the premises in question when they were numbered 4, and had so remained on the register, without objection, up to the present time.

It was also proved that there are in the same English-street other premises numbered 4, which do not belong to the said John Spiers Baker, and in respect of which he does not claim to be entitled to the franchise.

The revising barrister was asked to amend by altering the number in the fourth column from 4 to 9.

He decided that the said John Spiers Baker had not proved his right to have his name retained upon the said list of voters in respect of the qualification described in such list, because the number of the house and shop aforesaid was wrongly stated to be 4 instead of its proper number 9, and he declined to amend as asked because he did not consider that he had the power to do so, or that he should be right in exercising the power if he had it.

Except for the reason aforesaid the said John Spiers Baker had a right to have his name retained upon the said list.

The names of seven other persons (whose names and qualifications were set out in the schedule annexed to the special case, and therein described as they would appear if the descriptions were amended according to the facts), were objected to under similar circumstances.

The revising barrister expunged the names of the said John Spiers Baker and of the said seven other persons from the lists.

Due notice of appeal from the decision of the revising barrister was given, and he ordered the appeals in the above-mentioned cases to be consolidated, and named Joseph Bendle, of the city of Carlisle, gentleman, to be the appellant, and Thomas Watson, of the said city of Carlisle, gentleman, to be respondent in the said appeal.

If the court should be of opinion that the revising barrister had the power to make the aforesaid amendment and ought to have exercised it, the name of the said John Spiers Baker will, with the amendment asked for as aforesaid, be restored to the said list, as also the names of the said seven other persons altered as they appear in the said schedule.

Sharp for the appellant. — The revising barrister has not found the description insufficient to prove the identity of the property. The nature of the qualification is a freehold house and shop, which is sufficient. The 6 Vict. c. 18, s. 4 provides for persons making a fresh claim who do not retain the same qualification. By the 5th section the overseers are to make out a list of claimants, and there is also a list of the voters, which consists of the copy of the old register. I contend that if the nature and description of the qualification be misdescribed the claimant's name should be expunged. The case is clearly within the 40th section, for the place of abode is not a part of a voter's qualification, and one place of abode may be substituted for another (*Luckett* v. *Knowles*, 1 Lutw. Reg. Cas. 451; 2 C. B. 187); and here the abode is the same, although the number is altered: (*Barlow* v. *Mumford*, L. Rep. 2 C. P. 81; 15 L. T. Rep. N. S. 441.) The point is whether the revising barrister ought to have altered the number of the house, there being no such misnomer or inaccurate description of any place sufficient to abridge the operation of the Act under the 101st section of 6 Vict. c. 18. In the case of *Barlow* v. *Mumford* the claimant was described as of Ely-place, but the number of his house was not given. The revising barrister was considered to have acted rightly in amending the claim by adding a number and allowing the vote. And in *Flounders* v. *Donner*, 2 C. B. 63, Erle, C.J., says that if the omission of the number be supplied to the revising barrister, pending the revision, he is bound to amend the description under the 40th section. [BRETT, J.—An insufficient description is different from a wrong one.]

T. H. Fawcett for respondent.—There was no mistake on the part of the overseers or of the clerk of the peace. Sect. 4 provides for the publication of the lists by the overseers, which enables them to see if the voters are properly described. For six years the appellant had suffered the same error to be made, and he never claimed for the proper qualification. He ought to have made a fresh claim. The revising barrister might sanction an addition to the register, but no addition could make it accurate. [BRETT, J.—The nature of the qualification is in the third column; the description is in the fourth. Although the revising barrister cannot alter the third column, yet he can alter the description in the fourth column.] The number of the house refers to a different qualification altogether, and is not the qualification described on the register. In *Bartlett* v. *Gibbs* (13 L. J. 40; 5 M. & G. 81) Tindal, C.J. says: "We think the decision ought not to depend upon a critical examination of the forms in the schedule which are inserted as examples, and are only to be followed implicitly so far as the circumstances of each case may admit, but we think the Legislature intended that the registration list should afford such information of the nature and situation of the premises in respect of the occupation of which each person claimed a vote, as would enable the other voters to ascertain by inquiry the sufficiency of the occupation and value of each of the premises." [WILLES, J.—In that case the list gave the particulars of one occupation, though the qualification consisted of the occupation of several premises in the immediate succession.] In *Onions* v. *Bowdler* (5 C. B. 65; 2 Lutw. Reg. Cas. 59) the revising barrister was held to have rightly refused to alter the qualification by adding a new one, although he might have amended the old one: (*Hitchins* v. *Brown*, 2 C. B. 25.)

WILLES, J.—Turning to the language of the 4th section, we find that wherever the christian names or the place of abode, or the nature of the qualification (which relates to the qualification the claimant really has, but not a qualification in general), or the local or other description of the property of any person who shall be included in the list, and the name of the occupying tenant, shall be wholly omitted in any case where the same is by the Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification shall in the judgment of the revising barrister be insufficiently described for the

purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matters be supplied to his satisfaction before finishing the list; and we see, therefore, that it is sufficient to show the place of abode and the nature or description of the qualification. It has been decided that you may alter the place of abode, where the abode is *in rerum natura*, by amending, and you may also amend where the description is insufficient, and it now remains for us to see if you may alter an erroneous description. For the better illustration of my view on the subject, I will take a case for an example; for instance, the case of a house in a street and numbered 4. I will assume that the house is described on the register as No. 40, and the person who enjoys the occupation of No. 4, and is entitled to a vote, finds it described as No. 40. There is no No. 40 in the street, so that it is not the description of anything, and therefore not erroneous, but insufficient, according to the section. I think the revising barrister could have amended. But carry the case a little farther, and suppose No. 40 had been built while matters were *in fieri*, so that not only was the description insufficient, but erroneous also. That appears to have been the consideration applied in *Luckett* v. *Knowles* (2 C. B. 187), where two of the judges were for applying the early part of the section. The list in this case was erroneous, and an amendment was required; the fact of there being an insufficient description is not defeated by the description being erroneous also. The appellant was not struck off the list of voters because he owned old No. 4 and did not own new No. 4, but because his qualification was insufficient. Now comes the proviso to the 40th section, that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters, or claims; nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same. Surely it cannot be said that this was any other qualification than that in the list. The fact of the description being insufficient does not make the house any other than as described, and the description is of a freehold house and shop, the number being solely for the purpose of individualising the house, and as it is in one sense a true one, by which I mean that there was no falsification, the barrister might have amended. If there had been an attempt to introduce something new on the register, I should at once say no amendment could be made; but where there is a qualification, but insufficiently described, the barrister ought to amend, and his decision must, therefore, be reversed.

KEATING, J.—I am of the same opinion. The object of the Legislature when they intrusted the power of revising the vote to a barrister, was to prohibit him from altering the nature of a qualification in the third column; but where it is shown that the nature of the qualification was the same, the revising barrister was not denied the power under the 40th section to amend. Although six years have elapsed since the number of the house was changed, the question is just the same as if it had been changed on the last day of July. If the words of the Acts are susceptible of a construction to give the revising barrister a power to amend, we should do so upon the principle established in *Luckett* v. *Knowles*, where not only a total omission was supplied, but a description in the place of abode contrary to the fact was altered. The power of the barrister is not limited to cases of total omission, and I entirely differ with him in thinking that if he had the power to amend, he ought not; I think, if he had power, he undoubtedly ought to have amended.

BRETT, J.—This is a difficult case to decide. I think the revising barrister not only had power to amend, but that he was absolutely bound to amend. The time to which attention is called is the moment the parties were before the revising barrister; the description was inaccurate, as it was No. 4 instead of No. 9. The third and fourth columns together are the description of the qualification—the third column the description of the nature, the fourth column the local description of the subject matter. The inaccuracy was so great that the house could not be commonly described as set down in the list, and we must first see if the barrister had power to amend, and, if he had power, whether he ought to exercise it. Unless the case can be brought within the 40th section he has no power, but I think it falls within that section. Under the first part of the section he cannot amend, as there is no mistake by the overseer in inaccurately copying the register; the overseer could not alter the register, and the only person who could was the barrister. If the inaccuracy makes the description of the qualification the description of another qualification, and that were to be proved, no evidence could be given of the insufficient qualification, and the barrister cannot amend. The section says the barrister may strike out the name where the matter be insufficiently described, but if there be proof he may amend, if the case be not brought within the proviso. But there is an exception in an exception, for the proviso, after stating no evidence shall be given of any qualification except that in the list, goes on to say that the barrister shall not be at liberty to change the description of the qualification except for the purpose of more accurately defining it. If it were not for the case of *Luckett* v. *Knowles*, I should have great doubt in thinking that there was not a description of something else than that really proved.

COLLIER, J.—The first words of the section enact that the revising barrister shall correct any mistake which shall be proved to him to have been made in the list. This was a clear error in the list, but I think the amendment can also be made under the subsequent part of the section. It has been said the qualification is insufficient because it is erroneous, but I consider that to be a heresy. It has also been contended that the proviso applies, but I do not think any evidence of any other qualification was given, and I agree that the revising barrister ought to have amended.

Decision reversed.

Attorneys for appellant, *Carter* and *Bell* for *Bendle*, Carlisle.

Attorneys for respondent, *Gray, Johnstone*, and *Mouncey*.

Wednesday, Nov. 22, 1871.

REGISTRATION APPEAL.

HUCKLE (app.) *v.* PIPER (resp.).

***Parliamentary** election — County vote — Rateable value of occupation under several landlords — Aggregate value — Representation of the People Act* (30 & 31 *Vict. c.* 102, *s.* 6).

***An** occupation of several pieces of land under different landlords, none of which pieces are sufficiently rated to confer a vote for the county, but which are in the aggregate of sufficient value, makes a good qualification for a county vote under the 6th section of The Representation of the People Act: and the fact that the tenants hold under different landlords is no objection:* (Gadsby *v.* Burrow, 7 *M. & G.* 21, *distinguished*).

At a court held the 4th Oct., 1871, at Biggleswade, in the county of Bedford, to revise the lists of voters in the election of knights of the shire for the county of Bedford, the name of Henry Jeeves was duly objected to, and which name appeared on the list of persons entitled to vote in the election of knights of the shire for the said county, in respect of the occupation as owner or tenant of lands or tenements within the parish of Sandy, of the rateable value of 12*l.* and upwards.

Christian name and surname of each voter.	Place of abode.	Nature of qualification.	Street, lane, or other like place, No. of house (if any).
Jeeves, Henry	Sandy	£12	North Croft.

It was proved that Henry Jeeves, being of full age and not subject to any legal incapacity, had occupied for a sufficient time, on the 31st July last, as tenant, lands and tenements in the parish of Sandy, under four separate and distinct landlords, being separate and distinct owners of the respective lands and tenements, and to which said lands and tenements the said Henry Jeeves was separately assessed to the poor rates in the said parish in the sums following, that is to say, 5*l.* 10*s.*, 1*l.*, 2*l.* 12*s.* 9*d.*, and 5*l.* 12*s.* 6*d.*; that the lands and tenements comprised in such four several and distinct occupations were properly and fully assessed to the said poor rates in the said parish at such respective sums as aforesaid; that during the time of such respective occupations the said Henry Jeeves had been rated to the several premises so respectively occupied by him to all the rates made for the relief of the poor in respect of the said premises, and had paid all rates in respect of the said premises respectively.

It was objected that the name of the said Henry Jeeves could not be retained on the said list, inasmuch as the said Henry Jeeves was not separately assessed to the poor rate of the said parish in respect of a separate occupation of premises of the rateable value of 12*l.* and upwards, and was not the occupier of premises under one landlord of the rateable value of 12*l.* and upwards, and that the four separate assessments of premises held by the said Henry Jeeves under different landlords in the said sums of 5*l.* 10*s.*, 1*l.*, 2*l* 12*s.* 9*d.*, and 5*l.* 12*s.* 6*d.*, which when taken together make an aggregate sum of 14*l.* 15*s.* 3*d.*, were not a sufficient qualification under the 6th section of the Representation of the People Act 1867. The qualification was held sufficient, and the name of the said Henry Jeeves was retained on the said list.

At the same court the names of James Millard, William Patrick, John Gillions, and William Gosling were also duly objected to, and their names appeared on the list of persons entitled to vote in the election of knights of the shire for the said county in respect of the occupation as owner or tenant of lands or tenements within the said parish of Sandy, of the rateable value of 12*l.* and upwards, and also within the parish of Tempsford, as follows:

Christian name and surname of each voter at full length.	Place of abode.	Nature of Qualification.	Street, lane, or other like place in this parish, and number of house (if any), where the property is situate
Millard James	Girtford	12*l.* rateable value	St. Neot's-road
Patrick, William	Girtaford	12*l* rateable value	Blunham Field
PARISH OF TEMPSFORD.			
Gillions, John	Tempsford	12*l.* rateable value	Langford End
Gosling, William	Tempsford	12*l.* rateable value	Langford End

It was proved that James Millard was properly assessed to the poor rate of the parish of Sandy, in respect of two occupations by him of premises under different owners, in the separate sums of 7*l.* and 6*l.* 12*s.* 6*d.*; and that William Patrick was properly assessed to the like rate, in respect of three occupations by him under different owners in the separate sums of 10*l.*, 2*l.*, and 4*l.* 16*s.* 3*d.*; and that John Gillions was properly assessed to the poor rate of the parish of Tempsford, in respect of two occupations by him of premises under different owners, in the separate sums of 5*l.* 5*s.* and 7*l.* 6*s.* 8*d.*; and that William Gosling was properly assessed to the like rate, in respect of two occupations by him of premises under different owners, in the separate sums of 8*l.* and 5*l.* 10*s.*

It was objected that these names could not be retained on the said lists as occupiers of premises of the rateable value of 12*l.* and upwards.

The revising barrister held that the qualification was sufficient in each case, and retained the names of the said James Millard, William Patrick, John Gillions, and William Gosling on the said list.

If the court was of opinion that the qualification as proved in either of the foregoing cases was insufficient, the name of the person whose qualification is insufficient is to be struck out of the said list.

Bulwer, Q. C., for the appellant.—The right to vote for members of Parliament for the county was first conferred on the tenant occupier of lands by the Chandos clause (2 Will. 4, c. 45, s. 20). The 30th section of the Representation of the People Act directs in what manner the overseers are to make out the lists of persons on whom a right to vote for the county in respect of the occupation of premises is conferred by that Act, and they are to act in the same way as the overseers of the boroughs are required to do under the Registration Acts. Then the 27th section of 2 Will. 4, c. 45, provides that no person is to be registered unless he has been rated to all rates for the relief of the poor in such township during the time of his occupation; and by the 13th section of the 6 & 7 Vict. c. 18, the overseers are to prepare an alphabetical list of all persons entitled to vote in respect of the occupation of premises wholly or in part within his parish. If the tenant occupies lands of less value than 12*l.* a year in the parish, the overseer of the parish cannot put him on the list of

voters, nor can the overseer in the adjoining parish, for the same reason. The case of *Gadsby* v. *Barrow* (7 M. & G. 21), is in point. There it was held, under the Reform Act (2 Will. 4, c. 45, s. 18), that a tenant who holds under two different landlords two different sets of premises, the rent of each being less than 50*l.* per annum, though together they amount to more than that sum, is not entitled to a vote for the county. Erle, J. there says, "The 20th section of 2 Will. 4, c. 45, gives a qualification in respect of leasehold property, first to tenants, for sixty years at a 10*l.* rent; secondly, to tenants for twenty years at 50*l.* rent; and, thirdly, to tenants from year to year at a 50*l.* rent, and I think that in all these cases it was meant that the holding should be under one tenancy at one rent."

H. Shield, for the respondent, was not called upon.

WILLES, J.—We are of opinion that the revising barrister was right in deciding as he did. There are four pieces of land which, when put together, were of the rateable value of more than 12*l.* per annum, and although the claimant appears to have been differently rated for each piece of land, yet the total is sufficient to make up the amount necessary to confer a vote under sub-sect. 2 of the 6th section of the Representation of the People Act. Then, under sub-sect. 3, he has been rated in respect of all rates made for the relief of the poor, and paid them, so that he had fulfilled the requirements of the Act. The application of the case of *Gadsby* v. *Barrow* (7 M. & G. 21) seems to have been in the mind of the revising barrister, but that case was decided under authority of the Reform Act 1832, followed the terms of the Act, entitling only the occupier, who paid a single rent, to a vote, and I think the court rightly held that a yearly rent made up of two sums of 25*l.* each, due and payable to different landlords, was not a rent of not less than 50*l.* payable in respect of the tenancy of land; it was two separate pieces of land, the value of which could not be taken to make up the whole amount. But the 6th section which we deal with makes it sufficient to make up all the lands together within the county of the rateable value of 12*l.* or upwards, and with that the statute is satisfied.

BYLES, J.—I am of the same opinion. If the pieces of land were not separately assessed in respect of the separate occupation, by adding the amounts together we shall obtain the aggregate required.

BRETT, J.—It is most desirable that we should construe the statute according to the words used; whether the interpretation goes in favour of or against the exension of the franchise, we must construe the Act of Parliament according to the words of it. In the present case the rateable value of the lands are to be taken as more than 12*l.* per annum; the only objection is that the lands occupied by the claimants were occupied under different landlords. I think this case comes clearly within the words of the 6th section of the Representation of the People Act, and upon that section alone I should say the claimants were entitled to a vote, for the subject matter is being the occupier as owner or tenant of lands or tenements within the county.

Decision affirmed.

Attorneys for appellant, *Williams* and *James*, for *Wilkinson* and *Co.*, St. Neots.

Attorney for respondent, *Saunders*, for *Whyley* and *Piper*.

Wednesday, Nov. 22, 1871.

REGISTRATION APPEAL.

SIMEY *v.* DIXON.

Parliamentary election—Objection, notice of—County and borough vote—28 & 29 Vict. c. 36, s. 6.

A notice of objection, which named the "third column" as that on which the objection is grounded, and which stated that the objection related to the nature of the voter's interest in the qualifying property, is sufficient within the 6th section of 28 Vict., c. 36, to enable the objector to prove that a voter whose qualification was a "freehold benefice," in a borough, was entitled to a borough vote, and therefore not entitled to vote for the county under 2 Will. 4, c. 45, s. 24.

AT a court holden in Sunderland on the 12th Oct. last for the revision of the lists of persons entitled and claiming to be entitled to vote for a knight or knights of the shire for the northern division of Durham, the following name in the list of persons entitled to vote was objected to, that is to say:

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish, and number of house (if any) where the property is situate.
Cocken, William.	The Rectory, Bishopwearmouth.	Freehold benefice.	Bishopwearmouth parish.

It appeared in evidence that this was the name of the rector of Bishopwearmouth, and that the qualification for which it was endeavoured to retain his name on the said list was the parsonage house of the rectory, to which he was entitled in right of his benefice. It was proposed on behalf of the objector to prove that this house was situated within the parliamentary borough of Sunderland, and that it was and had been occupied by the voter a sufficient time to entitle him to a borough vote.

Exception was taken on behalf of the voter to the admissibility of the proposed evidence, on the ground that the notice of objection did not entitle the objector to go into this particular ground of objection. The notice of objection produced was in the form given by the 28 Vict. c. 36, Schedule A, No. 2, and specified the ground of objection in the following words, that is to say, "And I ground my objection on the third column of the register, and the objection relates to the nature of your interest in the qualifying property."

The revising barrister was of opinion that having reference to the 2 Will. 4, c. 45, s. 24, the said notice in point of form and particulars satisfied the 28 Vict. c. 36 for the purpose of the objector, and was sufficient within the said statute to entitle the objector to give in evidence the above facts. He thereupon admitted the evidence, and erased the name of the voter from the list.

The questions for the court is whether the said notice was sufficient within the 28 Vict. c. 36, to entitle the objector to give the above facts in evidence. If the court should be of opinion in the affirmative, the register shall remain as it is; if in the negative, the said name shall be restored to the register.

Udall for the appellant.—The objection to the vote cannot be raised in the manner in which it

has been in this case. The objection should have been to the fourth column; as it is, it is not sufficiently clear. The party who is objected to knows the grounds which he has to defend. The objection is under the 2 Will. 4, c. 45, s. 24, and it is there stated that no person shall be entitled to vote for a county in respect of any house occupied by himself which would confer a vote for the borough. If he was not in occupation on the 31st July he was entitled to a vote for the county, and he did not claim in respect of the rectory, but he claimed for the parsonage house. [WILLES, J.—A freehold benefice is a parsonage house.] He had a right to claim for any freehold part of the benefice out of the borough. The objection to the vote cannot be made to the third column, and no person shall be required to give evidence in support of his right to be registered otherwise than as such right shall be called in question in the grounds of objection: (29 & 30 Vict. c. 36, ss. 6, 7.) The objection ought to have been to the fourth column: (*Bennett* v. *Brumford*, L. Rep. 4 C. P. 407.) [BRETT, J.—Your case depends on whether the objection is to the third column or not.] When the objection is to the nature of the qualification it is not necessary to give notice.

Quain, Q.C. was not called upon.

WILLES, J.—We are of opinion that the revising barrister was right. The question is whether the objection is taken within the meaning of the statute. The claim was to a freehold benefice, being the parsonage house, which was within the limits of the borough of Sunderland. I think he was properly objected to, and that the franchise in the county was rightly refused, in pursuance of the 24th section of 2 Will. 4, c. 45. The 6th section of the County Voters' Registration Act (28 & 29 Vict. c. 36), already alluded to, enacts that if the objection be grounded on the third column it shall be necessary to state whether the objection is to the nature of the qualifying interest or to the value of the property, or to both; and the notice of objection was clearly to the third column. I reject any notion that the objection could have been taken to the fourth column, and if it had been it would have been idle. It was part of the nature of the interest of the rector that he should have a vote for the borough, and he therefore, under the 24th section, would have no right to vote for the county. The learned counsel for the appellant contends that the notice which is given must be more specific, but the objection to the nature of the interest in the third column seems to me as specific and pointed a mode of directing attention to what was to be proved as could well be; and I think the decision should be affirmed.

BYLES, J.—I am of the same opinion. The notice to my mind applies to the third column most clearly.

BRETT, J.—This objection is not to a person on the list of claimants, but to a person on the list of those who are entitled to vote for the county. It was thought that a notice of objection under No. 5 schedule of 6 Vict. c. 18 was insufficient, and the 28 Vict. c. 36, s. 6, was accordingly passed to alter it. To any person on the list of claimants, notice of objection may be general, otherwise it is not valid, unless the ground of objection be specifically stated therein, and this is to be deemed to be sufficiently satisfied by naming the column of the list on which the objector grounds his objection. Mr. Udall argued that this was an objection to no column. If you name the column, it is sufficient in all cases but one, but in that case it is necessary to state whether the objection relates to the nature of the interest or to the value of the property, so that it is sufficient except in the third column to object to the column and nothing more. Then comes the question: Did the objector misconceive the column? It is said he ought to have objected to the fourth column, but that only is the description of the property claimed for, and states that it is situate in Bishopwearmouth parish; such an objection would be utterly futile. The real objection is to the nature of the interest, that it gives no vote for the county because it gives a vote for the borough, and I therefore think the notice of objection was sufficient. *Decision affirmed.*

Attorney for appellant, *Hicking*.

Attorney for respondent, *Southgate*.

Saturday, Nov. 18, 1871.

REGISTRATION APPEAL.

FORD (app.) *v.* BOON (resp.).

Registration—Notice of claim—"House"—Amendment—6 Vict. c. 18, *ss.* 15 *and* 40; *Schedule B, No.* 6.

B. being entitled to be registered in respect of the occupation of a house in E. of the clear yearly value of not less than 10*l., served upon the overseers a notice of claim in the form given by the* 6 *Vict. c.* 18, *Schedule B, No.* 6, *in the third column of which the "nature of qualification" was stated to be "House."*

E. is a city and county of itself, having reserved rights of voting as freeholders and freemen under 2 *Will.* 4, *c.* 45, *and therefore persons possessing freehold property are entitled to vote for the city, and the overseers of the parish make out two lists, one of persons entitled to vote as occupiers, the other of persons entitled by virtue of other rights except as freemen:*

Held, that the notice was sufficient, or, if not sufficient, that the revising barrister had power to amend.

ON appeal from the revising barrister for the city of Exeter, the following case was stated:

At a court holden, &c., Robert Saunders Gaunicliffe claimed to have his name inserted in the occupiers' list for the parish of St. David.

Brutton John Ford duly objected to his name being so inserted.

It was proved to my satisfaction that the said Robert Saunders Gaunicliffe sent to the overseers of the said parish, between the 1st and 26th Aug., a notice of claim in the words and figures following:

NOTICE OF CLAIM.

To the Overseers of the Parish of St. David.

I hereby give you notice that I claim to have my name inserted in the list made by you of persons entitled to vote in the election of members for the city of Exeter, and that the particulars of my qualification and place of abode are stated in the columns below.

Dated the 21st Aug., 1871.

Christian name and surname of the claimant at full length.	Place of abode.	Nature of Qualification.	Street, lane, or other place in the parish where the property is situate, and name of the house (if any) where the right depends on property.
Robert Saunders Gaunicliffe.	Saint David's-hill.	House.	Saint David's-hill.

Signed R. S. GAUNICLIFFE.

It was proved to my satisfaction that the overseers duly published a list of persons claiming to

have their names inserted in the lists as required by 6 Vict. c. 18, s. 15, in which the names and qualifications of the claimants appear precisely as they are set forth in their respective notices of claim.

It was also proved to my satisfaction that the said Robert Saunders Gaunicliffe was on the 31st July last past entitled to have his name inserted in the said list in respect of the occupation of a house in the said parish of the clear yearly value of not less than 10*l*.

Exeter is a city and county of itself, having reserved rights of voting as freeholders and freemen under 2 Will. 4, c. 45, and therefore persons possessing freehold property are entitled to vote for the said city, and the overseers of each parish make out two lists, one consisting of persons entitled as occupiers, and the other of persons entitled by virtue of other rights except as freemen, which, after being revised by me, are amalgamated into one list by the town clerk, forming the register of voters for the city.

It was contended on the part of the objector, that though the claimant had followed the form in the schedule prescribed by the Act, he had insufficiently filled it up, inserting only the qualification and not the nature of it also, and that therefore the notice of claim was insufficient—that the word "house" did not express any qualification known to the law, and there was no indication of the list in which the said Robert Saunders Gaunicliffe claimed to have his name inserted, or whether he claimed to be entitled to vote as owner of a freehold house or as occupier of a house. It was further contended that I had no power to amend the notice of claim under 6 Vict. c. 18, s. 40, by inserting the words "occupation of."

First, because that would be giving a qualification, and not merely more accurately defining one already given, "house" being no qualification at all; secondly, because the said section only applied to the lists which I had to revise, and not to the list of claimants, or any notices, and no alteration of the published list of claimants could enable me to hold that the claimant had duly claimed as required by 6 Vict. c. 18, s. 38, before I could insert his name in the list.

On the part of the said Robert Saunders Gaunicliffe, it was contended: First, that the notice of claim being in the form given by the Act (6 Vict. c. 18), was sufficient, although it did not expressly state on which list the said Robert Saunders Gaunicliffe claimed to be placed; secondly, that the nature of the said Robert Saunders Gaunicliffe's qualification was sufficiently indicated by the notice of claim; thirdly, that section 40 did enable me, if necessary, to amend the list of claimants, and that the claim was good, and he relied as an authority for this upon the case of *Barlow* v. *Mumford* (Law Rep. 2 C. P., 81), and the cases therein referred to; fourthly, that any description of the nature of the qualification in the notice of claim which, if it had appeared in the overseers' list, I should have corrected into a correct description, was sufficient, in support of which he relied on the authority of *Eaden* v. *Cooper* (2 Lutw. 183; 11 C. B. 18), and that in an occupiers' list, even if "house" were insufficient to designate the qualification as being ambiguous, and not stating whether it meant "freehold house" or "house as occupier," yet it might be more clearly defined according to the nature of the qualification which it was proved to have been intended to mean if the information was supplied to me.

I held, first, that the form of the notice was sufficient, being that given by the Act, and no one being in fact required to place his name upon either list, till the case came before the revising barrister; secondly, that the description of the nature of the qualification in a notice of claim was sufficient, if it was such that I should (if it had appeared upon an overseers' list or a register for a county) have amended it under 6 Vict. c. 18, s. 40 into a correct description, and that "house" was a description which I should have been justified in amending into "occupier of a house" under such circumstances; thirdly, though I was of opin on that 6 Vict. c. 18, s. 40 did not apply, for the reason relied on by the objector, I held that I was bound by the authority of *Barlow* v. *Mumford* to hold that it did so apply, and I was satisfied that if I had the power of amendment, I ought to use it. I therefore held that the notice of claim was sufficient, and inserted the name of the said Robert Saunders Gaunicliffe in the said list of occupiers.

The said Brutton John Ford appealed from this decision.

Under similar circumstances I inserted in the list of occupiers the names of the persons whose names are given in a schedule marked A to this case annexed, and the said Brutton John Ford appealed from my decision thereon. The several appeals depend upon the same decision and ought to be consolidated.

The question for the opinion of the court is whether the said Robert Saunders Gaunicliffe duly claimed to be placed on the said list, I having made such amendment, if any were necessary, as I had power to do.

If the court shall be of opinion in the affirmative, the list of voters for the city of Exeter is to remain unaltered.

If the court should be of opinion in the negative the names of the said Robert Saunders Gaunicliffe and the other persons mentioned in the said schedule to this case are to be erased from the said list.

Kingdon, Q.C. for the appellant.—The notice was insufficient. The description of the nature of the qualification as "house" might be sufficient in an ordinary borough; but in a borough where freeholders have a right to vote, it is insufficient, as it does not indicate the list on which the claimant claims to be put. [*Lopes*, Q.C. mentioned *Hitchins* v. *Brown* (15 L. J. 38, C. P.; 2 C. B. 25.] In ordinary boroughs it is not necessary for a claimant to describe the particular nature of his interest in the property which is his qualification; but this is not an ordinary borough, and must be governed by the rules applicable to counties, and in counties the particular nature of the claimant's interest in the property which is his qualification must be stated. "Upon reference to the schedule relating to counties this is further illustrated, for there the parties are not required to be occupiers, and the particular nature of the party's interest must be stated; and if the party be an occupier, that is set forth, because that is an ingredient in the nature of the qualification" (per Erle, J., in *Daniel* v. *Camplin*, 14 L. J. 121, C. P.; 7 M. & G. 167; 1 Lutw. 264). That exactly applies to a case like this, as in a constituency of this sort the

parties are not required to be occupiers. There having been thus an omission to state some part of what was necessary to constitute the claim, and not merely an insufficient description of the claim, sect. 40 of 6 Vict. c. 18 did not give the revising barrister power to amend (per Williams, J., in *Howitt* v. *Stephens* (28 L. J. 105, C. P.; K. & G. 183). In *Townsend* v. *Overseers of Marylebone* (25 L. T. Rep. N. S. 749) the court thought that the word "dwelling-house" did sufficiently indicate the list on which the claimant claimed to be put, as, though valid as a claim by 10*l.* householder, it was not good as a claim under sect. 3 of 30 & 31 Vict. c. 102, and the court therefore thought that the claimant in that case had sufficiently indicated that he claimed to be put on the list of 10*l.* occupiers, as his notice of claim was insufficient as a claim to be put on the other list. [COLLIER, J.—In that case I thought that the word "dwelling-house" sufficiently described a claim as a 10*l.* occupier under the Act of 1832, but would not be sufficient for a claim under the Act of 1867; but I did not found my judgment upon that.]

Lopes, Q.C. for the respondent, was not called upon.

WILLES, J.—I am of opinion that the decision of the revising barrister was right. I do not at all concur in the doubts which he had as to the decision of the court in *Barlow* v. *Mumford*. He appears to have concluded that that case was one in which the court decided that the notice of claim ought to be amended; but in reality it was the list founded on the notice of claim which the court decided ought to be amended. It may be that a notice of claim is not within sect. 40 of 6 Vict. c. 18, but only the list; but as soon as the statement in the claim gets into the list, it is clearly within that section. The revising barrister was quite right, in my judgment, in holding that under *Barlow* v. *Mumford* he had power to amend, and that, if he had the power, he ought to use it, because, in giving notice of objection in such a case as this, the objector would object to the specifications of the qualification, and that is a case in which an amendment may be made. The amendment was necessary in this case, as Exeter happens to be (that it is a city and county is of no importance) a city in which burgage tenure exists, and the burgage tenants have in certain cases a right to vote under sect. 33 of the Act of 1832. Sects. 34 and 35 of that Act also relate to burgage tenants. Thus the 10*l.* occupation franchise existed in Exeter under sect. 27 of 2 Will. 4, c. 45, and the 40*s.* burgage franchise (under certain conditions) under sects. 33, 34 and 35. But for that circumstance, if Exeter were a pure borough, these claims would seem to be sufficient. The claim appears to have been deemed sufficient in *Hitchins* v. *Browne* (2 C. B. 25), in which case in column 3 there was simply the word "house," and in column 4, what was a description of the occupation of houses in succession. There, no one thought the statement "house" insufficient; indeed, the court thought it unnecessary for the barrister to make any amendment, to make the claim apply to houses in succession. The court thought the word "house" meant a house qualification. In this case, also, "house" was a sufficient description of the qualification. If it was not sufficient, the revising barrister was right in amending by inserting the words, "occupation of." My impression yesterday was, and, since our decision in the case of *Townsend* v. *Overseers of Marylebone*, it is now the law, that if there be a description which is sufficient in the case of a claim to vote in respect of a 10*l.* house, and that description happens also to include some other head of qualification, the claimant may prove a qualification, either under the Act of 1832, in respect of the genus "house," or under the Act of 1867, in respect of the species "dwelling-house." The head of qualification is the same in either case. Thus in a place where burgage tenants have the franchise, if a man claims for a "house," he may either show that he has a 10*l.* house, or he may prove that the house, in respect of its species, is a freehold house. In this instance, the claim was in respect of the occupation of a house which was of the yearly value of 10*l.* The claimant had, therefore, a good right to be inserted on the register, and the appeal must be dismissed.

KEATING, J.—I am of the same opinion, and think the revising barrister was right. The claim was for a "house," and the overseers' list so states. It is the duty of the overseers to receive claims, and out of them to make a list which goes before the revising barrister. The revising barrister has sometimes to look at the claim; but it is the list which is actually before him. Here the voter claimed for a "house," and Mr. Kingdon does not deny that, in an ordinary borough, that would be a good claim; but he contends that in this instance it ceases to be good, because Exeter happens to be a city and a county, where not only occupiers but freeholders vote, and we are asked to decide that the revising barrister ought, either under sect. 40 of 6 Vict. c. 18, to have struck the claim out as insufficient, or to say that a latent ambiguity appears when it is shown that freeholders have the franchise, so that it is impossible to say whether the claimant claimed as occupier or freeholder. I think the case is within our decision of yesterday: (*Townsend* v. *Overseers of Marylebone*.) We there thought that before 1867 the word "dwelling-house" would have been a sufficient description, and that it did not cease to be so in consequence of anything contained in the Act of 1867. So here, "house" would have been sufficient under ordinary circumstances, and the fact that Exeter is both a city and a county does not render it insufficient. The question is whether the revising barrister was bound to strike the claim out as insufficient. If it remains on the list, surely the claimant may prove his qualification as a 10*l.* householder. If it were necessary that the qualification should be more clearly defined as "occupation of house of 10*l.* value," then I agree with my brother Willes that the revising barrister ought to amend, the subject-matter of the occupation being rightly described.

BRETT, J.—As to the first point, I never had any doubt, viz., that the revising barrister ought to amend, not the notice of claim, but the list. The notice is only an authority to the overseer, who is entitled to make out the list only from the claim. When he has performed that duty, and made out a list, the list goes to the revising barrister. As to the main point, but for our decision yesterday in *Townsend* v. *Overseers of Marylebone*, I should entertain great doubts. In this borough, besides other qualifications, there were two in respect of the mere occupation of a house and in respect

of the freehold, and the claimant described his qualification merely as "house." Under these circumstances, the claim appears to me to have been not only inaccurate but insufficient, as, by omitting to state a material part of the qualification the claimant gives an objector great difficulty, as it is impossible to tell from this statement whether the claim is in respect of the occupation or ownership of a house, and it therefore throws on the objector the difficulty of having to be prepared to meet either case, and Mr. Kingdon contends that an objector ought not to have that difficulty cast upon him. He urges, moreover, that the difficulty is so great that the claim in that form ought not to be admitted, and he cites the judgment of Erle, J. in *Daniel* v. *Camplin*, and of Williams, J. in *Howitt* v. *Stephens*. But for our decision yesterday in *Townsend* v. *Overseers of Marylebone*, I should have thought that argument a strong one, and those dicta a strong authority. The argument yesterday was that a difficulty was thrown in the way of an objector, if the claimant might prove, under a claim for a "dwelling house," a qualification under the Act of 1832, or one under the Act of 1867. As I understood the majority of the court yesterday, they thought that "dwelling house" does not describe a qualification under the Act of 1867, but that, assuming that it does, it also describes a qualification under the Act of 1832, and is, therefore, applicable to either, and thus the decision of the court negatived the argument derived from the difficulty cast upon an objector. The decision of yesterday, therefore, negatives Mr. Kingdon's argument, and I bow to that decision. Here the term used was applicable to either of two qualifications, and, that being so, the claimant was justified in proving either of the two that was consistent with the description he had given.

COLLIER, J.—I am of the same opinion. Our decision in *Townsend* v. *Overseers of Marylebone*, governs this case. I understand that decision as affirming that where a claim is made under the Act of 1832, and the claimant has used words which describe that claim, that is sufficient, and the claim is not to be held bad simply because the words in question are such as would also include a claim under the new Act. I will only add, that I entirely agree that, if any amendment were necessary, the revising barrister was bound to make the amendment under sect. 40 of 6 Vict. c. 18.

Decision affirmed.

Attorneys for appellant, *Elliott* and *Fox*.

Attorney for respondent, *G. E. Philbrick*, for *Sanders, Burch* and *Barnes*, Exeter.

REGISTRATION APPEAL.

Saturday, Nov. 18, 1871.

FIRTH *v.* OVERSEERS OF WIDDICOMBE-ON-THE-MOOR.

Registration—County vote—12l. occupier—Notice of claim—30 & 31 Vict. c. 102, *s.* 30, *sub-sect.* 1—31 *& 32 Vict. c.* 58, *s.* 17—6 *Vict. c.* 18, *s.* 15, *and Form* 6 *Schedule B.*

The appellant claimed before the revising barrister to have his name inserted in the list of 12*l. occupiers for the parish of W. It was proved that on the 25th Aug. he sent to the overseers of W. a notice of claim in the following terms: "To the overseers, &c. I hereby give you notice that I claim to be inserted in the list of voters for the division of East Devonshire, and that the particulars of my place of abode and qualification are stated in the columns below. Dated the 25th Aug.* 1871. (*Signed*) *F. H. Firth." The nature of his qualification was described in the third column below as "land as occupier." The appellant was entitled to be put on the list in respect of land occupied by him of the value of more than* 50*l. a year. The revising barrister held the notice insufficient, as it was sent in too late to enable the appellant to claim to be put on the list of* 50*l. occupiers, and that a notice of claim to be put on the list of* 12*l. occupiers ought to show on its face that it was a claim to be put on that list, and not a claim to be placed on the register sent in too late.*

Held, that the notice was sufficient as a notice of claim to be placed on the list of 12*l. occupiers.*

ON appeal from the decision of the revising barrister for the Eastern Division of the County of Devon, the following case was stated:

1. At a court held, &c., Frederick Hand Firth claimed to have his name inserted in the list of 12*l.* occupiers for the parish of Widdicombe-on-the-Moor. Robert Ford Tucker duly objected to his name being so inserted.

2. It was proved to my satisfaction that the said Frederick Hand Firth had, on the 25th Aug. 1871, sent to the overseers of the said parish a notice of claim in the words and figures following:—

3. "Notice of claim.—To the overseers of the parish of Widdicombe-on-the-Moor. I hereby give you notice that I claim to be inserted in the list of voters for the division of East Devonshire, and that the particulars of my place of abode and qualification are stated in the columns below. Dated the 25th Aug. in the year 1871.—Signed F. H. FIRTH."

Christian name and surname of the claimant at full length.	Place of abode.	Nature of qualification.	Street or other like place in this parish, and number of house (if any) where the property is situate, or name of the property, if known by any, or name of the occupying tenant, or if the qualification consist of a rent-charge then the name of the owner of the property, out of which such rent is issuing, or some of them, and the situation of the property.
Frederick Hand Firth.	Great Cator.	Land as occupier.	Great Cator.

4. It was proved to my satisfaction that the said Frederick Hand Firth was entitled, on the 31st July last past, to have his name inserted in the said list, in respect of the qualification described in the said notice of claim, and that the land occupied by him was of the value of more than 50*l.* a year.

5. There was no evidence that any list of persons claiming to have their names inserted in the said list of 12*l.* occupiers had been published by the overseers of the said parish.

6. It was contended by the said objector that the notice was insufficient, because it did not show in what list the said Frederick Hand Firth claimed to have his name inserted.

7. It was contended by the said Frederick Hand Firth that the notice was to the like effect as the form of notice given by 6 Vict. c. 18. sch. B, No. 6, and that the date at which the notice was sent to the overseers sufficiently indicated the list in which he desired his name to be inserted.

8. I held that the Legislature having, by 6 Vict. c. 18, s. 4, appointed a form in which persons should claim to be placed on the register of voters for a county, and by 31 & 32 Vict. c. 58, s. 17, taken in conjunction with 6 Vict. c. 18, s. 15, having expressly appointed a different form in which persons should claim to be placed on the list of 12*l.* occupiers, the first form was not applicable to a claim to be placed on the list of 12*l.* occupiers, but that a notice of claim to be placed on such list should show on its face that it was a claim to be placed on that list, and not a claim to be placed on the register sent in too late.

9. I therefore refused to insert the name of Frederick Hand Firth in the said list.

10. William Avery claimed to have his name inserted in the said list under precisely similar circumstances, the nature of his qualification being described as follows:—

William Avery.	Lower Cator.	Land as Occupier.	Lower Cator.

11. I refused to insert his name in the said list on the same ground.

12. Due notice of appeal from my decision was given by the said Frederick Hand Firth and William Avery, and the appeals depend upon the same decision, and ought to be consolidated.

13. The question for the opinion of the court is whether the said notices of claim were sufficient.

14. If the court is of opinion that the said notices were sufficient, then the said list is to be amended by inserting the names of the said Frederick Hand Firth and William Avery according to their said claims.

15. If the court is of opinion that the said notices were not sufficient, then the said list is to remain unaltered.

16. And the said Robert Ford Tucker having in writing declined to support the decision appealed against, I appoint the overseers of the said parish of Widdicombe-on-the-Moor to be the respondents herein.

G. Lewis for the appellant.—The claim was sent in Aug. 25th, and the last day for claims, other than those of 12*l.* occupiers, is July 20th. The date at which the claim was sent in, then, shows sufficiently on what list the claimant claimed to be put. The notice here was substantially the same, *mutatis mutandis*, as form 6 schedule B to 6 Vict. c. 18, which is made by sect. 30 of 30 & 31 Vict. c. 102, and of 31 & 32 Vict. c. 58, s. 17, the proper precedent. It does not vary further from that precedent than the notice of objection in *Lambert* v. *Overseers of New Sarum* (12 C.B. 642), varied from the statutory form; and yet the notice of objection there was held sufficient; and a notice of objection is always construed more strictly than a notice of claim.

The respondents did not appear.

WILLES, J.—I am of opinion that the notice of claim sent in by the appellant was not open to the objection made to it, and that the decision of the revising barrister was erroneous. The decision seems to be founded on the notion that a 12*l.* occupier, sending in his *claim, cannot* properly do so by only describing himself in column 3 as claiming in respect of the nature of his qualification for land as occupier, and that if he does nothing more he omits to give sufficient notice to the overseers to put him on the proper list. Having carefully searched through the Acts of Parliament I find nothing applicable beyond the 17th section of 31 & 32 Vict. c. 58, which refers back to sect. 15 of 6 Vict. c. 18 and the forms given in the schedule of that Act, and I do not find in sect. 6 of 30 & 31 Vict. c. 102 any provision that a person claiming the new county franchise given in that section shall tell the overseer on which list he claims to be put. Looking at the terms of the Act, which provides that a claimant shall describe the nature of his qualification, I do not think that it is to be inferred that he is bound to claim to be put on any particular list. The overseers in counties have a particular duty with regard to the 12*l.* occupiers. The later statutes, which provide for the case of a 12*l.* occupier, omitted by the overseers, refer to previous enactments applicable to the case of claimants of borough votes. The enactments in question are forms 6 and 7, schedule B, of 6 Vict. c. 15, but form 7 being wholly inapplicable, we must take form 6 as the proper precedent for a notice in the present case. If we take into consideration the fact that form 6 dealt with a claim in respect of property, and form 7 with a claim otherwise than in respect of property (viz., as a freeman), that may seem an indication, taking the two together, that a person claiming should, in his notice, indicate the list on which he claims to be put. But, if we take form 6, which alone relates to property, as the proper precedent applicable here, then we have in the present case a notice which sufficiently complies with the requirements of the statute, and it appears to me to be an unnecessary refinement to go into the question of the necessity of dealing with form 7, which is not applicable at all to the case of a claim for a county. I think that the notice before us was sufficient, as it gives every information that is required, and enables the overseers to do everything that is necessary.

KEATING, J.—I am of the same opinion. It is the duty of the overseers in boroughs to make out lists of the persons entitled to vote for the borough, and all persons omitted from such lists had a right to make their claims, and, if qualified, to have their names inserted on the lists. In counties, the rule was different; there the duties of the overseers were merely ministerial. In this state of things, the Representation of the People Act 1867 was passed, by which a new franchise was created in counties. This Act put on the overseers in counties a duty with regard to the newly created franchise, similar to that already imposed on overseers in boroughs. But, doubts having arisen as to whether the right to make a claim in case of omission attached to the 12*l.* occupiers, the 31 & 32 Vict. c. 58, sect. 17 provided that a person omitted might claim in the same way as a person under similar circumstances would claim in a borough, or as nearly as circumstances allowed. In the case of a person omitted in a borough, a form of claim was given in the schedule to 6 Vict. c. 18. In a borough, a person could only claim as either an occupier or else as a freeman; but, if he sent in his notice to the overseer, it was not necessary for him to say that he claimed as an occupier, because the

fact of his not claiming as a freeman was equivalent to his claiming as an occupier. That seems tolerably clear. But the revising barrister seems to have thought that 30 & 31 Vict. c. 58, s. 17, taken in conjunction with 6 Vict. c. 18, s. 15, rendered it necessary for a person claiming a county vote in respect of a 12*l.* occupation to claim as a 12*l.* occupier, and to be put on the 12*l.* occupiers' list. I have looked all through the Acts, and I am unable to find that such a person is under any obligation to say that he claims as a 12*l.* occupier, and I therefore think that the decision of the revising barrister must be reversed.

BRETT, J.—The objection raised before the revising barrister and his decision raise this point: Assuming that the nature of the qualification is sufficiently described, is it or is it not necessary that the notice of claim should show further on which list the claimant claims to be put? In counties, before the Act of 1867, the overseer used to send out a notice, and a person claiming to be put on the list then sent in a claim in the form 2 of schedule A to 6 Vict. c. 18. In boroughs the overseers made out a list, and any person omitted from that, or from the list made up by the town clerk, sent in a claim, in form 6 or 7 of schedule B of 6 Vict. c. 18, as the case might be. But since the Act of 1867, which gave a new county franchise, any person claiming in respect of the new franchise, was bound to claim, not in the mode hitherto in use in counties, but according to the mode previously used in boroughs. Thus the overseers were first required to make out a list of the persons entitled in respect of the new franchise, and if any person was omitted from that list, he was to make his claim according to the mode previously in use in boroughs. Taking that to be so, the revising barrister, conceiving that the Legislature had, in sect. 4 of 6 Vict. c. 18, referring to form 2 schedule A to that Act, given a form applicable to a claim for a county vote, thought that the Legislature had, by 31 & 32 Vict. c. 58, s. 17, taken in connection with 6 Vict. c. 18, s. 15, expressly appointed a different form. That is, in a sense, true; as the Legislature appears to have provided that a person omitted in a county was to claim according to form 6 or 7, schedule B of 6 Vict. c. 18, and not according to form 2, schedule A, of that Act; and form 7 being inapplicable, it would appear that the claim must be according to form 6. The revising barrister accordingly concluded that a person omitted in a county must adopt form 6, schedule B, of 6 Vict. c. 18, and not form 2, schedule A. He then goes on to say that, as form 2 of schedule A is not applicable to a claim as a £12 occupier, it is not sufficient for such a person to claim according to form 6 of schedule B of 6 Vict., c. 18, but he ought to show on the face of his claim that he claims to be put on the £12 occupiers' list. I think his reasoning erroneous. He appears to have overlooked the fact that form 2, schedule A, which is applicable to counties, is as nearly as possible the same as form 6 of schedule B of 6 Vict. c. 18, which is applicable to boroughs; and although the claim in the present case is as nearly as possible in form 2, schedule A, rather than in form 6 of schedule B of 6 Vict. c. 18, the revising barrister has failed to see that the claim is practically in accordance with form 6, schedule B of 6 Vict. *c. 18 (as made* applicable to a claim for a county vote), though literally in accordance with form 2, schedule A. Form 6 of schedule B of 6 Vict. c. 18 having been provided (*mutatis mutandis*) for a case like the present, we have no right to engraft upon it the rule that it should show on its face that it is a claim to be put in one list rather than another. I, therefore, concur in thinking that the decision should be reversed.

COLLIER, J.—I am of the same opinion. Section 17 of 31 & 32 Vict. c. 58, refers us to section 15 of 6 Vict. c. 18, and the forms there referred to, for the proper form applicable to the present case. When we turn to that form, we find that it does not precisely apply, and we then have to make it apply as far as we can. The notice in the present case is, in my judgment, sufficient, as it is substantially according to form 6 of schedule B, of 6 Vict. c. 18.

Decision reversed.

Attorneys for appellant, *Coode*, *Kingdon*, and *Cotton*.

Tuesday, Nov. 21, 1871.

REGISTRATION APPEAL.

BUCKLEY (app.) *v.* WRIGLEY (resp.)

Registration—County vote—40s. freehold—Expenses to be deducted.

Appellant, and forty-seven other persons, claimed a county vote, describing their qualification as "share of freehold houses and lands." The appellant and another person were the owners in fee simple of certain houses and land in trust for themselves and the other forty-six claimants, in forty-eight equal undivided shares as tenants in common. The gross annual rental up to June 1871 *was* 141*l.* 14*s.* 4*d.*, *but for the year between* 31*st July* 1870, *and* 31*st July* 1871, *it was* 143*l.* 2*s.* 10*d.*, *the increased rent of* 1*l.* 8*s.* 6*d. being occasioned by the bringing into the dwelling-houses a supply of water, and such bringing in of water was found by the revising barrister a convenience to the tenants, who were charged an increased rent in respect of it, and such increased rent commenced in June* 1871, *when the water supply commenced. The cost of laying on such water was* 21*l.* 19*s.* 1*d.* *There were certain outgoings in the shape of chief rent, right of way, repairs, and commissions to a rent collector, amounting to* 39*l.* 18*s.* 2*d.* *If only this last amount was deducted (and it was conceded that this was properly deducted) from the gross rental of* 143*l.* 2*s.* 10*d.*, *there remained a net annual rental of* 103*l.* 4*s.* 8*d.*, *and each of the forty-eight claimants was then entitled to be put on the register as a 40s. freeholder; but if the expense of laying on the water was also deducted, there remained a net annual rental of only* 81*l.* 5*s.* 7*d.*, *which did not give a 40s. freehold to each of the forty-eight claimants. The revising barrister held that the expense of laying on the water was a necessary expense and proper to be deducted from the gross annual rental, and consequently disallowed the votes.*

Held, that the revising barrister was wrong.

ON appeal from the revising barrister for the southern division of the West Riding of Yorkshire, the following case was stated:

The names of the appellants and forty-six other persons were in the list of voters for the southern division of the West Riding of Yorkshire for qualifications described as "Share of freehold

houses and lands in the township of Saddleworth, called Valley Cottages, Woodend, near Mossley," and the said appellant and forty-six other persons were duly objected to as not being entitled to have their names retained in the said list of voters.

The conveyance of the property was in fee simple, and dated in January 1870, and was to Robert Shaw Buckley and another in trust for themselves and forty-six other persons (including the appellant) in forty-eight equal undivided shares as tenants in common.

The gross annual rental at the date of the conveyance, and thenceforward up to June 1871, was 141*l.* 14*s.* 4*d.*; but for the year between the 31st July 1870, and the 31st of July 1871, the gross annual rental was 143*l.* 2*s.* 10*d.*, the increased rent of 1*l.* 8*s.* 6*d.* being occasioned by the bringing into the dwelling-houses a supply of water from the Ashton-under-Lyne, Staleybridge, and Dunkinfield Waterworks, and such bringing in of water was a convenience to the tenants, who were charged in respect of it an increased rent, and the increase of rent took place in June 1871, when such water supply commenced. Thus the gross annual rental of the property during the year between the 31st July 1870, and the 31st July 1871, was 141*l.* 14*s.* 4*d.*, *plus* 1*l.* 8*s.* 6d. (the increase of rent obtained between June, 1871, and the 31st July, 1871), equal to 143*l.* 2*s.* 10d.

The houses were managed by an agent who was paid by commission which I found to be necessary, and who expended during the year, between the 31st July 1870 and the 31st July 1871, in repairs and otherwise in respect of the houses in question the following amounts which I held, in the absence of any other evidence, to be necessary expenses and proper to be deducted from the gross annual rental.

	£	s.	d.
Chief rent	4	11	6
Right of way	1	10	0
Repairs	26	15	0
Commission	7	1	8
Expended for laying on water for use of tenants of the houses	21	19	1
Total	61	17	3

which, being deducted from 143*l.* 2*s.* 10*d.*, the gross annual rent, left a net annual rental of 81*l.* 5*s.* 7*d.* The latter sum, being equally divided among the forty-eight tenants in common, left a less sum than 40*s.* annual value to each. Upon this I disallowed the votes of the appellant and of the other forty-six tenants in common whose names are appended to the schedule hereto annexed.

In all other respects the appellant and the said forty-six other persons were duly qualified. And I declare that the appeal of the said Jesse Edward Buckley and of the said forty-six other persons depend upon the same decision, and ought to be consolidated.

If I was wrong in deducting the sum of 21*l.* 19*s.* 1*d.* from the gross rental for the purpose of estimating the annual value, then the vote of the appellant is to be allowed, and his name, and the names of the said other forty-six persons in the schedule hereto, are to remain in the list of voters for the southern division of the West Riding of Yorkshire in respect of the said qualification. If I was right, then the votes are to be disallowed.

C. Bowen, for the appellant.—This is simply a case where a man has improved the value of his property by making a permanent improvement. He cited *Rolleston* v. *Cope*, 24 L. T. Rep. N. S. 390; L. Rep. 6 C. P. 292; 40 L. J. 160, C. P.

Pickering, Q.C. for the respondent.—It is simply a question of fact whether the expenses are necessary or not; whether they were incurred voluntarily or not does not matter. The expenses incurred in this case were necessarily incurred in order to get the rent. He cited *Hamilton* v. *Bass*, 1 C. B. 631; 2 Lutw. 213; 22 L. J. 29, C. P.; *Moorhouse* v. *Gilbertson*, 14 C. B. 70; 23 L. J. 19, C. P.; 2 Lutw. 260.

C. Bowen was not called on to reply.

KEATING, J.—I am of opinion that the revising barrister was wrong, and that the votes ought to be allowed. If I could adopt the argument of Mr. Pickering, that the revising barrister found as a fact that the expense of laying on the water was necessary for obtaining the rent which was essential to the qualification, I should not hesitate to say that the revising barrister was right; but, on looking at the case, it seems plain that the laying on the water was for the convenience of the tenants, and that the expense incurred was for the purpose of suiting their convenience, and an increased rent was paid in consequence of the additional convenience thus afforded. Mr. Pickering contends that the revising barrister meant that the 141*l.* could not be got if the water were not laid on. We do not infringe on the rule laid down in *Sherlock* v. *Steward* (29 L. J. 87, C. P.), where it was held that the commission paid to the rent collector was rightly deducted, because it was found as a fact that without incurring that expense there would be no rent.

BRETT, J.—If the case meant that 141*l.* could not have been got without the expenditure, it would be admitted that it fell within *Sherlock* v. *Steward*. But the revising barrister does not say that. He simply says that the supply of water was for the convenience of the tenants, so that the case is the same as if the 21*l.* had been expended in building an additional luxury in the shape of a room.

KEATING, J.—My brother Willes, who has left the court, authorised me to say that he fully concurred in the judgment we have given.

Decision reversed.

Attorneys for appellant, *Rickards* and *Walker*.

Attorneys for respondent, *Baxter*, *Rose*, and *Norton*.

Wednesday, Nov. 22, 1871.

FERNIE *v.* SCOTT.

REGISTRATION APPEAL.

Parliamentary election—County vote—Freehold for life—40s. freehold—Bye-laws passed by corporation—Poor and necessitous burgess—Custom—Tenant from year to year.

A corporation, being possessed of certain lands, made a bye-law that they should be occupied by poor and necessitous burgesses at a rent to be fixed and named by the corporation at their pleasure. The bye-law provided that only such persons were poor and necessitous burgesses as were declared so by a majority of the council of the borough. The claimant, who claimed to be entitled to a vote as a 40s. freeholder, had been declared a poor and necessitous burgess, and had been allotted one acre at a rent of 5s. per annum until further notice:

Held, that the claimant had no freehold or equitable interest sufficient to entitle him to a vote; that the estate was held at the will of the council, and at the most his interest was not greater than that of a tenant from year to year.

CASE stated by the revising barrister for Stafford.

At a court held by me, one of the barristers appointed to revise the lists at Stafford, on the 21st Oct. 1871, for the revision of the list of voters for the county of Stafford, Alexander Scott duly objected to the name of Joseph Abberley being retained in the list of voters for the western division of the said county. The following facts were established by the evidence. The mayor, aldermen, and burgesses of the borough of Stafford, for many years previously to the passing of the Municipal Corporation Act, 1835, were possessed of certain land situate within the said borough, and, known by the name of Coton Field. Before the year 1835 the custom and practice of the said mayor and aldermen and burgesses, with regard to the occupation of the said land, was as follows: Each member of the common council, usually called the corporation, had two acres for his life, and his widow after his decease, so long as she continued such widow, and resided in the borough; but a non-resident in the borough, on the receipt of parochial relief, forfeited the holding. The other acres, as they became vacant by death or forfeiture, were distributed by the mayor for the time being, one each to be held by those persons whom he selected, for the same tenure and under the same customs as those above described. If the acre was in tillage, 5*s.* was paid by each person to the treasurer of the corporation, as entrance money, on taking possession. If in grass, 10*s.* as entrance was paid. The rents have varied, some having paid 2*s.* 6*d.* and others 5*s.* a year.

The Municipal Corporation Act superseded the old charter under which Stafford became a corporation.

In the year 1836 a bye-law was enacted, to point out the manner in which the corporation of the borough of Stafford should deal with Coton Acres.

The following is the bye-law referred to in the last paragraph:—

Borough of Stafford, to wit.—At a quarterly meeting of the council of the borough of Stafford, held this 9th Feb. 1836 at the mayor's office within the said borough, two-thirds of the whole of the said council being present, to wit—John Masfen, Esq., the now mayor of the said borough, and Edward Lloyd, William Jones, Thomas Stevenson, John Kenderdine Shaw, being respectively now alderman of the said borough, and Thomas Hammersley, Joseph Clewlon, John Marson, Thomas Woolley, Thomas Watwood, Charles Edward Morgan, John Wyme, Thomas Cliffe, Thomas Lea, Thomas Frith, Charles Wright, and Thomas Carter being respectively now councillors of the said borough, and the said John Masfen, Esq., presiding at the said meeting.

It is now by the said council so assembled, as aforesaid, declared, enacted, constituted, and ordered as follows:— Whereas the mayor, aldermen, and burgesses of the said borough for many years now last past, to wit, from the 12th day of Jan. in the fourth year of the reign of our late Sovereign Lady Queen Anne, have been entitled to the fee simple and inheritance of and in certain lands and tenements near the said borough, situate in the manor of Coton Field, subject nevertheless to a certain perpetual annual rent charge amounting to the sum of 12*l.*, now payable to the Right Honourable Charles Chetwynd, Earl Talbot, and also to a certain perpetual annual payment amounting to the sum of 26*l.* for the maintenance of certain almshouses in the said borough.

And whereas certain orders, rules, and ordinances, have been heretofore from time to time made and resolved by the said mayor, aldermen, and burgesses of the said borough, touching the holding, enjoyment, and occupation of the said lands and tenements, under the said mayor, aldermen, and burgesses, and the reservation of the rents and profits of the same, under, and by virtue of which orders, rules, and ordinances, the said lands and tenements have heretofore and are now held and enjoyed by certain persons (except as hereafter mentioned) in certain divisions or portions each amounting to an acre, more or less, under the said mayor, aldermen, and burgesses.

And whereas certain parts, to wit, two acres of the said lands and tenements, are at this time unoccupied by any tenant or holder thereof, under the said mayor, aldermen, and burgesses, and it is proper and expedient that reasonable and wholesome rules, ordinances, and regulations, and orders should be made and established respecting the future holding and enjoying of the said parts of the said lands as shall hereafter become vacant, and further respecting the future reservation of the rents and profits of such parts of the said lands and tenements as are now held, occupied, and enjoyed as aforesaid, under, and by virtue of the former orders, rules, and ordinances before mentioned. Therefore it is now, by the said council of the said borough, so assembled as aforesaid, hereby declared, enacted, constituted, and ordered that the said part of the said lands, called Coton Field, which are now unoccupied as aforesaid, and all such parts thereof as shall become vacant, shall, in future, be held and enjoyed by no other persons whatever than the poor and necessitous burgesses of the said borough by birth or servitude, duly qualified to vote for members of Parliament for the said borough, or the widows of such burgesses, the said burgesses and widows being respectively resident within the said borough. And it is hereby further, by the said council so assembled as aforesaid, declared, enacted, constituted, and ordered that no one burgess or widow of a burgess as aforesaid, shall hereafter hold or enjoy more than one acre of the said lands now vacant or which hereafter shall become vacant, under the said mayor, aldermen, and burgesses.

And it is hereby further, by the said council so assembled as afores id, declared, enacted, constituted, and ordered that such lands shall be held and enjoyed at a certain rent payable therefore to the mayor, aldermen, and burgesses of the said borough, the amount thereof and days of payment to be fixed and ascertained by the council of the said borough, from time to time, as occasion shall require, at the reasonable discretion of the said council. And it is hereby further, by the said council so assembled as aforesaid, declared, enacted, constituted, and ordered, that for the purpose of selecting from the said poor and necessitous burgesses proper persons for the holding and enjoying the said lands under the said mayor, aldermen and burgesses, two grounds of preference shall hereafter exist, and be maintained, to wit, one ground of preference shall be in favour of that burgess who shall appear by the freeman's roll to have been a sworn burgess for the greatest space of time; and the other ground of preference shall be in favour of that burgess, who for six months previous, and up to the time of selection shall have had and then have the greatest number of children at home under the age of ten years, and that as often as any part of the lands aforesaid shall from time to time become vacant, the selection of a burgess for the holding and enjoying the same shall be made by turns with respect ultimately to the said two grounds of preference, provided that in the first instance of election, a burgess shall be selected on the ground of preference first above-named.

And it is hereby further provided, that if at any time two or more burgesses claiming preference on the ground first above-named shall appear to have been sworn as burgesses on the same day, then the said selection shall be made of such one of the said two or more of the said burgesses as shall be most aged. And that if at any time two or more burgesses claiming preference on the ground secondly above-mentioned shall have happened to have had for six months previous, and up to the said time of selection, and then have the same number of children at home under the age of ten years, then the said selection shall be made of such one of the said two or more of the said last-mentioned burgesses as shall appear by the freeman's roll to have been a sworn bur-

r the greatest space of time; and if two or more said last-mentioned burgesses shall appear to have ers as burgesses on the same day, then the said n shall be made of such one of the said last- ed two or more burgesses as shall be most aged.

t is hereby further, by the said council so assem- aforesaid, declared, enacted, constituted, and that if any burgess shall hereafter die in the and enjoyment of any part of the said lands he ordinances, regulations, and orders hereby made ublished, and shall leave a widow, she being a within the said borough, shall continue, from n of the death of her said husband, to hold and he said part of the said lands, subject nevertheless ordinances, regulations, and orders which are or hereafter in force in and for the said borough, spect to burgesses holding any part of the said s well relating to rent payable for the same as to r things whatsoever.

t is further hereby, by the said council so assem- aforesaid, declared, enacted, constituted, and that no burgess shall be regarded or considered ed necessitous burgess within the meaning of the rdinances, and regulations, and orders, unless he declared so to be by a majority of the council of borough, assembled at a regular meeting of the ncil.

ded always that no present or future member of ncil of the said borough shall be capable of hold- njoying any part of the so vacant, or which shall vacant as aforesaid, so long as he shall continue er of the said council.

t is hereby further, by the said council declared, , constituted, and ordered, that all persons, what- o at this present time hold or enjoy any part of lands under the said mayor, aldermen, and bur- shall hereafter pay an advanced rent for the ed that the amount of the said rent, and the om which the same shall begin to be payable, and the same shall in future be payable, be respec- ed and ascertained by the said council at some r regular meeting thereof; and that each and every persons last mentioned who shall refuse their to hold the said lands so now occupied by them wly as aforesaid at the advanced rent so to be d ascertained as aforesaid, shall be ejected from e by due course of law.

t is hereby further by the said council so assem- aforesaid declared, enacted, constituted, and that so much and so many of all former orders, gulations, enactments, and ordinances heretofore ed resolved by the mayor, aldermen, and bur- f the said borough, and now in force, touching ding, enjoyment, or occupation of the said lands nents, or the reservation of the rents and profits as is and are inconsistent with or contrary to larations, enactments, constitutions, and orders made, shall be and the same is and are hereby , and annulled. JOHN MASPEN, Mayor.

ph Abberley obtained possession of an acre n Field as aforesaid, under a resolution of ncil and Watch Committee of the borough ord, held on the 12th June 1809.

meeting of the Council and Watch Committee of ugh of Stafford, held on Monday, 12th July, 1869, and declared that William Taylor, who was burgess of this borough on the 19th Nov. 1832, ph Abberley, who was sworn a burgess of this on the 2nd Jan. 1835, are poor, necessitous e resident within the borough within the mean- e bye-law dated the 28th Feb. 1837

d that the acre lately held by widow Adams ed to the said Joseph Abberley as tenant thereof uncil, and that he do pay 5s. entrance money er annum as and for rent, until further notice, to the right of the council to get sand, gravel, e therefrom, and under the same pursuant, to the the 29th April 1856, the council paying compen- e all surface damage.

names of 110 other persons whose names lifications are set out in the schedule hereto, jected to under similar circumstances by . Alexander Scott. I decided that the said Joseph Abberley and the other said 110 other persons had not freehold in the said land called Coton Field, such as would entitle them to a vote for the county; and I disallowed the claim of the said Joseph Abberley and the 110 other persons mentioned in the schedule, and struck their names out of the said list of voters.

Due notice of appeal from my decision was given, and I ordered the appeals in the before-mentioned cases to be consolidated.

If the court be of opinion that my decision was wrong, the register is to be amended by inserting the name of the said Joseph Abberley and of the 110 other persons mentioned in the schedule hereto.

Streeten (*Gorst* with him) for the appellant.—The question is whether Joseph Abberley was a tenant at will or whether he had an equitable freehold estate entitling him to a vote. [WILLES, J.—Is he not entitled to a vote only so long as he is poor?] It was an estate of uncertain duration, but a custom had existed prior to the passing of the Municipal Corporation Act. [WILLES, J.—A member of the common council is not a member of the corporation.] The bye-law was passed by the corporation in favour of poor and necessitous burgesses for the better regulation of their tenure, and although the corporation can alter the rent, they cannot alter the possession. [BRETT, J.—Only while the bye-law is in existence. They may repeal the bye-law to-morrow, and turn the claimant out.] The tenure is regulated by the bye-law, and no burgess can hold more than one acre. [WILLES, J.—The legal estate in the land was vested in the corporation, and you must divide that among all the burgesses and show that they had 40*s.* apiece.] There is no instance of any person ever having been turned out, and this estate, which may last for life, although determinable on a contingency, is in the nature of a freehold, (He referred to Coke upon Littleton, Fol. 42 A.) [WILLES, J.—I am not aware of any case of an estate for life where the termination of it is in the option of the grantor.] A freehold estate of uncertain duration is sufficient to confer a vote: *Beeson* v. *Burton* (20 L. T. 111; 12 C. B. 647). There Jervis, C.J., says: "The estate is held upon an uncertain event, for it is uncertain whether the majority of allottees will consent to a sale or exchange, and therefore the case falls within the definition of an estate for life in Coke upon Littleton, 42 A. [WILLES, J.—In that case the estate was not determinable at the will of the grantor.] The estate of the burgesses as it stands now is a freehold for life.

Davis v. *Waddington*, 7 Man. & G. 37;
Trentfield v. *Lowe*, L. Rep. 4 C. P. 454; 20 L. T. Rep. N. S. 394.

There is no power in the grantors to do away with the estate, although they can vary the rent, and the case comes within the definition of freehold for life in Coke upon Littleton.

Gough, for the respondent, was not called upon.

WILLES, J.—I am of opinion the decision of the revising barrister was right, and ought to be affirmed. There is a mistake in supposing that the occupier had a freehold interest in the land. If it was a question in whom the interest was, I should say in the corporation. The mode of enjoyment has differed, and different people have had that enjoyment, and the interest therefore seems vested in the corporation, who could deal with the land as they pleased. When the equit-

able rights are stamped on the corporation, the equitable tenants have a right to vote by virtue of 8 Hen. 6, c. 7, and the 73rd section of 6 & 7 Vict. c. 18, their qualification being sufficient, if it comes to the question that they are entitled to vote at all. But they must make out, not only an equitable interest in land, but an equitable interest as freehold in land. The mere fact that the occupation was originally conferred from charitable motives, and is still enjoyed with restrictions, will not, if the interest of the occupier amount to freehold subject to a certain contingency, preclude him from the franchise, is laid down in *Fryer* v. *Bodenshaw* (1 Hop. & Colt. Regis. Cas. 204; 19 L. T. Rep. N.S. 645; L. Rep. 4, C. P. 529), where the claimant's vote was allowed, he being appointed to a house for his life from which he could not be disturbed except for felony, although he was subject to certain rules and obliged to observe the regulations of the charity. The present case is not like this, for there is here no such limit to the expiration of the tenancy; nor is it like *Durant* v. *Kennett* (21 L. T. Rep. N. S. 603; 1Hop. & C. Regis. Cas. 297) which was decided on the ground that the claimant was occupying as member of a corporation aggregate, and not in the character of an owner or tenant. I pass over the question of custom, as it is clearly manifest that no claim can be made by the present claimant under that head. Here the foundation for the claim is directly on the order by which the tenant came into possession, but really by virtue of the bye-law. The bye-law recites that the claimant was a poor and necessitous burgess, and only such as are poor and necessitous burgesses are entitled to receive a plot of land; and the reasons which are given for the occupation show that the occupation is to be regarded not so much as a benefit to him as to the corporation, who would otherwise have to relieve him out of the rates, which would fall on the inhabitants. Let us see what the order is. "Ordered, that the acre lately held by Widow Adams be delivered to Joseph Abberley, as tenant thereof to the council, and that he do pay 5*s.* entrance money and 5*s.* per annum as and for rent until further notice, subject to the right of the council to get sand, gravel, and stone therefrom and under the same, pursuant to the order of the 28th April 1856, the council paying compensation for all surface damage," meaning they are to become tenants till further notice, and such notice must be given fairly. Now, if the tenant received a legacy, the council might turn him out as a person not requiring a benefit. That would fairly put an end to the tenancy, as it is of such an uncertain period. The case of *Davis* v. *Waddington* (7 M. & G. 37) is not in point, as it does not involve a case of freehold, and in *Beeson* v. *Burton* (12 C. B. 647; 20 L. T. Rep. 111), the tenancy was not determinable at the will of the grantor, but the allotments were to be held respectively by each resident freeman desiring to become the occupier, obtaining possession thereof so long as he should be willing to hold the same, and pay the annual rent and conform to the orders and regulations; but here it is determinable without the will of the occupier being taken into consideration. Then, passing over to the provision that no burgess shall be considered poor and necessitous unless he is declared so to be, it was competent for the revising barrister to come to the conclusion that the land was to be distributed as a charity, and that the corporation reserved the power of apportioning the rent. This shows an enjoyment as tenant from year to year. I think the revising barrister was right, and there is no evidence in the case to hold there was such a freehold in the claimant as to entitle him to a vote. We are not disposed to lay down that a person receiving alms from a corporation should have a vote.

BYLES, J.—I am of the same opinion. The order is in the nature of the title deed of the occupier, and the order creates a tenancy from year to year. In *Trentfield* v. *Lowe* (L. Rep. 4, C. P. 454; 20 L. T. Rep. N. S. 394) there was a distinct estate for life.

BRETT, J.—I am of the same opinion. I think there is no finding of any legal custom to confer a vote. If there was a custom it must have existed previous to the year 1836, when the bye-law was passed, and the case cannot be supported on custom. If the attempt is made to support the case on the bye-law, then we discover the grantors can alter the bye-law at will. Whether they can make such a bye-law I give no opinion; but as they repealed the former bye-law, why should not they do the same by this? At most it creates a tenancy from year to year, after entry and payment of rent. The person appointed to the property is entitled to notice to quit, and it seems to me impossible to imagine any arrangement more likely to create abuse, and therefore more mischievous, than to hold the claimant entitled to a vote, which would in fact be giving the franchise to a person in receipt of parish relief.

Decision affirmed.

Attorney for appellant, *Beddall.*

Attorneys for respondent, *Corser* and *Fowler.*

Wednesday, Nov. 22, 1871.

REGISTRATION APPEAL.

CHARLTON (app.) *v.* THE OVERSEERS OF STRETFORD (resps.).

Parliamentary election—County vote—Sub-lessee—Term of more than sixty years—Representation of the People Act 1867 (30 & 31 *Vict. c.* 102), *s.* 5—(2 *Will.* 4, *c.* 45), *ss.* 20, 26.

A sub-lessee of a term which, when originally created was for more than sixty years, and of the clear yearly value of 5*l. over and above all rents and charges payable out of the same, is entitled to vote for members of Parliament for the county.*

Semble, the 5*th section of the Representation of the People Act* 1867, *does not create a new franchise, but lowers the value of the old one.*

AT a court for the revision of the list of voters for the polling district of Stretford, in the south-eastern division of the county of Lancaster, Thomas Surwood, described on the list of persons claiming to be entitled to vote for the township of Stretford as follows:

Name.	Place of abode.	Nature of qualification.	Street, lane, &c.
Surwood, Thos.	4, Gladstone-street, Stretford.	Leasehold houses, term over 60 years.	Nos. 60 and 62, Bold-street, and No. 4, Gladstone-street.

was duly objected to. The said Thomas Surwood had no qualifying interest whatever in the houses in Bold-street, but he was a sub-lessee for a period of not less than sixty years, and was in actual occupation of, No. 4, Gladstone-street.

The clear yearly value of No. 4, Gladstone-street

was over 5*l*., but under 10*l*., over and above all rents and charges payable out of or in respect of the same.

It was contended on behalf of the claimant that the 5th section of the Representation of the People Act 1867 extended to the case of a sub-lessee as well as to that of a lessee, and that such sect. 5 was in substitution, and was substantially a repeal of that part of the 20th section of the 2 Will. 4, c. 45, which relates to the clear yearly value of leaseholds, notwithstanding the 56th and 59th sections of the said Act of 1867.

The revising barrister considered that the claimant's case did not come within the 5th section of the Representation of the People Act 1867, because he was not entitled to the said house, either as lessee or assignee, for the unexpired residue of any term originally created; secondly, that the claim could not be supported under the 20th section of the Reform Act (2 Will. 4, c. 45), because the said house was not of the clear yearly value of not less than 10*l*.; and, thirdly, that the said two Acts could not be construed as if the last part of the said 20th section of the Act of Will. 4, beginning with the words "Provided always," formed part also of the said 5th section of the Act of 1867. He therefore disallowed the said claim of the said Thomas Surwood, and struck his name off the list of claimants, deciding that to entitle a person, being only a sub-lessee of premises, to vote in the election of a knight of the shire to serve in Parliament for the said division of the said county, such premises must be of the clear yearly value of not less than 10*l*. over and above all rents and charges as aforesaid. If the court should be of opinion that the decision was wrong, then the name of the said Thomas Surwood must be inserted in the list of the said claimants.

Joshua Williams, Q. C. (*Edwards* with him) for the appellant.—The right of voting by leaseholders was originally created by 2 Will. 4, c. 45, and the 20th section of that Act throws light on the 5th section of the Representation of the People Act (30 & 31 Vict. c. 102). The under lessee is quite as much a lessee as the lessee of a freehold, and so entitled to a vote. The two statutes are to be read together. He referred to

Warburton v. *Overseers of Denton*, 23 L. T. Rep. N. S. 729; L. Rep. 6 C. P. 267.

No counsel appeared to argue on the other side.

WILLES, J.—I am of opinion that this appeal is well founded. The revising barrister seems to have come to the conclusion that the under lessee was not a lessee within the 5th section of the Representation of the People Act, which defines who is entitled to be registered as a voter and to vote for members of Parliament, that is to say, everyone who is of full age and not subject to any legal incapacity, and is seised at law or in equity of any lands or tenements of freehold, copyhold, or any other tenure whatever for his own life or the life of another, or for any lives whatsoever, or for any larger estate of the clear yearly value of not less than five pounds over and above all rents and charges payable out of or in respect of the same, or who is entitled either as lessee or assignee to any lands or tenements of freehold or of any other tenure for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than five pounds over and above all rents and charges payable out of or in respect of the same. The revising barrister did not seem to come to his conclusion on the notion that the lease was the less a lease because the claimant was an under tenant, but because the claimant was not entitled to a vote unless he was lessee or assignee of the lease. The language of the statute is for any term originally created for a period of not less than sixty years, and it does not exclude a voter because he has only thirty years or twenty years of his term remaining, so long as at the creation of the term it exceeded sixty years, although part of that time has expired. But all doubt is cleared up when we turn to the 20th section of 2 Will. 4, c. 45, which gives a vote to every male person of full age who shall be entitled either as lessee or assignee to any lands or tenements, whether of freehold or any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than 10*l*. over and above all rents and charges payable out of the same; and then the proviso at the end of the section provides that the sub-lessee or assignee of any underlease shall have a right to vote if he be in actual occupation. The proviso is not declaratory that the lessee is the same as the sub-lessee, but it says that as a sub-lessee is a lessee, and as great abuses might follow by splitting up votes, a check shall be put on the practice, and that no one shall have a right to vote in respect of any term of sixty years, unless he shall be in occupation of the premises. The case of *Warburton* v. *The Overseers of the Township of Denton* (L. Rep. 6 C. P. 267; 23 L. T. Rep. N. S. 729) is binding on us, for, by the construction of the 5th section, we held that a person to be entitled to a vote under its provision must be lessee of a corporeal hereditament which could be the subject of occupation, or assignee of such an hereditament, and that a chattel rent-charge, though originally created for more than 60 years, does not confer a vote; and we are equally bound to hold that the 5th section includes the case of a sub-lessee. The difficulty of the case of a sub-lessee not in occupation does not arise here; when it does present itself for our decision, it will be a question of difficulty whether the proviso at the end of the 20th section is to be read in or not; if it is to be read in, all difficulty will vanish, but at present we are not called upon to deliver judgment upon that point.

BYLES, J.—I am of the same opinion upon the question which is now before us. I have nothing further to add.

BRETT, J.—I am of the same opinion. I think the question comes within the Representation of the People Act, and I should have thought so if it had stood alone. It applies to the state of things when the lease was made. The first part of the section repeats in terms the 19th section of the Act of 2 Will. 4, c. 45, and looking to the provisions in the 20th section, the real effect is not to create a new franchise, but to lower the value from 10*l*. to 5*l*. Considering also the 56th and 59th sections of the Representation of the People Act, we must read the franchises conferred in addition to, and not in substitution of, any existing franchises, except where it would be inconsistent with the tenor of former Acts to do so. *Decision reversed.*

Attorney for appellants, Blain and Chorlton.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Saturday, Jan. 20, 1872.

DIXON (app.) *v.* COCKETT (resp.)

Summary jurisdiction of justices—Bonâ fide claim of right—Express provision for settlement of disputes.

A private Act of Parliament, incorporating a bridge company, and enabling them to take certain maximum tolls, which the company by resolution might diminish and alter, provided for the settlement of disputed tolls by a justice, by way of arbitration. By a subsequent section, if any collector should demand or take a greater or less toll from any person than he should be authorised to do by virtue of the Act or resolutions under it, or should demand or take a toll from a person exempt from the payment thereof, he was to forfeit a sum less than 5l. upon an information before justices.

The respondent, a foot passenger, paid the appellant, the collector of tolls, upon demand, a toll the second time the same day, and laid an information before justices against the appellant for demanding it. There was no exemption in the Act upon a passenger's crossing the bridge a second time in the same day; but it was admitted that from the passing of the Act, forty years before, until this demand, no passenger ever had paid under such circumstances. No resolution of exemption, however, was in existence. The justices, convicted, notwithstanding the appellant's assertion of a bonâ fide claim of right.

Held, upon a case stated by the justices, that as there was a particular provision in the Act for the settlement of such a dispute, the information ought to have been dismissed; also that the fact of forty years' practice, although evidence of exemption, was not conclusive.

THIS was a case stated by two of Her Majesty's justices of the peace in and for the parts of Lindsey, in the county of Lincoln, under the stat. 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law, which arose as hereinafter stated.

At a petty sessions holden at Lincoln, in and for the said parts of Lindsey, on the 16th June 1871, an information preferred by Wm. Cockett, of Dunham-on-Trent, in the county of Nottingham (hereinafter called the respondent), against Wm. Dixon, of Newton, in the said parts, collector of tolls (hereinafter called the appellant), charging for that on the 24th May 1871, in the parish of Newton, in the said parts of Lindsey, the said Wm. Dixon, the toll collector of a bridge called Dunham Bridge, did unlawfully demand and take from the said Wm. Cockett the sum of 1*d.*, as and for the toll of a foot passenger over the said bridge, he the said Wm. Cockett being exempt from the payment of such toll by reason that no more than one full toll should be taken for or in respect of the same foot passenger in any one day for passing and repassing any number of times through the said toll gate or toll bar at Dunham Bridge aforesaid, he the said William Cockett having previously paid the sum of 1*d.* for toll, contrary to the stat. 11 Geo. 4, c. lxvi., and the rules and regulations made thereunder, was heard and determined, the *said parties* respectively being then present, and *upon such hearing* the appellant was duly convicted of the said offence, and the justices adjudged him for his said offence to forfeit and pay the sum of 6*d.* to be paid and applied according to law, and also to pay to the said respondent the sum of 1*l.* 12*s.* 6*d.*, for his costs in that behalf; and if the said several sums should not be paid forthwith, they ordered that the same should be levied by distress and sale of the goods and chattels of the said appellant, and in default of sufficient distress they adjudged the said appellant to be imprisoned in the house of correction at Kirton in the said parts, and there kept to hard labour for the space of seven days, unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said appellant to the said house of correction, should be sooner paid.

And whereas the applicant being dissatisfied with this determination upon the hearing of the said information as being erroneous in point of law, had in pursuance of sect. 2 of the said statute of 20 & 21 Vict c. 43 duly applied to the justices in writing to state and sign a case, setting forth the facts and grounds of such determination for the opinion of this court, and had duly entered into a recognisance as required by the said statute in that behalf.

Therefore the said justices in compliance with the said application, and the provisions of the said statute, and by consent of the said parties, stated and signed the following case:

The Act 11 Geo. 4, c. lxvi, contains the following provisions:

By clause 69, that as soon as the said bridge shall be made fit for the passage of carriages, horses, cattle, and passengers, it shall and may be lawful for the said company, or the committee of management, or the collector, to be appointed by the said company or committee, or by any lessee or lessees of the tolls from time to time, and at all times hereafter, to demand, collect, and receive, before any horses, beasts, cattle, carriages, or foot passengers, shall be permitted to pass over the said bridge, or through any gate to be erected by virtue of this Act across the approaches thereto, such tolls as the said company shall from time to time think proper, not exceeding the respective sums following, that is to say:

Tolls (amongst others). For every foot passenger, except the person employed in driving any waggon, cart, or other such like carriage, the sum of one penny.

By clause 70, Provided always, and it is further enacted that no more than one full toll shall be taken for or in respect of the same horses, beasts, or cattle in any one day for passing and repassing any number of times through the said toll gate or toll bar to be erected by virtue of this Act.

By clause 84, And be it further enacted that if any dispute or disputes shall happen respecting the demanding, or taking, or the payment of toll, or about the amount of the toll due, or the charges of making, keeping, or selling any distress for the recovery of the said tolls, such dispute shall be settled and determined by some justice of the peace for the said county, liberty, or place, in which respectively, such dispute or disputes shall happen, who, upon application made to him for that purpose, shall examine the matter on the oath of the parties or other witness or witnesses (which oath such justice is hereby authorised to administer), and shall determine the amount of the tolls due, and other matter in dispute between the parties, and may also award such costs and charges to either party as to the said justice shall appear right and proper; all which costs and charges shall and may be levied and recovered in case of non-payment thereof forthwith by distress and sale of the goods and chattels of the person or persons awarded or directed to pay the same by warrant under the hand and seal of such justice, rendering the overplus, if any, upon demand, after deducting the costs and charges of making such distress and sale to the person or persons whose goods and chattels shall have been so distrained and sold.

By clause 85, Collectors, &c., are not to be deemed incompetent witnesses in any dispute, suit, or litigation, touching, or in anywise relating to the said tolls.

By clause 86, That it shall be lawful for the said company, and they are hereby empowered from time to time to lessen or reduce all or any of the tolls by this Act granted, and for such time or times as they the said company shall think proper, and from time to time afterwards to advance any of the tolls so lessened or reduced to any sum or sums of money not exceeding the respective tolls granted by this Act: Provided always that it shall not be lawful for the said company to lessen or reduce the said tolls or any of them without the consent of three-fourths in value of the creditors on the said tolls respectively; and no toll shall be lessened, reduced, or advanced unless at a meeting of the said company, of which twenty-one days' public notice shall be given.

By clause 88, The tolls may be leased.

By clause 90, That all and every toll collector, being lessee of the said tolls, or appointed either by any such lessee or lessees, or by the said company or committee of management to collect the tolls by this Act granted, shall and he is hereby required to place his christian and surname, painted on a board in legible characters in the front or some other conspicuous part of the toll house or toll gate, immediately on his coming on duty . . . . and shall continue the same so placed during the whole time he shall be upon such duty; and every such collector shall place or cause to be placed on the front of the toll house or toll gate at which such collector shall be stationed, the board hereinbefore directed to be provided, containing the usual name of the bridge, and of the toll gate whereon the board shall be fixed, and also the list of the tolls payable at such bridge or g te; and if any collector of the said tolls shall not place such boards respectively as aforesaid, and keep the same there during the time aforesaid, or shall demand or take a greater or less toll from any person than he shall be authorised to do by virtue of this Act, or of the orders and resolutions of the company or committee of management, made in pursuance thereof, or shall demand and take a toll from any person or persons who shall be exempt from the payment thereof and claim such exemption, or shall refuse to permit or suffer or shall in anywise hinder any person or persons from reading such boards respectively, or shall refuse to tell his christian or surname to any person or persons who shall demand the same on having paid the said tolls or any of them, or shall refuse to give a ticket denoting the payment of toll, or shall in answer to such demand give a false name or names, or upon the legal toll being paid or tendered shall unnecessarily detain or wilfully obstruct, hinder, or prevent any horse, beast, cattle, carriage, or passenger from passing over the said bridge or through the said toll gate, or shall make use of any scurrilous or abusive language to any proprietor, treasurer, clerk, surveyor, or other officer, or any passenger or passengers, then and in every such case every such toll collector shall forfeit and pay any sum not exceeding 5*l.* for every such offence, as the justice or justices, before whom the information shall be laid, shall adjudge, to be recovered and applied as hereinafter mentioned.

By clause 104, That if any person shall think himself or herself aggrieved by anything done in pursuance of this Act (except in such cases where the final determination is directed by this Act), and for which no particular method of relief hath been hereby appointed, such person may appeal to the justices of the peace at any general or quarter sessions of the peace to be holden in and for the county or parts in which the cause of complaint shall arise.

The following facts were proved and found by the justices:

That the said bridge had been erected and built about thirty-seven years.

That the company (called the Dunham Bridge Company) on the completion of the said bridge opened the same for the accommodation of the public, and by their agents entered into the receipt of the tolls on their own account, and so continued to receive them for upwards of a year.

That the said company has since then let the said tolls on lease; but on two subsequent occasions it has been in receipt of the tolls on its own account.

That on the opening of the bridge for traffic, a toll board with a list of the tolls was hung up at the entrance of the bridge, such list being, in fact, a copy of the list of the maximum amount of tolls authorised by the Act; but the said board contained no reference to the exemption from toll under the Act.

That the company had let the tolls arising and becoming payable under the said Act to the present lessees for two previous separate terms, and lastly for a third term as and from the 18th April, 1871, for three years, at 227*l.* per annum, to three persons, named Thomas Bower, John Richard Bower, and Enoch Blackbourne. By the indenture of lease, the bridge, the toll house, "and all and all manner of tolls whatsoever arising or to arise and become payable during the continuance of the term hereby demised at the said toll bar or toll gate respectively, by virtue of the said recited Acts of Parliament," were demised to the said lessees.

That the said company and their lessees from the opening of the said bridge to the time alleged in the said information, demanded one penny for each passenger for passing and repassing any number of times in one day, and no more than one penny has ever been charged by the said company during the three separate terms when the said company was in receipt of the said tolls on its own account.

That at the time stated in the information the appellant demanded and claimed, as of right, one penny of the respondent for passing over the bridge, namely, both in passing, and a second penny for repassing.

It was contended on the part of the appellant that he was of right entitled to levy a toll of one penny on each passenger for each time he might pass over the bridge through the toll bar or toll gate erected across the approach to such bridge; that the tolls set out in the Act of Parliament, and specified on the toll board, entitled him to do so; and that there being an exemption in favour of the same, horses, beasts, or cattle in any one day passing and repassing any number of times through the said toll gate or toll bar, and not in favour of foot-passengers, duly entitled him to such toll; and that the justices had no jurisdiction under that form of summons to determine the question, as the appellant claimed the toll as a matter of right.

The respondent contended that the appellant was only authorised to levy such tolls as the said company should from time to time think proper, and not the tolls mentioned in the Act; that, although he was bound to admit that the board was evidence of the tolls leviable, yet, as the board was silent as to the exemptions under the Act, it was only reasonable to suppose that exemptions made by the company were also omitted.

It was also stated on behalf of the respondent, and admitted by the appellant, that there is not in existence any minute of the company either adopting the table of tolls in the Act, or making any other table. The respondent therefore contended that the fact of the company and its lessees having for so many years exempted foot passengers from more than one payment, must be taken as evidence of the company having made such an exemption when framing their table of

tolls, and that the appellant by having demanded a second toll had contravened the Act of Parliament.

The justices being of opinion that the 84th section of the Act gave them authority to settle disputes with regard to the tolls, overruled the appellant's objection to their jurisdiction; and they were of opinion that the company in making their scale of tolls exempted foot passengers from paying toll for passing or repassing any number of times after the first, and they gave their determination in manner aforesaid.

The questions for the opinion of the court were: first, whether the justices had any power to determine the question under the said summons, as the lessees claimed the toll as a matter of right, the question being one of law; secondly, whether the lessees were entitled under the circumstances to claim a penny each time every foot passenger passed or repassed over the said bridge, and whether the justices were right in convicting the appellant.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

Cave for appellant.—This was a matter which ought to have been determined by arbitration under clause 84, and not upon an information under clause 90. It may be, that upon a claim for excessive toll, after the determination of a justice under clause 84, a collector may be convicted summarily. Here, however, there had been no such determination, and the *bonâ fide* claim of right by the appellant was sufficient to oust the jurisdiction of the justices upon a summons. Also there was no evidence of any resolution or meeting of the bridge committee, both of which are, by clause 86, necessary preliminaries to any alteration of the tolls from those provided by the Act. [BLACKBURN, J.—The justices have found as a fact that this alteration was made, and we cannot upset their finding, unless we consider that there was no evidence to support it.]

J. W. Mellor for respondent.—Unless the justices had jurisdiction under clause 90 to hear and decide this information, they had no power to state this case, nor could the appellant in any way take the opinion of this court. By Jervis's Act, 20 & 21 Vict. c. 43, s. 2, "After the hearing and determination by a justice or justices of the peace of any information or complaint, which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in point of law, apply in writing, within three days after the same, to the said justice or justices, to state and sign a case, setting forth the facts and the grounds for such determination, for the opinion thereon of one of the Superior Courts of law, to be named by the party applying." If, therefore, the justices have exceeded their jurisdiction, this court cannot review their decision: *Flannagan* v. *Overseers of Bishopswearmouth* (27 L. J., M. C., 47). [LUSH, J.—Cases are continually stated with the object of raising the question of the justices' jurisdiction.] By clause 84 of the *local act, the justice* shall determine a dispute *brought before him* under that provision, and such determination is excepted in clause 104 from the provision for appeal to quarter sessions.

Cave not heard in reply.

BLACKBURN, J.—In this case one or two questions depend upon the construction of the local Act referred to, but the main point upon which our decision is required is, whether this proceeding, which is clearly a summary conviction under the 90th section, was rightfully adopted by the justices under the circumstances. Now if that section stood alone, we should have first to apply the general principle that, in cases which are rendered liable to the summary jurisdiction of justices, a *bonâ fide* claim of right on the defendant's part is sufficient to oust the jurisdiction. The Legislature has thought fit not generally to trust such a tribunal with questions of title, which its members are not accustomed to deal with. There are no doubt certain cases concerning which the summary jurisdiction granted by statute would be inoperative, unless the justices assume power to investigate questions of title; for instance, the case of an encroachment under the Highway Acts, which we have often held to be within the jurisdiction of justices, although a question of title only. Had sect. 90 stood alone, there might too have been difficulties as to its interpretation; but, in my opinion, they need not now be considered; for here, by this Act, a peculiar tribunal is appointed for the particular purpose of settling all disputes of this kind, and we are bound to read the whole Act together. The justices should, I think, have decided not to hear this case upon the information before them; they should have said, as objection is taken to our summary jurisdiction, we are bound at all events to consider whether, under the provisions of the Act, this dispute between the parties cannot be otherwise determined. They might have dismissed this charge against the collector, and suggested an application by the respondent in pursuance of sect. 84, not against the collector, but against the lessees. The justices here seem to have thought correctly, that they had jurisdiction to determine this question of title under that section; and they were incorrect in thinking, upon the whole Act considered together, that they had a summary jurisdiction under sect. 90, after the objection taken by the appellant. They made a mistake in a matter of law, and the information ought to have been discharged. On the other points discussed, it is not necessary that we should express an opinion; but, for the future guidance of the justices and the parties interested, we may mention our opinion that, under sect. 104, there is given an appeal to quarter sessions from an order made under sect. 84. It appears that for forty years a toll was never demanded from a foot passenger twice in the same day, and the justices concluded from that fact that the bridge company must have formally resolved not to levy double tolls from a passenger in one day. It is not necessary for us to allude to this point, but we may as well say that, although non-user for so long a time was evidence to create a strong impression of a formal exemption, yet it was not conclusive. What we desire to intimate is, that this fact should be considered as evidence only. These remarks, however, are to be taken as *obiter*. Our decision is, that the justices should have dismissed this information.

LUSH, J.—I am of the same opinion. This is not an order under sect. 84, but a conviction under

sect. 90. If the later section had stood alone, it would have given the justices authority to decide the toll due from the respondent, and even to convict the appellant for making a mistaken but innocent demand. But as sect. 84 expressly provides for the settlement of *bonâ fide* disputes, sect. 90 must have been intended to treat of acts which are of the nature of offences.

QUAIN, J.—I am entirely of the same opinion.

Judgment for appellant.

Attorneys for appellant, *Swann* and *Co.*
Attorneys for respondent, *Scott* and *Co.*

Friday, Nov. 3, 1871.

REG. *v.* MORGAN.

*Local board of health—Election of members—Nomination—Qualification of voters—*11 *&* 12 *Vict. c.* 63, *ss.* 22, 24.

The 11 *&* 12 *Vict. c.* 63 (*The Public Health Act* 1848), *s.* 22, *enacts that ratepayers and owners of property shall be entitled to vote at the election of members of a local board of health, "provided that no owner whatsoever shall be entitled to vote as such, unless, fourteen days at least previously to the day of tendering his vote, he shall have delivered" to the clerk of the board "a statement in writing of his name and address, and containing a description of the nature of his interest or estate in the property, giving the qualification," &c.:*

Held, that a statement of qualification delivered prior to one annual election would not suffice for another election in the year following, but must be renewed.

Sect. 24 *enacts that any person entitled to vote may nominate for the office of member in manner therein specified, but does not require the person nominating to state whether he does so "as owner" or "as ratepayer." A nominator described himself in a nomination paper to be "duly qualified as owner," whereas, in fact, he was only qualified "as ratepayer."*

Held, that the statement of the nature of the qualification was surplusage, and that, as he was duly qualified to nominate, his nomination was good, notwithstanding the error in description.

Motion for a rule *nisi*, calling on George Morgan to show cause why an information in the nature of a *quo warranto*, should not issue, calling on him to show by what authority he exercised the office of member of the local board of health for Sheerness.

An election, under 11 & 12 Vict. c. 63, of members of the Sheerness Local Board of Health being about to be held, candidates were nominated on the 15th Sept. 1871, some of them, amongst whom was John Cole, were nominated by A. W. Marks, in a document which fulfilled the requirements of sect. 24 of the above Act, and was subscribed as follows:—

I, being duly qualified as owner in the district, nominate the above to be member of the local board.
A. W. MARKS.

The notice necessary to give Marks a right to vote as owner had been given by him fourteen days before the election held in 1870, and his name was then entered by the clerk to the local board in the proper register. No subsequent notice was sent in by Marks, but his qualification as owner, in respect of the same property, continued to exist, and he was, moreover, qualified to vote as a ratepayer.

Upon the 26th Sept. voting papers were issued. They were collected on the 29th of the same month, and afterwards four persons were declared by the chairman (under sect. 27), to be elected, one of whom was Morgan, and Cole was declared not to be elected (although he had obtained more votes than Morgan), on the ground that his nomination was void, Marks not being entitled to vote as owner, he having omitted to send in a notice.

11 & 12 Vict. c. 63, s. 22, enacts:

That the ratepayers in respect of property in the district for which the election is held, and the owners of such property shall be entitled to vote according to a certain scale, provided that no owner whatsoever shall be entitled to vote as such, unless, fourteen days at least previously to the day of tendering his vote, he shall have delivered to the clerk a statement in writing of his name and address, and containing a description of the nature of his interest or estate in the property giving the qualification, &c.

Sect. 24 enacts:

That any person entitled to vote may nominate for the office of member of the local board of health himself (if qualified to be elected), or any other person or persons so qualified (not exceeding the number of persons to be elected); and every such nomination shall be in writing, and shall state the names, residence, calling or quality of the persons nominated, and shall be signed by the party nominating.

Michael in support of the motion.—A claim to vote as owner had been sent in by Marks twelve months previously to the election; and such claim need not be renewed every year (11 & 12 Vict. c. 63, s. 22). [COCKBURN, C. J.—Is not the language of the final proviso there too strong to be overcome. The owner is not to be entitled to vote as such "unless fourteen days at least previously to the day of tendering his vote" he shall have delivered a statement in writing of the kind specified. That enactment was, I suppose, intended to ascertain and fix the fact of his being an owner. And if a notice given twelve months before the tender of the vote would be sufficient, then one given twelve years before might do, although he might since have changed his ownership. LUSH, J.—Suppose he had sold all his property?] Then his vote would be bad. [COCKBURN, C. J. But is it not the function of the returning officer to see that persons disentitled to vote do not do so, and not to let them vote first and strike their votes out afterwards. MELLOR, J.—Besides, how is he to judge? Must he search through the voting papers of numerous bygone years?] He had certainly returned Marks as "owner." [LUSH, J.—But there can be no estoppel by the act of the returning officer if the statute says that notice shall be given within fourteen days.] Next, sect. 24 enacts that any person entitled to vote may nominate for the office of member of the local board of health himself (if qualified to be elected), or any other person or persons so qualified (not exceeding the number of persons to be elected.) It does not say that he is to be qualified in any particular manner. He is to be "entitled to vote"—the rest is mere surplusage. [LUSH, J.—If he had nominated himself "as owner," would he have been entitled to be elected?] No, for he would not have been within the terms of the statute, and could not have been returned. But here he was qualified as ratepayer. He fulfilled all the section required, but added surplusage.

COCKBURN, C.J.—Upon this latter ground you may take a rule *nisi*, but not on the former point that the notice given for a previous election would suffice for a subsequent one.

A rule *nisi* having been accordingly drawn up in the terms above stated:—

Nov 20, 1871. *Merewether* showed cause.—No form of nomination is prescribed by the Act, but schedule A. gives the form of voting paper. In that voting paper the voter must state the number thereof, his name and address, and the number of votes "as owner," "as ratepayer." And the act of nomination is an act of voting. Thus, under sect. 6 of 22 Vict. c. 35, where a municipal borough is divided into wards, the person nominating a candidate for town councillor must be entitled to vote for the particular ward for which he nominates, and if he be entitled to vote only for another ward, his nomination and the election of the candidate are void (*Reg.* v *Parkinson*, 17 L.T. Rep. N.S. 169, L. Rep. 3 Q B 11; 37 L.J., 52, Q. B.). The person nominating in the present case ought to have given the same information to the returning officer, as schedule A. requires in the voting paper. [HANNEN, J.—A nomination may operate as a vote, but it is not one. COCKBURN, C.J.—The returning officer might easily see if the nominator was a ratepayer or not.] It would be troublesome to the officer to ascertain the fact. If Marks were not an owner entitled to vote, he could not nominate as such, but he essayed to do so, whereupon the returning officer looked to see if he was an owner qualified to vote as such, and found that he was not. Then was it the part of the returning officer to refer to the rate book, in order to ascertain if he was a ratepayer? [COCKBURN, C.J.—That would not be a very onerous duty, for doubtless the owners are few. There is nothing which requires the nominating party to state a qualification, and if he gave none, the officer would then have to inspect both books.] That which must be done on nominating must be done on voting, if the nomination is to have the effect of a vote.

COCKBURN, C.J.—We need not trouble you to support the rule, Mr. Michael. The question all turns on the construction of the 24th section which runs thus: "Any person entitled to vote may nominate for the office of member of the local board of health himself (if qualified to be elected), and every such nomination shall be in writing, and shall state the names, residence, calling, or quality of the persons nominated, and shall be signed by the party nominating," &c. Now in that there is nothing that provides that the party nominating shall state in what respects he is entitled to vote. And, besides the fact that there is nothing said on the subject, it seems to me plain from the same section, containing an express provision that the qualifications of the persons nominated shall be stated, that it was not intended to require a similar statement with respect to the person nominating, otherwise there would also have been a provision in terms to that effect. Then Mr. Merewether says that is to be implied from the fact that the person voting must state his qualification when the nomination paper operates as a vote. It may have been that there is an omission in the statute, and it would have been *advisable* to call on the party to state his qualification, *but the Legislature* has not done so, and we *must not interpolate* a term in an Act of Parliament, or attempt to repair defects; we are not called upon to undertake such arduous duty. "But," says Mr. Merewether, "what trouble is caused to the returning officer, if he is compelled to ascertain for himself the qualification of the person?" Yet, if my first proposition is correct, viz., that the person nominating is not called on to state a qualification at all, in every instance where he puts in a qualification which he is not bound to state, that addition is mere surplusage, and the returning officer would have to look first to see if the person were an owner, and, if not, then if he were a ratepayer; so there is no hardship on the returning officer. In the present case, though the party being misled from circumstances, put in his qualification "as owner." I consider that, inasmuch as he was not called upon to insert any qualification at all, it is pure surplusage, and the returning officer might, had he been so minded, have looked at the list of ratepayers, when he would have seen that the person was in the list, and was qualified. I think, therefore, that this rule must be made absolute.

MELLOR, J.—I am of the same opinion. There might have been some effect in Mr. Merewether's argument if the statute had not directed the form in which the nomination paper should be made; but, on the contrary, the section declares that the nomination shall "state the names, residence, calling or quality of the persons nominated, and shall be signed by the party nominating;" it seems to me that the argument is entirely upset by the fact that the section is so worded—all that is necessary as far as description of the nominator is concerned is that the nominatoin should be signed by him.

LUSH and HANNEN, JJ. concurred.

Attorney for the relator, *A. Scott*, London.
Attorney for the defendant, *Mole*, Sheerness.

Nov. 15, 1871, *and Jan.* 24, 1872.

WILLIAMS (app.) *v.* LEAR (resp.)

"Taxed cart"—Excise licence—Tolls.

A local Turnpike Act of the year 1852 *allowed a higher toll upon a "taxed cart" than upon "a gig, or chair, or such like carriage with a single seat only, and with two wheels only."*

The appellant, the toll-collector, demanded and took the higher toll from the respondent for a butcher's cart, with one seat and two wheels, for which he had taken out an excise licence under 32 *&* 33 *Vict. c.* 14, *and was convicted by justices under the local Act for so doing.*

Held, that the conviction was right; for the words "taxed cart" must refer to the particular kind of cart so called and defined in 43 *Geo.* 3. *c.* 161, *&* 48 *Geo.* 3. *c.* 55; *and not to every cart upon which a tax had been paid, as was decided in* Purdy *v.* Smith, 28 *L. J.* 150, *M. C.*

CASE stated by justices of Devon sitting at the Castle of Exeter, under 20 & 21 Vict. c. 43:

The appellant, John Williams, the lessee and collector of tolls at the Alphington turnpike gate, in the parish of St. Thomas, in the county of Devon, appeared before the undersigned justices of the peace for the county of Devon at the Castle of Exeter, on the 12th May 1871, in pursuance of

a summons issued against him on the complaint of Henry Salter Lear, for unlawfully demanding and taking from him, on the 5th May 1871, the toll of 6*d.* for a cart and one horse driven by him through the said turnpike gate; the same being a greater toll than he was authorised to take in respect of such cart and horse by virtue of the powers of any Act of Parliament, or of the orders and resolutions of the trustees or commissioners of the turnpike road in which the said gate is situated.

The complaint was preferred under a part of the 30th section of 4 Geo. 4, c. 95 (the General Turnpike Act), which is as follows:

If any collector of the said tolls shall demand and take a greater or less toll from any person than he shall be authorised to do by virtue of the powers of any Act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof, he shall forfeit and pay any sum not exceeding 5*l.*

The local Act (15 & 16 Vict.), entitled "An Act to repeal the Act relating to the Exeter and Countess Weir turnpike roads, and to make other provisions in lieu thereof, and to authorise the construction of certain new roads, and for other purposes," enacts—

Sect. 27:

That after the 31st Dec. 1852 the trustees may demand and take at the several and respective toll gates which shall by virtue of this Act be upon or on the sides of the roads such tolls as the trustees at any of their meetings may direct, not exceeding the tolls following—that is to say:

For every horse or other beast drawing any gig or chair or such like carriage, with a single seat only and with two wheels only, or any double-seated carriage, on two wheels only, commonly called a dog-cart, sixpence.

For every horse or other beast drawing any car or chair or other such like carriage, with double seats (except a dog-cart), or any phaeton, caravan, or taxed cart, or any other four-wheeled light carriage, if drawn by one horse or other beast only, eightpence.

Sect. 39 authorises the trustees from time to time to lessen or reduce all or any of the tolls authorised to be taken under the powers of that Act.

The trustees did, by resolution, reduce the above tolls as follows, the 6*d.* to 4½*d.*, and the 8*d.* to 6*d.*

The facts proved were that the complainant was a butcher residing at Chudleigh, ten miles from Exeter, and that on the day named he drove through the defendant's turnpike gate with one horse, drawing an open cart on springs, with a single shifting seat only, and with two wheels only; the toll of 6*d.* was demanded by the defendant, was objected to by the complainant, but ultimately paid by him, under protest.

That the cart was an ordinary market cart used by the complainant in his business and on other occasions, and for which he took out an excise licence. And he contended before us that it came within the above first description of a carriage liable to the toll of 4½*d.* only.

The defendant insisted that it was, in fact, a "taxed cart" within the meaning of the above second description, and was, therefore, liable to the higher toll of 6*d.*

The justices being of opinion that the cart came within the first description, and was, therefore, liable to the toll of 4½*d.* only, convicted the defendant in the penalty of 6*d.* and costs.

The defendant, being dissatisfied with this judgment, as being erroneous in point of law, requested a case for the opinion of Her Majesty's Court of Queen's Bench, which was granted and stated accordingly.

Lopes, Q.C. argued for the appellant.—Since an Act of 1869 (32 & 33 Vict. c. 14), assessed taxes on carriages have been abolished; and by sect. 18 an excise duty is payable upon every "carriage;" that term, by sect. 19, clause 6, being defined to mean and include any vehicle "except a waggon, cart, or other vehicle used solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the christian name and surname," &c. shall be painted. In the case of *Purdy* v. *Smith* (28 L. J. 150, M. C.), it was contended that a cart which had paid a tax the year before was not a taxed cart; but Lord Campbell is reported to have said, "Is it not a better construction to hold that a cart upon which a tax has been paid is a taxed cart?" The respondent's cart in this case comes within that definition, and was therefore liable to the higher toll.

The respondent did not appear.

Cur. adv. vult.

Jan. 24.—LUSH, J. delivered the judgment of himself and Hannen, J.—We are of opinion that the conviction is right. The name "taxed cart" was a designation given by the 43 Geo. 3, c. 161, Sch. D, No. 4, also by the 48 Geo. 3, c. 55, Sch. D, No. 4, to a particular kind of carriage described in the Act, namely, to a carriage with less than four wheels, "constructed wholly of wood and iron, without any covering other than a tilted covering, and without any lining or springs," and with a fixed seat, without slings or braces, and without any ornament whatever, other than paint of a dark colour, for the preservation of the wood or iron only, and which shall have the words 'a taxed cart' and the owner's christian and surname and place of abode marked or painted" in letters of a given length, and of a given colour, upon the back panel, and which should not be of more than a given value. Carriages which answered these conditions were taxed at a lower rate than ordinary carriages, and they were designated "taxed carts," to distinguish them from carts or carriages which were exempt from duty on account of their being used solely for purposes of husbandry, or as common stage carts In course of time such vehicles came to be also exempted from duty, but they were still called by the old name, and are referred to in the Stamp Acts as carriages of an exceptional description, which were entitled to exemption because of their peculiar construction: (see 3 & 4 Will. 4, c. 39). It cannot be doubted that many such "taxed carts" were in use at the date of the local Act, and that the term is there used for the purpose of denoting this well-known description of vehicle. As all the earlier statutes were repealed by the 32 & 33 Vict. c. 14, and every carriage, whatever may be its form, construction, or value, is now subject to duty, except such as are used solely for purposes of trade or husbandry, it may be that "taxed carts," in the sense in which the term is used in the local Act, no longer exist. But whether they do or not, the carriage in respect of which the higher toll was charged by the appellant was not one of this description, and therefore it was not liable to the toll of 6*d.* The origin and meaning of the term appear to have been over-

looked by this court in deciding the case of *Purdy* v. *Smith* (28 L. J. 150, M. C.), when it was held that a taxed cart meant simply a carriage upon which a tax had been paid. It is clear to us that such was never the meaning of the term, and we cannot therefore follow that decision. The appeal must be dismissed, and the conviction affirmed.

Judgment for respondent.

Attorneys for appellant, *Griffith* and *Brownlow*, for *J. Toby*, Exeter.

Thursday, Jan. 25, 1872.

DUDLEY UNION (appts.) v. WOLVERHAMPTON UNION (respts.).

Union extending into several jurisdictions—Court of appeal from order of removal—Poor Law Amendment Act 1867 (30 & 31 *Vict. c.* 106), *s.* 27.

By sect. 27 *of the Poor Law Amendment Act* 1867, "*where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians thereof are affected or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union:*"

Held, that the appellate jurisdiction from an order of removal under this section is the same as that under which the order is made; and it does not depend upon the place from which the removal is ordered.

Bosanquet, last term, obtained a rule *nisi*, calling upon the justices in and for the county of Stafford to show cause why a writ of *mandamus* should not issue directed to them, commanding them to enter or cause to be entered continuances from session to session to the next general quarter sessions of the peace in and for the said county, upon the appeal of the guardians of the poor of the Dudley union against an order under the hands and seals of two of Her Majesty's justices of the peace in and for the borough of Wolverhampton for the removal of Anna Maria Rudge and her three children from and out of the Wolverhampton union into the said Dudley union, and at such next general quarter sessions of the peace to hear and determine the merits of the said appeal.

It appeared from the affidavit of the clerk to the guardians of the Dudley union, upon which the rule was obtained, that all preliminary requisites to entitle the appellants to have the appeal from the said order of removal heard by the justices of Staffordshire at the last October quarter sessions, had been complied with, that when the appeal accordingly came on to be heard, the respondents admitted that the appellants were entitled to have judgment given in their favour upon the said appeal, if the said court of quarter sessions had any jurisdiction to hear such appeal. The said court declined to hear the appeal on the ground that they had no jurisdiction to entertain it, because the appeal, under the circumstances, ought to have been made to the quarter sessions for the borough of Wolverhampton.

The whole of the Wolverhampton Union is in the county of Stafford, and it includes several parishes and townships, and among others the parish, (within which is the borough) of Wolverhampton, and the township of Bilston. The whole of the township of Bilston is in the county of Stafford, and no part of it is within the borough of Wolverhampton. The borough of Wolverhampton has a recorder and a separate quarter sessions of the peace. The last Michaelmas sessions of Staffordshire took place before those of the borough of Wolverhampton.

The paupers were in the township of Bilston at the time the order of removal to the appellants' union; but the order was made by the justices of Wolverhampton, within the borough of Wolverhampton.

Matthews, Q.C. and *Jelf*, on behalf of the appellants, showed cause against the rule.—By the Poor Law Amendment Act 1867 (30 & 31 Vict. c. 106, s. 27, "Where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint, by which the guardians thereof are affected, or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union." The earliest provision on the subject is in sect. 6 of 8 & 9 Will. 3, c. 30, "The appeal against any order for the removal of any poor person from out of any parish, township, or place, shall be had, prosecuted, and determined, at the general or quarter sessions of the peace for the county, division, or riding, wherein the parish, township, or place, from whence such poor person shall be removed, doth lie, and not elsewhere, any former law or statute to the contrary thereof in anywise notwithstanding." That provision was held in *Reg.* v. *Salisbury* (2 Q. B. 72), and four following cases, to have been repealed by the Municipal Corporation Act 1835 (5 & 6 Will. 4, c. 76, s. 105); by which section the recorder of every borough shall hold "a court of quarter sessions of the peace in and for such borough, of which court the recorder of such borough shall sit as the sole judge; and such court of quarter sessions of the peace shall be a court of record, and shall have cognisance of all crimes, offences, and matters whatsoever cognisable by any court of quarter sessions of the peace for counties in England; and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned court," except with respect to county rates and liquor licenses. In a later case, *Reg.* v. *The Recorder of Liverpool* (16 Q. B. 1070), Lord Campbell, in referring to this section, said, "The statute makes the place of appeal depend not upon the place *for* which the justices acted, but upon the place *in* which they acted."

Powell, Q.C. and *Bosanquet*, for the respondents, supported the rule.—Sect. 27 of the Poor Law Amendment Act 1867 relates only to the original jurisdiction in such matters as these, and makes no provision for appellate jurisdiction. It is necessary, therefore, to look at the earlier law; and, although the Municipal Corporations Act 1835 has restored to borough recorders the appellate jurisdiction for matters within their borough, which was taken away by the Act of 1697 from borough justices, it does not give them jurisdiction in matters outside their boroughs. Appeals to quarter sessions are entirely creatures of statute; and the only Act which provides concerning the particular sessions to which appeals must be made is the 8 & 9 Will. 3, c. 30, which, by sect. 6, requires the appeal to be prosecuted and determined at the sessions for the county, division, or

riding wherein the parish, township, or place from whence such poor person shall be removed, doth lie. To the extent of defining which is the proper sessions for the appeal, this section cannot be said to have been repealed by subsequent legislation. Indeed, it cannot have been altogether repealed, for without it there is no express provision for an appeal to sessions at all. [COCKBURN, C.J.—By the Union Chargeability Act 1865 (28 & 29 Vict. c. 79) the word "union" must be read instead of the words "parish, township, or place," in the Act of Will. 3.] The whole union is here in the county of Stafford; and that part of it from whence the paupers were removed is not in the borough of Wolverhampton.

COCKBURN, C.J.—To my mind this is a clear case, and I have no doubt the rule should be discharged. It is plain that when guardians fix the jurisdiction under which they obtain an order of removal, they fix also the appellate jurisdiction for reviewing the order. It seems to me to be unnecessary to discuss the old law, further than to consider what was the state of the legislation on the subject at the time of the Poor Law Amendment Act 1867. By the Municipal Corporations Act 1835 the law stood thus: Whenever a question arose upon the removal of a pauper from a parish in a borough having a recorder, the appeal must go to the recorder, and not, as by the Act of Will. 3, to the county. By the Act of 1867, where a union extends into several distinct jurisdictions, every matter affecting the guardians shall, for the purpose of jurisdiction, be deemed to arise or exist equally throughout the union. It is plain that the Legislature intended that a matter happening in any parish of a union should be treated as if it happened in any other parish. It was contended that the whole union, being thus subject to any jurisdiction existing in it, it was open to a party aggrieved to appeal from the jurisdiction under which the first order was made to any other jurisdiction existing over the union; the rule, however, seems to be that the appellate jurisdiction must be that which relates to the place where the original matter arose; and this is the only rational, consistent, and convenient course to adopt. In the present case, at all events, it must be quite as satisfactory to carry this appeal to the learned recorder of Wolverhampton, as to the changing and uncertain tribunal which has to decide appeals to the county sessions.

BLACKBURN, J.—I am of the same opinion. In enacting this 27th section of the Act of 1867, probably the Legislature never thought of the tribunal for an appeal; the language, however, carries the appellate as well as the original jurisdiction in its provision.

MELLOR, J.—I am of the same opinion. The respondents seem to attach to the statute of Will.3, an importance which I do not think it deserves. The object of the Union Chargeabilty Act was to place each union in the same position as a parish occupied before. Formerly, however, the justices of the county only had jurisdiction over some of the parishes of unions in which another jurisdiction existed. By sect. 27 of the Act of 1867 all jurisdictions in a union are extended over the whole union; and it seems to me that the appellate jurisdiction is fixed by the original jurisdiction chosen.

LUSH, J.—I have felt considerable doubt about this matter; but so much inconvenience would attend upon uncertainty as to the appellate tribunal, which would be the consequence if the respondent's arguments were to succeed, that I have concluded that the only reasonable intention of the Legislature must be that by the 27th section of the Poor Law Amendment Act the appellate jurisdiction is the same as that under which the original order was made. Some violence, in my opinion, is done by that conclusion to the provisions of the Act of Will. 3, but to some extent that Act has been repealed, and our decision is the most consistent with subsequent legislation.

Rule discharged.

Attorneys for appellants, *S. W. Johnson*, for *Brooke, Robinson*, and *Co.*, Dudley.

Attorneys for respondents, *Neal* and *Philpot* for *H. Langman*, Wolverhampton.

Tuesday, Jan. 30, 1872.

REG. *v.* THE JUSTICES OF SURREY.

New highway—Certificate of justices—Consent of owner—Order of quarter sessions—Certiorari—5 & 6 Will. 4, c. 50, ss, 84 & 85.

Proceedings were taken under 5 & 6 Will. 4, c. 50, ss. 84 and 85, to divert a footpath which crossed the corner of the grounds of an asylum, the new path being of greater length round the fence, and upon what had been a ditch between the fence and the highway. Two justices certified that the new path was more commodious than the old, but made no mention in their certificate of any consent of owner. A written consent of the proprietors of the asylum was enrolled with the certificate and plan by the quarter sessions. This consent professed to be by the owners of the lands or grounds through, along, or adjoining which the footpath was intended to be diverted and turned, and they consented to the making and continuing of the new path through, along, or adjoining their said lands or grounds.

Held, upon a rule for a certiorari to bring up the order of quarter sessions for want of jurisdiction, an appeal having failed by reason of insufficient notice, that this was a substitution of a new path; that the certificate need not mention the consent of the owner; and that this consent contained in effect what was mentioned in the scheduled form.

The rule was therefore discharged.

E. Clarke, at the instance of Charles Ansell the younger and others, had obtained a rule *nisi* calling upon the keepers of the peace and justices in and for the county of Surrey, and John Walker and William Alston Head, to show cause why a writ of *certiorari* should not issue to remove into this court all and singular the orders made by the said justices, or some of them, at a general sessions of the peace holden at Reigate, in the said county, on or about the 4th April last, upon a certain appeal, wherein the said Charles Ansell the younger and others were the appellants, and the said John Walker and Wm. Alston Head were the respondents, against an original order or certificate dated the 28th Feb. last, and made or given by the Right Hon. the Earl of Cottenham and Lieut.-Colonel Charles Sedley Burdett, two of the said justices, for the diversion of a certain footpath in the parish

of Caterham, in the said county, and also the said original order or certificate.

The following is the order made by the justices of Surrey, at the said general sessions. The certificate is recited in the order:

At the general quarter sessions of the peace holden at Reigate, in and for the county of Surrey, on the 4th April 1871, and from thence continued by adjournment to the 1st May 1871.

Whereas the deputy clerk of the peace for this county in pursuance of an Act of Parliament passed in the 5 & 6 Will. 4, intituled, "An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England," has now laid before this court a certificate under the hands of the Right Hon. the Earl of Cottenham, and Lieut.-Col. Chas. Sedley Burdett, two of Her Majesty's justices of the peace for this county, relating to the diverting, turning, and stopping up a certain part of a certain footway in the parish of Caterham, in the county, which certificate is accompanied by certain proofs, written consent of the owners of the lands, and a plan particularly describing the said part of the said footway proposed to be diverted, turned and stopped up, and the proposed footway to be substituted by metes, bounds, and admeasurements thereof, which said certificate proofs, written consent, and plan were lodged with the said deputy clerk of the peace on the 1st March last, and which said certificate is in the words following, that is to say, "Surrey to wit. To Her Majesty's Justices of the Peace at the General Quarter Sessions to be holden at Reigate in and for the said county of Surrey on the 4th April 1871. Whereas, on the 23rd Jan. 1871, at Caterham, in the said County of Surrey, the Godstone District Highway Board through John Walker, their surveyor, and duly authorised agent in that behalf, made application and request unto us, the undersigned, The Right Hon. the Earl of Cottenham, and Lieutenant-Colonel Charles Sedley Burdett, two of Her Majesty's Justices of the Peace in and for the said county of Surrey, to view a certain part of a certain public footway, being so much of the said footway as led out of a certain public highway leading from Coulsdon to Caterham, both in the said county, into a certain other public highway leading from Coulsdon aforesaid to Chaldon in the said county, and the said part of the said public footway being situate in the parish of Caterham, within the district of the said Godstone district highway board, and hereinafter more particularly described, and did at the same time produce unto us a certain order in writing for such application and request, bearing date the 22nd Dec. 1870, under the hand of the Reverend Jarvis Kenwick, therein described to be, and being the chairman of a vestry meeting of the inhabitants of the said parish, held on the 15th Dec. 1870, and then continued by adjournment to, and holden on the said 22nd Dec. 1870, from which said order it appeared as the fact was, that the said inhabitants in such vestry as aforesaid assembled, deemed it expedient that the said part of the said public footway should be diverted, turned, and stopped up, as proposed to the said vestry meeting, and as hereinafter more particularly set forth. And whereas the said part of the said footway so proposed to be diverted, turned, and stopped up, commences at the junction of the said footway so proposed to be diverted, turned, and stopped up, with the said highway leading from Coulsdon to Caterham, extends therefrom in a south-westerly direction across certain land there used for the purposes of, or in connection with, the asylum, for imbecile poor, and terminates at a point of junction between a certain public highway leading from Caterham to Chaldon, and the said highway leading from Coulsdon to Chaldon, and is of the length to wit of 530yds., or thereabouts, and of the breadth to wit of 4ft., or thereabouts. And whereas the proposed public footway to be substituted between the said points of commencement and termination for the said part so proposed to be diverted, turned, and stopped up as aforesaid, is within the said parish of Caterham, and within the said Godstone highway district, and is to be carried between the said points on a raised footpath to be made at the side of the said existing highways leading respectively from Coulston to Caterham, and from Caterham to Chaldon, and is of the *length to wit of 616yds.*, or thereabout, and of the breadth to wit of 5ft., or thereabouts. And whereas on the said 23rd Jan. 1871, we, the said justices, in pursuance of such order, application, and request, and of the statute in that behalf made and provided, did jointly in company with each other view the said part of the said public footway proposed to be diverted, turned, and stopped up as aforesaid; and it appeared to us, upon such view, that the said part of the said public footway might be so diverted, turned, and stopped up as aforesaid, so as to make the same more commodious to the public. And whereas we, the said justices, did thereupon direct the said highway board to affix a notice in the form or to the effect of schedule (No. 19) to the statute aforesaid annexed, in legible characters, at the place and by the side of each end of the said part of the said footway, so proposed to be diverted, turned, and stopped up as aforesaid, from whence the same was proposed to be diverted, turned, and stopped up; and also to insert the same notice in one newspaper published or generally circulated in the county, where the said part of the said footway proposed to be diverted, turned, and stopped up as aforesaid lay, for four successive weeks next after our said view of the said part of the said public footway, and to affix a like notice on the doors of the several churches of the parish of Caterham, such being the only parish in which the said part of the said public footway so proposed to be diverted, turned, and stopped up, lay, on four successive Sundays next after the making of such view by us. And whereas the said several notices were so published as aforesaid, and proof thereof has this day been given to our satisfaction; and a plan (which is hereunto annexed) has been delivered to us at the same time, particularly describing the said part of the said old, and also the proposed, public footway to be substituted therefore by metes, bounds, and admeasurements thereof; which plan has been verified by the said John Walker, a competent surveyor in that behalf. Now we the said justices do hereby, in pursuance of the statute in such case made and provided, certify that we have jointly in company with each other, viewed the said part of the said public footway as aforesaid, and that the said footway proposed to be substituted for the said part of the said old footway is more commodious to the public for the following reasons, that is to say: Firstly by reason of its greater width; secondly, by reason of its being to be carried for the whole of its course between the said points of its commencement and termination on a made path, while the said path of the said footway proposed to be diverted, turned, and stopped up, is carried by an unmade path over an arable field; and, thirdly, by reason of its being to be subject to no right restricting its full and free use and enjoyment by the public, while the said part of the said footway proposed to be diverted, turned, and stopped up is subject to a right on the part of the owners of the soil thereof of ploughing it up periodically in due course of farming; and we further find that the said part of the said old footway will, if and when the said diversion and substitution shall be effected, become and be unnecessary and useless. Given under our hands the 28th Feb. 1871, at Sandridge Court, in the parish of Sandridge, in the county of Surrey, Cottenham C. S. Burdett. And whereas the said certificate, proofs, and written consent have been now read by the deputy clerk of the peace in open court, and Charles Ansell the younger, John James, Edwd. Hooper, Juland Danvers, Wm. Darley Bentley, Francis Parsons, Thos. Bradbury Winter, Jo. Bennett, Wm. Roffey, Thos. Ellis, Wm. Ellis, Wm. Tamplin, and Francis Spencer have considered that they would be injured and aggrieved by the diverting, turning, and stopping up of the said part of the said footway, and have made an appeal to this court against the same. And whereas due notice has not been given of such appeal. It is ordered by this court that the said appeal be, and the same is hereby dismissed; and whereas no other appeal has been made to this court against such diverting, turning, and stopping up, it is ordered by this court that the said certificate, proofs, written consent, and plan be, and the same are hereby enrolled; that the said part of the said footway mentioned and described in the said certificate be diverted, turned, and stopped up accordingly; and the footway also therein mentioned and described be substituted in lieu thereof; and that the said appellants do forthwith pay to the managers of the Metropolitan Asylum District the sum of 15*l.* 5*s.* and for the costs and expenses

incurred by the said managers in resisting the said appeal. By the Court,

(Signed) DEPUTY CLERK OF THE PEACE.

The following are the words of the consent which accompanied the certificate, and is mentioned in the said order:—

We, the managers of the Metropolitan Asylum District, being the owners of the lands or grounds described on the plan hereunto annexed, and through, along, or adjoining which, part of a certain footpath or highway leading out of the road from Coulsdon to Caterham, both in the county of Surrey, and extending in a south-westerly direction across certain land there now used for the purposes of, or in connection with, the Asylum for Imbecile Poor, to and into a certain other highway leading from Coulsdon to Chaldon (and which footpath or highway is shown on the said plan by the colour blue) is intended to be diverted and turned; in consideration of the stopping up of such part of the said footpath or highway so shown by the colour blue as aforesaid, do hereby consent to the making and continuing of the new highway, which is indicated by the colour red on the said plan, through, along, or adjoining our said lands or grounds.

Given under our common seal the 18th Jan. 1871.

The common seal of the managers of the Metropolitan Asylum District in the presence of

WM. BREWER, Chairman.

It appeared from the plan, and also from the affidavits upon which the rule was granted, that the length of the footpath across the land of the asylum was 530yds.; and that the length of the substituted footpath along the side of the highway was 616yds. The new footpath was constructed upon what had been a ditch between the high road and the fence round the land of the asylum.

Field, Q. C. and *Thesiger* for the respondents, showed cause against the rule.—The first case upon this subject was *Welch* v. *Nash* (8 East. 395), in which it was held under the 19th section of the General Highway Act, 13 Geo. 3, c. 78, that it was not sufficient that an old highway was widened in parts to make it a substitution for a new highway. That decision, however, was dissented from by the Court of Common Pleas in *De Ponthieu* v. *Pennyfeather* (5 Taunt. 634); and this court distinctly overruled *Welch* v. *Nash* in the case of *Reg.* v. *Phillips* (L. Rep. 1 Q. B. 648), and held that the addition of fresh land to an old narrow highway, so as to widen it and make it a commodious road, is sufficient substitution of a "new highway." It was held in the same case that a certificate was valid which alleged only one of the two alternatives, either that the new highway was nearer, or that it was more commodious than the other. By the authority of *Reg.* v. *Phillips* therefore, this substituted path is a new highway within sect. 85 of 5 & 6 Will. 4, c. 50; and being more commodious than the old one, it need not be nearer. The certificate of the justices contains all the assertions required by that section, and is therefore good on its face. It is not stated that the consent of the owners should form part of the certificate, and therefore it is sufficient that it appears in the order of the sessions that the consent was lodged with the clerk of the peace. Moreover, the certificate has been before the sessions, and the justices have entertained the question whether it was good or bad. *Certiorari* therefore, in the same way as *mandamus*, will not lie against them upon this question, even if they were wrong:

Reg. v. *The Justices of Worcestershire*, 3 E. & B. 477; *Reg.* v. *Justices of Surrey*, L. Rep. 5 Q. B. 466; 3 L. T. Rep. N. S. 801.

The consent sufficiently states that the managers of the Metropolitan Asylum, who give it, are the owners of the grounds through which the proposed new highway was to be made.

Denman, Q. C. and *E. Clarke*, for the appellants, supported the rule.—This is an attempt by the respondents to extend the effect of the case of *Reg.* v. *Phillips*. Here there is no new right of way to be dedicated to the public in place of the old; the substituted footpath is to be made over the ditch, which is already part of the highway. *Reg.* v. *The United Kingdom Electric Telegraph Company* (*Limited*) (6 L. T. Rep. N. S. 378; 31 L. J. 166, M. C.). The words of the earlier Act of 13 Geo. 3 were the same as in this Act concerning consent, and it was held in *Rex* v. *Kirk* (1 B. & C. 21), that an order was bad because it did not appear upon the face of it that the consent of the owner had been obtained. And in *Rex* v. *The Justices of Kent* (1 B. & C. 622) Bayley, J., held that it should have appeared upon the face of the order that a sufficient assent was given under the hand and seal of the owner. [LUSH, J.—The Act of Will. 4 does not say that the consent of the owner must appear on the certificate, nor, indeed, on the order itself. It only requires the owner's consent as a fact.] At all events the words of the consent are not sufficient; the form given in the schedule No. 18 has words asserting that the person who gives the consent is the owner of the lands through which the highway is to be diverted and turned, and that he consents to the making and continuing such new highway through his said lands. Here the managers merely claim to be owners of the lands or grounds "through, along, or adjoining which," the highway was intended to be diverted—in fact, it is not through their land at all, but upon the old highway. The Act never contemplated such a diversion, for the consent in the schedule provides for money to be paid to the owner in consideration for his consent. By sect. 118 the forms in the schedules "shall be used upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case." [LUSH, J.—That section concludes "that no objection shall be made or advantage taken for want of form in any such proceedings by any person whomsoever."]

COCKBURN, C.J.—I think this rule must be discharged. The preliminary formalities required by the 84th and 85th sections appear to me to have been substantially complied with. When the vestry deem it expedient to divert a highway, the surveyor is to request the justices to view it; and when it appears to the justices that it may be diverted so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, and certain notices have been given, the justices are to certify that the new highway is nearer or more commodious, and why; and afterwards this certificate, with a certain plan and the written consent of the owner, is to be enrolled by the clerk of the peace at quarter sessions, provided, by sect. 87, that upon appeal the court of quarter sessions do not refuse to enrol the same. Now, throughout these sections, the certificate, the plan, and the consent, are spoken of as separate matters, and I see no necessity for referring to the consent in the certificate. There is nothing wrong, therefore, on the face of the certificate; inasmuch as a certificate is of no

force until enrolment. If anything were wrong on the face of it, it would be beyond the jurisdiction of the quarter sessions to order it to be enrolled. Here the consent certainly was not in the words of the schedule, but the section referring to the schedules provides that no objection shall be made or advantage taken for want of form. It is true that no statement is made to the effect that the asylum board were owners of the whole ground of the new footpath; but it appears that they claim to be owners of the lands or grounds, through, along, or adjoining which the path was intended to be diverted; and they consented to the making of the new highway "through, along, or adjoining our said lands or grounds." It seems that the new path is in a great measure what was the ditch by the side of the asylum grounds, which with the road *ad mediam filum viæ* must be presumed to be in the same ownership as that of the adjoining land. Taken altogether, it must be sufficient, as no mention of the consent is necessary on the face of the certificate, that the persons who are the owners, which fact may be shown *aliunde*, consent to the new path. I think the justices at quarter sessions are the proper persons to judge whether the consenting parties are the real owners, and upon these materials they might reasonably hold the asylum board to be the owners, whose consent was necessary. I see no reason to question the validity of this order, or the application of *Reg.* v. *Phillips* to the facts of the case, so the rule will be discharged.

MELLOR, J.—I am of the same opinion. I think the scheme of the statute was to substitute a new road for the closed old road; but the facts of this case are within the rule established in *Reg* v. *Phillips*, and this seems to be a substitution offered to the public for the old right of way they had before; it increases the accommodation for the public along the highway, just as was done by the substituted road in that case. Although we are, by confirming this order, going perhaps further than that case, yet I think the circumstances of this case are within the principle there laid down. I am satisfied also that although the form of this consent departs from that given in the schedule, yet there appears sufficient evidence to show that the asylum managers are owners of the land adjoining, and *primâ facie* therefore they are owners of the soil to the middle of the road. As to the other objection, the order is to be made by the quarter sessions, and it would be inconvenient for all the justices there assembled to view the substituted roads. On that account it is provided that two justices only shall view and certify. They have to satisfy themselves and certify of the comparative distance or convenience of the old and new roads; but they are not bound to examine the form of the written consent. No mention of the consent need appear in the certificate, and in some cases I do not know how it could. The ownership and the consent of the owner are questions for the quarter sessions. No doubt the certificate and the consent are separate matters, and I think we are bound to say there is no want of jurisdiction in any part of the justices' proceedings.

LUSH, J.—I am of the same opinion. The certificate required by the Act is not operative by itself; it is sufficient, if it shows upon the face of it that the two justices have done all that is required of them. The written consent truly does *not in terms state* what is contained in the scheduled form; but in effect the managers claim what by law makes them owners of the new path. I think this was a sufficient substitution of a new path, and the certificate and consent are good.

Rule discharged.

Attorneys for appellants, *Horne* and *Hunter*.

Attorneys for respondents, *Nicholson* and *Herbert*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and E. A. KIRKLAND, Esqrs., Barristers-at-Law.

Saturday, Nov. 18, 1871.

REGISTRATION APPEAL.

CHORLTON (app.) v. THE OVERSEERS OF TONGE (respts.).

Registration—County vote—Notice of objection—Description of objector—Parish divided into polling districts—31 & 32 *Vict. c.* 58, *s.* 22.

Sect. 22 *of* 31 & 32 *Vict. c.* 58, *which provides that in the case of a parish forming part of more than one polling district, the part of such parish situate in such polling district shall be deemed to be a separate parish for the purposes of the revision of voters, and the lists and register of voters, does not render it obligatory on an objector having his qualification in such a parish to show on the face of his notice to which particular polling district he belongs, but it is still sufficient, notwithstanding this enactment for him to describe himself as on the list of voters for the parish in question.*

ON appeal from the decision of the revising-barrister for the South-Eastern Division of the County of Lancashire, the following case was stated:

At a court holden, &c., Samuel Stott, of Quarry-hill, Healey, near Rochdale, objected to the name of Enoch Beswick.

The notice of objection to the person objected to was in the following form:

To Mr. Enoch Beswick, of Kemjon-lane, Tonge.

Take notice that I object to your name being retained on the Tonge list of voters for the South-East Division of the County of Lancaster. Dated this 15th Aug. 1871.

(Signed) SAMUEL STOTT, of Quarry-hill, Healey, near Rochdale.

On the register of voters for the township of Spotland.

The township of Spotland consists of the hamlets of Brandwood Higher End, Brandwood Lower End, Whitworth Higher End, Catley-lane, Chadwick, Clay-lane, Falinge, Healey, Whitworth Lower End, Wolstenholme, and Woodhouse-lane.

The first three named hamlets of Brandwood Higher End, Brandwood Lower End, and Whitworth Higher End, constituted the whole of Brandwood Higher End polling district in the year 1871 and preceding year.

The said other hamlets within the township of Spotland, form part of, and are included in, the Rochdale polling district.

It was not proposed to be proved before the revising barrister that the said Enoch Beswick was entitled to have his name retained in the list of voters in respect of the said qualification hereinbefore described, but on his behalf it was contended that the said notice of objection was invalid on the ground that it did not state the particular list of voters in which the name of the said Samuel Stott appeared. The overseers of

the township of Spotland prepare the list of voters of the whole township of Spotland, and they published during the year 1871, within the Brandwood Higher End polling district, the names of all voters whose qualification was situate within such polling district; and they published during the same year, within the polling district of Rochdale, the names of all voters whose qualification was situate within such part of the township of Spotland as was within such polling district of Rochdale. Thus they published during the year 1871, on or before the 1st Aug., within the Brandwood Higher End polling district, a document headed as follows:

Brandwood Higher End Polling District.

The register of persons entitled to vote at any election of a member or members of Parliament for the Division of South-East Lancashire between the 3rd Dec. 1870 and the 1st Jan. 1872:

Hamlets of Brandwood Higher End, Brandwood Lower End, and Whitworth Higher End, in the township of Spotland.

And the said overseers also published during the year 1871, on or before the 1st August, within such part of the township of Spotland as lies in the Rochdale polling district, a document headed as follows:

Rochdale Polling District.

The register of persons entitled to vote at any election of a member or members of Parliament for the Division of South-East Lancashire, between the 31st Dec. 1870 and the 1st Jan. 1872:

The hamlets of Catby-lane, Chadwick, Clay-lane, Falinge, Healey, Whitworth Lower End, Wolstenholme, and Woodhouse-lane, in the township of Spotland.

The name of the objector appears only as follows on the last above-mentioned register of persons entitled to vote:

Christian name and surname of the claimant at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in the parish, and No. of house (if any) where the property is situate, or any name of the property, if known by any, or name of the occupying tenant, or if the qualification consist of a rentcharge, then the names of owner of the property out of which such rent is issuing, or some of them, and the situation of the property.
Stott, Samuel.	Quarry-hill, Healey, near Rochdale.	Freehold house and land.	Quarry-hill, tenants, John Williamson and others.

It was contended before the revising barrister on behalf of the persons objected to, that such notice of objection was invalid on the following grounds:

First, that there was no list of voters described or distinguished by the name of "The register of voters for the township of Spotland; secondly, that the list of voters whose qualifications were in the township of Spotland were divided into two parts, one part consisting of the three townships of Brandwood Higher End, Brandwood Lower End, and Whitworth Higher End, and constituting the Brandwood Higher End polling district; and the other part consisting of the eight townships of Catley-lane, Chadwick, Clay-lane, Falinge, Healey, Whitworth Lower End, Wolstenholme, and Woodhouse Lane, and forming part of the Rochdale polling district; thirdly, that the objector should have described the particular list of voters on which his name appeared, and not have given the name of a township which formed part of two polling districts, and had two separate and distinct sets of lists.

The revising barrister considered that if the said notice of objection was according to the form numbered 5 in schedule A of the 6 & 7 Vict. c. 18, or to the like effect, as required by the 7th section of the said Act, it was good, and seeing that the only difference between the said notice of objection and the said form was that in the said notice it was "on the register of voters for the township of Spotland," and in the said form numbered 5, the words are, "on the register of voters for the parish of ——," he considered that the said notice of objection was, under the circumstances of this case, to the like effect as the said form No. 5, and that it was not necessary to specify the particular list of voters, as was contended. He, therefore, decided that the said notice of objection was valid, and struck off the name of the said Enoch Beswick from the said list of voters.

This was an appeal against that decision.

Edwards for the appellant.—The person objecting has signed himself as on the register of voters for the township of Spotland, and that was sufficient, according to form 5 schedule A of 6 Vict. c. 18, and form 2 schedule A. of 28 & 29 Vict. c. 36. But subsequent enactments have rendered it insufficient. Sect. 34 of 30 & 31 Vict. c. 102, provides for increased polling places in both counties and boroughs, and a description of such new polling places is to be advertised. Sect. 6 (subsect. 6) of 31 & 32 Vict. c. 58, provides for the uniform printing of all the lists of a county, so as they shall be capable of forming one book, or of being detached each list by itself, so that the list of any parish or township, or all the lists of any polling district or districts may be had separately. Sect. 22 of the same Act provides that where any parish (which is the same as township) "forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purposes of the revision of voters, and the lists and register of voters." Here the township of Spotland formed part of more than one polling district; a separate list was made for each such polling district, and each such district must be deemed a separate parish for the purposes of the revision. The effect, then, of sect. 22 of 31 & 32 Vict. c. 58, is to render form 5, schedule A to 6 Vict. c. 18, and form 2 schedule A of 28 & 29 Vict. c. 36, insufficient in a case where the parish forms part of more than one polling district (as was the case here), and to render it necessary for the person objecting to specify in what polling district the part of the parish in which his qualifying tenement lies is situate. It has often been decided that the person objecting must give such a description of the list on which his name is to be found, that the party objected to may at once be able to find his name without being obliged to search several lists for it. The most recent authority for that is *Allen* v. *Town Clerk of Warrington* (22 L. T. Rep. N. S. 169; L. Rep. 5 C. P. 291; 39 L. J. 113, C. P.); but, as the party objecting in this case did not specify the list on which his name was to be

found, the appellant might have had to search more than one list in order to find his name. Moreover, the effect of sect. 22 is to abolish altogether the parish of Spotland for the purposes of the revision; so that "on the register of voters for the parish of Spotland is no description at all; as for registration purposes, there is no such parish and no such register.

The respondents did not appear.

WILLES, J.—I am inclined to think that the revising barrister was right, and that the notice of objection was good. I start with this proposition, that the notice to be good must be in accordance with the Act of Parliament. The first form of notice to be given to parties objected to by any persons other than the overseers, is form 5, schedule A, to 6 Vict. c. 18; and in the case of the person objected to being already on the register, form 2, schedule A, to 28 & 29 Vict. c. 36, is given. That form has been followed here, as the party objecting has described himself as "on the register of voters for the parish of Spotland." My next proposition is that 28 & 29 Vict. c. 36, has not been expressly repealed by any subsequent Act; but Mr. Edwards's argument is directed to show that it has been impliedly repealed by the subsequent Act, providing for the establishment of new polling districts, the effect of which, he contends, is to expunge and abolish the township of Spotland for purposes of registration, so that, according to his argument, it is now necessary for the objector to describe himself as on the register of voters, not for the township of Spotland, but for the particular polling district of the township of Spotland to which he happens to belong. That, he contends, is the effect of sect. 22 of 31 & 32 Vict. c. 58. That conclusion is led up to by reference to various provisions in previous Acts as to providing different polling places. To take a consistent view upon this subject, one must go back to the Reform Act of 1832 (2 Will. 4, c. 45). It is remarkable, when looking at the provisions of this Act as to polling-places, that there is nothing to show that such polling-places are to be coterminous with parishes. A man is bound, in signing a notice of objection, to describe himself as of a particular parish or township, just in the same manner as a person making a claim. Thus in all these cases, the ecclesiastical divisions are to be followed more or less. The 63rd section of 2 Will. 4, c. 45 makes provision for dividing counties into polling districts (a division which was actually made by 2 & 3 Will. 4, c. 64), and the 64th section of 2 Will. 4 c. 45 provides for the erection of a polling booth in each of such districts, and enacts that no voter shall poll out of the district in which his qualifying property lies. Now, I believe, some parishes lie partly in one county and partly in another; but, assuming that no instance of such a division could be given, the possibility of such a state of things is sufficient to show that it is not legally impossible to attribute one part of a parish to one polling district and another to another. I come now to the provision in sect. 34, by which justices of the peace are to assign new polling places, and a description of the new polling places is to be advertised. If that provision stood alone there would be no doubt that it would be more convenient for a voter to describe himself, not only as of a particular parish, but also as of a particular polling district in the parish. By subsect. 6 of sect. 6 of 31 & 32 Vict. c. 58, provision is made for the uniform printing of the lists of a county, so that they shall be capable of forming one book, or of being detached, each list by itself, so that the lists of any parish or township, or all the lists of any polling district or polling districts, may be had separately. This section, therefore follows the civil divisions referred to in sect. 34 of 30 & 31 Vict. c. 102; and if the enactment of the sub-section is carried out, there could be no difficulty in getting the lists for the whole township and finding out the objector's name. I now come to the section that has been mainly relied on, the 22nd section of 31 & 32 Vict. c. 58, which provides that "where any parish . . . forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purposes of the revision of voters and the lists and register of voters, and may be designated by some distinguishing addition in the list of voters for such a parish." That does not expressly repeal the schedules of 6 Vict. c. 18, and 28 & 29 Vict. c 36 above referred to; the question is, whether it repeals them by necessary implication, so as to render the descriptions there given as "in the register of voters for the parish of ——," insufficient where the parish in question forms part of more than one polling district, and to render it necessary for the objector to describe himself as on the register of voters for the particular polling district as well as for the particular parish. I do not think it does so impliedly repeal them. It provides that "the part of such parish situate in each polling district shall be deemed to be a separate parish" for certain purposes there specified. Those purposes are "the revision of voters and the list and register of voters." These words are confined, in my judgment, to the revision by the revising barrister, who is the judicial officer appointed to revise the lists, and to the settlement of the lists and register by the officers whose duty it is to settle them for the purpose of revision. An objector is neither such an officer nor the revising barrister, but only a person who has the right to intervene and correct the people who have to do with the revision; the same remark applies to a claimant. The words of the section are satisfied by referring them to the judicial and ministerial officers appointed by the statutes to frame correct lists, and have no application to private persons, who have a statutory right to intervene to set those officers right. I am therefore of opinion that the description given in form 5, schedule A of 6 Vict. c. 18, and form 2, schedule A of 28 & 29 Vict. c. 36, is still sufficient, and that the decision of the revising barrister must be affirmed.

KEATING, J.—I am of the same opinion, and on the short ground last adverted to by my brother Willes. Here the objector gave the notice in the form prescribed by the statute. Mr. Edwards's argument is that the effect of sect. 22 of 31 & 32 Vict. c. 53 is to render the statutory form, which before was admittedly sufficient, insufficient in a case where the parish to which the objector belongs forms part of more than one polling district. The words of that section that he relies on are: "The part of such parish situate in such polling district shall be deemed to be a separate parish for the purposes of the revision of voters and the

nd register of voters." There is no doubt in Mr. Edwards's argument, but what I fail is that there is anything in the section in- ent with the sufficiency of the form previ- iven by statute, and which has been fol- here. I do not think that this 22nd section it difficult to accept the form previously in still sufficient. I should not be disposed to the words as confined to the proceedings the revising barrister; still I think that s nothing inconsistent in holding that they repeal previous express enactments as to the which notices of objection are to be given. ght to be extremely careful before we con- hat an express provision of an Act of Par- t is impliedly repealed by a subsequent Act.

T, J.—But for sect. 22 of 31 & 32 Vict. should have thought it was not possible to hat the notice given here was insufficient, llows the form given in previous statutes. sufficiency of that form, then, affected by id section? The section is perhaps rather t to construe. At first it appeared to me ble of being construed in two ways, either licable to every purpose of the revision ginning to end, or else as confined to the revision before the revising barrister. construction is difficult; as, if the former ect, it must apply to the precept, the list, de of publication, and notices of objection. hing would be altered, and all the enact- of former statutes would be affected. If, other hand, the section applies only to the roceedings before the revising barrister, ficulty arises, that, when the lists for a par- parish come before the revising barrister, d have to divide them, and settle on which ar list each person was to be placed. s, however, an intermediate interpretation, though with some doubt, I adopt. The 'for the purposes of the revision of voters lists and register of voters" may mean, purposes of all such acts, ministerial or , as are done by those responsible for ision of voters directly for the purpose of ision. If that is so, the act of a person to be put on the register, or of a person notice of objection, does not come within s of acts contemplated. Sect. 22 has, e, no application to this case, and conse- the notice was sufficient.

ER, J.—I am of the same opinion. I think ent to say, that the words "for the pur- revision," &c., in sect. 22, do not neces- clude a notice of objection, at least, not so ily as to oblige us to hold that they over- plain enactments of a previous statute.

Decision affirmed.

neys for appellant *Horne* and *Hunter*.

Tuesday, Nov. 21, 1871.

REGISTRATION APPEAL.

E (app.) *v.* THE OVERSEERS OF PUTNEY ps.); WADMORE (app.) *v.* DEAN (resp.).

tion — County vote — Freehold interest — s in a bridge — Commissioners appointed blic purposes — Limited authority to convey mes Navigation Act 1870 (33 & 34 *Vict. . 10, sub-sect. 6.*

By an Act (12 *Geo.* 1, *c.* 36) *commissioners were appointed for building a bridge across the river T. from F. to P., after compensating the proprietors of the then existing ferries, and a pontage or toll was granted to and vested in the commissioners, to be by them applied as directed in the Act. By a subsequent Act of Geo.* 2, *for more effectually enabling the commissioners to complete such work, they were empowered to convey in perpetuity the tolls and income of the said bridge or ferries to such persons as would undertake to erect and maintain the bridge. The commissioners accordingly, in* 1728. *contracted with thirty persons, who subscribed the necessary funds and became the shareholders of the bridge, to build and maintain the bridge, and compensate the proprietors of the said ferries; and afterwards, the bridge having been built, the commissioners in* 1729, *by a deed which recited the above Acts, and their powers thereunder, conveyed the said bridge and tolls and all such grounds adjacent and belonging to the same as they had power to convey, by virtue of the said Acts, to certain trustees in fee, in trust to permit the said thirty shareholders to receive the said tolls and income and have the sole management thereof. The management of the property was vested in a committee of management, appointed annually by the shareholders. The Thames Navigation Act* 1870 (33 *&* 34 *Vict. c.* 149) *s.* 10, *sub-sect.* 6, *subsequently vested the bridge and the lands thereunto belonging, and the tolls, &c., in the committee of management and their successors for the time being, subject to the trusts on which the same were held at the time of the passing of the Act.*

W. and certain other persons, who all deduced their title from the thirty persons above-mentioned, and were respectively the holders of a share or part of a share, duly claimed to be registered as voters in respect of the said share or part of a share, for the county of M. and the county of S., these being the counties in which F. and P. were respectively situate. In each case the share or part of a share so held was of the clear annual value of 40*s.*

It having been decided in Tepper *v.* Nicholls (11 *L. T. Rep. N. S.* 509, *and* 34 *L. J.* 61, *C. P.*), *before the passing of the above-mentioned Thames Navigation Act* 1870, *that the commissioners had no power to convey the land belonging to the bridge which had become vested in them by virtue of the said Acts; and that the said shareholders having knowledge of the commissioners' title under the said Acts, acquired nothing more under the said deed than the commissioners could lawfully convey, viz., the tolls and income; and consequently that none of the shareholders had, as such, any freehold estate, which would qualify him for a county vote;*

Held, that the above-mentioned section of the Thames Navigation Act 1870, *did not alter the nature of the interest which the shareholders had in the bridge so as to qualify them for a county vote.*

Tepper *v.* Nichols *considered and explained.*

THESE two cases, involving precisely the same question, were stated by the revising barristers for East Surrey, and the Western Division of Middlesex respectively, and were taken and argued together.

WADMORE v. THE OVERSEERS OF PUTNEY.

On appeal from the revising barrister for East Surrey, the following case was stated:

1. At a court holden, &c., James Foster Wadmore, and the several persons whose names appear in the next paragraph, duly claimed to have their names inserted in the list of voters for the Eastern Division of the county of Surrey, and were duly objected to.

2. The said James Foster Wadmore, and the several persons whose names are hereunder written, stated the nature of their qualification to be a share, or part of a share in a bridge. The value of the said shares or parts of shares was over 40s. per annum. (Then followed the names of the other claimants.)

3. In support of the right of the said James Foster Wadmore, and the said several persons, to have their names inserted and placed on the said list, the following documents and facts were duly established in evidence before me.

4. In or about the year 1724, the Act 12 Geo. 1, c. 36, was passed, intituled, "An Act for building a bridge across the River Thames, from the town of Fulham in the county of Middlesex, to the town of Putney in the county of Surrey."

5. By sect. 1 of that Act, certain persons were constituted and appointed commissioners and trustees for designing, directing, ordering, and building such bridge, and for maintaining, preserving, and supporting the same when built, and they were empowered at any time after the 24th June 1726, to design, assign, and lay out, how, and in what manner, the said bridge should be made and built from the town of Fulham to the town of Putney aforesaid, and the ways and passages to and from the same, and to preserve and keep in repair such ways and passages from time to time, and to make contracts, and do all matters and things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly.

6. And to the intent that the navigation of the said river of Thames might receive no prejudice, by sect. 2 it is enacted that when the said bridge was built across the said river, there should remain free and open passage for the water to pass and repass through the arches or passages under the said bridge of 700ft. at the least within the then present banks of the said river. By sect. 5, bodies corporate and others who were seised of ground in Putney or Fulham, which might be required for the purpose of making convenient approaches to the said bridge, were enabled to convey to the said commissioners and trustees, or to any nine or more of them, or their successors, or as they should appoint, any such ground for the purposes of that Act.

7. By sect. 7 it is enacted:

That it shall be lawful to and for His Majesty, his heirs and successors, by letters patent under the Great Seal of Great Britain, to incorporate all and every the commissioners and trustees appointed by this Act, or who shall be appointed pursuant thereto, to be commissioners and trustees for putting this Act in execution, or such of them as shall be then living, and such others as His Majesty, his heirs or successors shall think fit, to be one body politic and corporate in deed and in name, and they and their successors to have perpetual succession, and a common seal, and such seal from time to time to break, change, make new or alter, as shall be found most expedient; and that they and their successors shall be able and capable in law to have, purchase, receive, enjoy, possess, and retain to them and their successors, messuages, lands, rents, tenements, and hereditaments of what kind, nature, or quality soever, and also to sell, grant, demise, alien, or dispose of the same or any part thereof at their free will and pleasures, to sue and implead, be sued and impleaded, answer and be answered in courts of record or elsewhere, and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them shall or may appertain to do, with such powers and clauses as shall be necessary or requisite for erecting, building, preserving, and supporting the said bridge, and the ways and passages thereto from time to time.

The said commissioners and trustees were never incorporated in pursuance of this Act.

8. By sect. 8 it is enacted:

That it shall not be lawful to or for the corporation or company which shall or may be erected or established by virtue of or pursuant to this Act, as such corporation or company to borrow, or take up or give security for any sum or sums of money payable in less than six months, or to discount any bill of exchange or other bill or note whatsoever, or to keep any books or cash of or for any person or persons, bodies politic or corporate, whatsoever other than and except only the proper books, moneys and cash, of the said company or corporation.

9. By sect. 10 it is enacted that certain pontage or toll shall be paid before any passage over the said bridge shall be permitted, and that the said pontage or toll shall be vested in the said commissioners to be by them applied in accordance with the provisions of the said Act towards the expenses of making and maintaining the said bridge, ways, and passages, and purchasing the necessary ground for the same.

10. By sect. 13, the commissioners or any eleven or more, of them were empowered when incorporated by indenture or writing under the common seal, to convey and assure the toll by that Act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purpose of the Act, and to grant any annuities for one, two, or three lives, or for twenty-one years or a less term, such annuities to be chargeable upon and payable out of the tolls, estates, and revenues belonging to such corporation.

And by sect. 14 it is enacted that such annuities shall be personal estate.

11. By sect. 16 it is enacted:

That it shall be lawful for the said commissioners and their successors, and for such intended company or corporation and their agents or officers from time to time, to remove any shelfs in the said river of Thames, and to make the same river deeper.

12. By sect. 17 it is enacted:

That all stones, bricks, planks, piles, and other materials which shall be made use of for or towards building or making the said bridge, or in or about the same, or for maintaining, repaving, or supporting the same, or for making the said river deeper as aforesaid, shall always be deemed to belong and appertain to the commissioners and corporation aforesaid, and by the 18th section it is provided that if the said bridge should at any time become damaged it shall be lawful for the said commissioners or corporation to set up ferries across the said river near to the said bridge, and to take certain rates and duties for passage by such ferries over the same.

13. By sect. 19 it is enacted as follows:

It shall not be lawful to erect or build the said bridge or any part thereof before or until full and ample satisfaction be made for all such prejudice, loss, or damage, as shall or may be sustained or suffered by any of the owners, proprietors, lessees, or others having any property or interest in the present horse or fleet ferries between Fulham and Putney aforesaid.

14. By sect. 22 it is enacted:

That nothing in this Act contained shall extend or be construed to extend to prejudice or take away any right, property, or jurisdiction of the mayor, or of the mayor

commonalty and citizens of the city of London, to in and upon the river of Thames aforesaid, other than and except to remove any shelf or shelfs, or to deepen or widen the said river where the said bridge shall be built, and to do every other matter and thing as shall or may be necessary for the erecting and maintaining the said bridge.

15. By the Act 1 Geo. 2, c. 18, for explaining and amending the Act above referred to, it is by sect. 1, enacted as follows:

The commissioners and trustees appointed by the said recited Act, and those appointed by this Act or any nine or more of them, and the commissioners and trustees, when incorporated in pursuance of the said former Act, shall have, and they have hereby, full power and authority to contract and agree with any person or persons whatsoever, as well commissioners and trustees as others, to erect and build a bridge across the said river of Thames from the said town of Fulham to the said town of Putney, and to repair, maintain, and support the same when built, in such manner as by the said commissioners and trustees or corporation aforesaid shall be judged proper, and the said commissioners and trustees aforesaid, or any nine or more of the said commissioners and trustees, before such incorporation, have hereby power and authority to grant any annuity or annuities, all which annuities in fee to be granted pursuant to this Act, shall be registered, and shall be assignable and devisable as the said other annuities are by the said former Act, and such annuities in fee shall be deemed personal estates, and shall go as such.

16. And for the more effectual enabling the said commissioners and trustees and corporation aforesaid as speedily as may be to complete and perfect the said work, by sect. 3 it is enacted:

That it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them before incorporated, and also lawful for such corporation when created, at any time or times, to convey and assign over in perpetuity or otherwise all or any tolls, revenues, profits, or incomes of or belonging to the said bridge or ferries, or which shall in any wise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security so to do to the satisfaction of the said commissioners and trustees and corporation aforesaid, anything herein or in the said former Act to the contrary notwithstanding.

17. By sect. 5 it is enacted as follows:

It shall not be lawful for the said commissioners and trustees or corporation to erect or build the said bridge, or any part thereof, before or until full and ample satisfaction be made for all such prejudice, loss, or damage, as shall or may be sustained or suffered by any of the proprietors of the horse ferries, between the said towns of Putney and Fulham, unless the proprietors of the said horse ferries by writing, under their respective hands and seals should consent and agree with the said commissioners and trustees, or any nine or more of them, or the said corporation, to permit the said commissioners and trustees, or corporation, to build the same before such satisfaction shall be made; and in case such consent of the said proprietors shall be had and obtained in manner aforesaid, that then the said bridge when built, and all tolls, revenues, profits, and incomes belonging or to belong to the same, shall be and are hereby made chargeable and charged in the first place with all such sums of money as are by the said former Act to be paid to the respective owners, proprietors, and persons interested in the present ferries between Fulham and Putney aforesaid, and that upon payment thereof respectively, or tender and refusal, all ownerships, properties, and interests of, in, or to the horse and foot ferries between Fulham and Putney aforesaid, shall be and are hereby extinguished and determined; and the said ferries and passage over the river of Thames there, and the ground and soil adjacent and belonging to the said respective ferries, shall be and are by the authority of this Act transferred to and absolutely vested in the said commissioners and trustees and corporation aforesaid, and their successors and assigns for ever.

All such moneys and payment for the said horse ferries have long since been duly made and paid by the thirty persons who, as hereinafter is mentioned, contracted with the commissioners and trustees of the said hereinbefore-mentioned Acts for the building of the said bridge.

18. Copies of both of the Acts above referred to accompany this case and are to be taken to be and form part of the same for the purpose of reference or otherwise.

19. The ferries referred to in the said Act, on the Putney side of the river, were held and were parcel of the Manor of Wimbledon, and on the Fulham side were held and were parcel of the Manor of Fulham, and previously to the 24th March 1782, Daniel Pettiward and William Skelton had been respectively admitted to and each of them then held in fee by copy of the court rolls of the respective manors, one undivided moiety of the ferries on both the Putney and Fulham sides of the river, and on the 24th March 1728 the sum of 8000*l.* was paid by the said thirty persons who had so, as aforesaid, contracted for the building of the bridge, to the said Daniel Pettiward and William Skelton, in full satisfaction of all damage which they or either of them should sustain by occasion of building the bridge. The rights and interests of all other parties in the said ferries having been previously satisfied as is hereinbefore mentioned.

20. On the 19th Nov. 1728, a contract was duly entered into by the commissioners with thirty persons who had subscribed 1000*l.* each for building the bridge and making the purchases and payments required by the said Acts by which those thirty persons contracted to build and maintain the bridge and the ways and passages thereto, and make the said purchases and payments, and in pursuance thereof the said thirty persons did build the said bridge and make the said payments and purchases.

21. By indenture of bargain and sale, bearing date the 11th Nov. 1729, duly enrolled in Chancery, made between the said commissioners, of the first part, the said thirty persons therein named and described as being all the contractors and subscribers for building the said bridge, of the second part, and certain other persons as trustees, of the third part, after reciting the 1st, 2nd, 5th, 7th, 10th, 11th, 12th, 16th, 17th, 18th, and 19th sections of the Acts first above mentioned, and the 1st, 3rd, and 5th sections of the Acts secondly above mentioned; and further reciting the said contract of the 19th Nov. 1728. And that the said thirty persons had paid all moneys they had agreed to pay, and built the said bridge, the commissioners granted, bargained, sold, assigned, and set over unto the said persons, parties thereto of the third part, their heirs and assigns, for ever, the said bridge, and all the materials wherewith the same was erected and built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge, so built, from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provision in that behalf made by the said recited Acts, or either of them, or which should in anywise arise, accrue, or belong to the same, with all such ground and soil adjacent and belonging to the then late or then present horseferries, and passage over the said river between Fulham and Putney, as had been, was or should be vested

in the said commissioners, and all benefits, advantages, powers, privileges, and authorities, and every other matter and thing whatsoever, vested in or granted to the said commissioners which they are empowered or capable to assign and convey over by virtue of the said Acts, or either of them, to hold the same unto and to the use of the said trustees, parties thereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits, and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed (which condition has been duly performed), and after payment of such sums of money should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenues, profits, and income of the said bridge, ferries, and other the premises (if any) unto and amongst the said thirty subscribers and proprietors for the time being, and their respective heirs and assigns rateably and proportionably according to the several sums of money by them subscribed for the purposes aforesaid, and to their several and respective rights, shares, and interests of, in, and to the same to have, take, and enjoy the same as tenants in common, and not as joint tenants.

22. And by the same deed it was provided that in case the tolls, revenues, profits and incomes of the said bridge or ferries, should at any time or times thereafter fall short, and not be sufficient to answer and make good all such sums of money as should be requisite for putting and keeping the said bridge, together with the ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts; then all such sums of money as shall so fall short or be wanting for the said purposes, should from time to time be paid, and borne by the said thirty subscribers, the parties thereto of the second part, their heirs and assigns rateably and proportionably, and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares, and interests therein.

A copy of the last-mentioned deed accompanies this case, and is to be taken to be and form part of the same for the purpose of reference or otherwise.

23. On the 16th June 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney bridge 200 superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the said bridge more commodious, and the same was used for that purpose, and now forms part of the approach to the bridge.

24. There is no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors of the said bridge, except what is comprised in the before stated deed of the 11th Nov. 1729, and the last stated grant, and no evidence was adduced before me as to the annual value of or income arising from the said land *separate* and apart from the income derived and issuing from the said bridge and land together, which said last mentioned income in the shape of tolls, revenues, profits, and income, is sufficient to give to each of the claimants in this case an income of more than 40s. per annum.

25. The interest of the present proprietors in the said bridge is derived from and through the thirty persons parties to the said deed of the 11th May 1729 of the second part, and is identical in all respects with the interests of the said thirty persons under and by virtue of the said deed, save in so far as the same may have been affected or altered, or modified, or enlarged, by the provisions of the Thames Navigation Act 1870 hereinafter mentioned, and such interest has always been conveyed and transmitted as and dealt with as freehold estate, and the shareholders or proprietors in the said bridge are at present about 100 in number.

26. The proprietors meet once a year and select a committee of management of six out of their own body to manage their affairs.

27. The said persons so objected to as aforesaid are respectively the holders of a share or part of a share of such interest as aforesaid, and the sufficiency of the annual money value of such share or part of a share is not now in dispute.

28. The bridge is built partly upon piles driven into the bed of the river, and at either end upon brick foundations, which stand respectively upon that part of the banks between high and low water mark, whence formerly the ferries used to ply from side to side, and part upon land which formerly was ground and soil belonging to the said ferries.

29. There are toll-houses at each end of the bridge at which tolls are collected, and each of them is a structure of brick and stands upon the brick foundations of the bridge referred to in the preceding paragraph hereof.

30. By an Act passed in the 33 & 34 Vict. (The Thames Navigation Act 1870, 33 & 34 Vict. c. cxlix.), reciting, amongst other things, that it was expedient that provision be made for the improvement of Putney-bridge, it was, by the 10th section, enacted that:

10. With respect to the improvement and management of the bridge across the Thames between Fulham in the County of Middlesex and Putney in the County of Surrey (in this section referred to as Putney-bridge), the following provisions shall have effect: (namely),—

(1.) The committee of management for the time being of Putney-bridge (in this section referred to as the committee of management) shall within twelve months after the passing of this Act widen the centre arch of Putney-bridge in accordance with the deposited plans and sections.

(2.) If the committee of management desire to erect a landing place in connection with Putney-bridge, they may do so without payment to the conservators; but so that the same be made at such place, and in accordance with such plans as the conservators approve, and the same shall be subject to the bye-laws and regulations of the conservators.

(3.) In widening the centre arch and erecting the landing place as aforesaid, the committee of management may close Putney-bridge and its approaches to such extent and for such time as in their judgment may be expedient.

(4.) For the purposes of this section the committee of management may raise money not exceeding the sum of 6000*l.* by mortgage of all, or any part of the tolls, revenues, profits, income, or property, of or belonging to Putney-bridge, with such powers of sale, and other incidental powers as the lenders and the committee of management agree on, and the receipts in writing of the committee of management, or of any four or more of

shall effectually discharge the lenders from the
r lent, and from all responsibility in respect of the
ation thereof.

All moneys so borrowed by the committee of
gement, shall be applied for the purposes afore-
and not otherwise.

The improvements of Putney-bridge, authorised by
section, and the same bridge and the lands there
belonging, and the tolls, revenues, profits, and
ie of or belonging to the same, shall be vested in
mmittee of management, and their successors for
me being, subject to the trusts on which the same
ld at the passing of this Act.

In case at any time Putney-bridge is purchased com-
rily, under the authority of Parliament, due regard
be had in the ascertainment of the amount of com-
tion to be paid in respect thereof, to the money
ded by the committee of management, in widening
ntre arch as aforesaid, and to the costs and charges
ed by them in relation thereto.

id by the 11th section of the same Act it was
ed that,

The conservators on the one hand, and the pro-
rs of the bridge across the river Thames between
m, in the county of Middlesex, and Putney,
e county of Surrey, commonly called Putney-
, on the other hand, may from time to time
into and carry into effect such agreement as they
fit relative to the alteration, raising, lowering, re-
, or rebuilding, wholly or in part, of Putney-bridge,
lative to any contribution to be made by the pro-
rs of Putney-bridge to the expenses of any such
, and to the raising of money by the proprietors of
y-bridge for the purposes of any such works or con-
ions; and every such agreement shall have the like
as if it were in terms contained in and enacted by
ct, and shall be binding on and enforceable against
nservators, and the proprietors of Putney-bridge
thereto accordingly.

copy of the last-mentioned Act of Parliament
Thames Navigation Act 1870) accompanies
ase, and is to be taken and form part of the
for the purpose of reference or otherwise.

For the said persons objected to, it was
nded that notwithstanding the decision of
ourt of Common Pleas in the case of *Tepper*
ichols, decided on the 24th Nov. 1864, and
r and by virtue of the said Acts of Parliament
particularly under and by virtue of the said
ies Navigation Act 1870, and of the said
of bargain and sale of the 11th Nov. 1729,
nbefore stated, they had respectively such
old estates in the said bridge tolls and other
rty comprised in the said Acts and deed as
ed them respectively to be on the list of
s for the said division of the said county.
for the said objector it was contended that
had not respectively such freehold estates
ould entitle them to vote for the said
y, and also that the shareholders were
mpany or corporation, or *quasi* corpo-
, and that the individual shareholders,
only entitled to a share of the receipts
profits, were not entitled to be on the
ist of voters, I decided in favour of the said
tor that, notwithstanding the provisions of
hames Navigation Act 1870, having regard
decision of the Court of Common Pleas in
id case of *Tepper* v. *Nichols*, the said several
ns objected to had not respectively such free-
estates as entitled them respectively to be on
id list of voters, and I accordingly disallowed
several claims. If my decision is wrong, the
s of the said persons objected to are to be in-
l on the register for the said parish of
y.

e notice of appeal from my decision was given on behalf of the said James Foster Wadmore, and of the said thirty-five other persons whose names appear in the list in the second paragraph of this case referred to, and I declared that the appeals in all the above-mentioned cases against my said decision ought to be consolidated. And I name Samuel William Aries and George Robert Lillyman, overseers of the poor of the said parish of Putney, to be the respondents in such consolidated appeal.

If the court be of opinion that my decision was wrong, the register is to be amended by inserting the names of the said James Foster Wadmore, and of the said thirty-five other persons, on the register for the said parish of Putney.

WADMORE *v.* DEAN.

THIS was an appeal from the decision of the revising barrister for Middlesex.

The case was set out in exactly the same terms, and the question raised was precisely the same as in the case above set out, except that paragraphs 23 and 24 were omitted.

E. Clarke for the appellant in each case.—The question is whether the proprietors of the tolls on Putney-bridge are entitled to an equitable freehold in the bridge so as to be entitled to the county franchise. The question was decided some years ago against the appellant in the case of *Tepper* v. *Nichols* (34 L. J. 61, C. P.; 11 L. T. Rep. N. S. 509), the court there basing their judgment on the fact that the commissioners had no power to convey the fee simple in the bridge to the trustees for the shareholders; and that the tolls, which were all that had been conveyed, were independent of the land so as to give no right to vote. But, since the decision of that case, an Act has been passed (33 & 34 Vict. c. 149) intituled The Thames Navigation Act 1870, and sect. 10 and sub-sects. 4 and 6, taken in connection with sect. 11, have this effect. The commissioners by whom the bridge was held had disappeared, and the legal estate was outstanding, and the sections just cited have the effect of vesting the legal estate, as well as the mere right to tolls, in the committee of management. The committee of management hold, whatever they do hold, in trust for the appellant and the other shareholders of the bridge. He cited:

Rex v. *Inhabitants of Barnes*, 1 B. & Ad. 113;
Badger v. *South Yorkshire Railway Company*, 1 E. & E. 347.

[WILLES, J. cited *Stracey* v. *Nelson* (12 M. & W. 535.]

McIntyre, for the respondent in each case.—The Act cited for the appellant does not vest the bridge in the committee of management so as to make it their property, and does not make the shareholders *cestuis que trust* of the land; simply the committee are to take the tolls on the same trusts as the commissioners had done. (He was stopped by the court.)

WILLES, J.—If this case is to rest on the law as settled by the decision of this court in 1864, in *Tepper* v. *Nichols*, there can be no doubt that the claim would have to be rejected, and that the decision of the revising barrister was right, as *Tepper* v. *Nichols* is an express decision upon the point. I must confess that I did not at first understand that case. It is, however, now quite intelligible to me. The court did not there decide that

tolls cannot be considered free tenement within the statute of 8 Henry VI. All that the court said was, that tolls of a particular description were not a sufficient tenement under that Act. The tolls in this case, though substituted for a right of ferry, must at common law be treated either as toll thorough or toll traverse. In respect of toll thorough, that is to say, the toll paid for the privilege of passing over land which is not in the ownership of the person claiming toll, it is necessary to show a special consideration, In this case no consideration is shown sufficient at common law to justify the claim of toll. In respect of other toll, it is not necessary to prove special consideration, as the nature of the toll implies a consideration. If the claim here were for "free tenement" I should consider it was made out by showing that the appellant had a free tenement of such a description that it might have existed at the time of the passing of the Act of Henry VI., and might come within the terms of that statute. I quite understand that the word tenement includes not only land, but many franchises, as fisheries and the like; and so it may include any tolls of the nature of those in existence at the time of the passing of the Act of Henry VI. There may be such a thing as a tenement, created since that time by Act of Parliament, but no new tenement within the Act can be created by conveyance. But many acts have since been passed by which tenements have been created, which were not such in the time of Henry VI. We had recently to consider the case of pews given to a man and his heirs (*Brumfit* v. *Overseers of Liverpool*, 22 L. T. Rep. N. S. 301; L. Rep. 5 C. P. 224; 39 L. J. 95, C. P.), which might or might not have been a tenement at the time of Henry VI. These pews were held by this court to be no qualification, as they did not exist in the time of Henry VI. So that I now perceive and understand the distinction drawn by this court in the case of *Tepper* v. *Nichols* between the right to be deemed the *cestuis que trust* of tolls arising out of land, and the equitable right given by statute to receive the tolls granted by Act of Parliament to the commissioners. The court in *Tepper* v. *Nichols* impliedly decided that the sort of tolls granted by the statute was not a free tenement within 8 Hen. 6, c. 7, but something new, and that they would not consider an act as conferring the parliamentary franchise which had nothing to do with it, but was only intended to substitute a more convenient way of crossing the river for the old ferry. The tolls in this case could only be held as representing the profits arising out of land, and could not be deemed free tenement within 8 Hen. 6, c. 7. The Act of Parliament appointed commissioners to build the bridge, and authorised them to convey the tolls to trustees for the shareholders; but it gave them no power to convey the fee simple of the bridge itself. That is the explanation of *Tepper* v. *Nichols*, which perfectly satisfies me. Having that proposition established by *Tepper* v. *Nichols* matters now stand thus: There were commissioners in whom the land was vested (though vested perhaps only for the purpose of building the bridge), and these commissioners were authorised to convey, and did convey, the tolls to the persons who claimed the county vote. That claim was disallowed in *Tepper* v. *Nichols*. Since the decision in that case an Act has been passed, and the effect of that Act is this: Improvements were to be made in the bridge, and sect. 10. subsect. 6 provides that thereupon "the same bridge and the lands thereunto belonging, and the tolls, revenues, profits, and income of, or belonging to, the same, shall be vested in the committee of management and their successors for the time being, subject to the trusts on which the same are held at the time of the passing of this Act." Unquestionably, the tolls were held at the time of the passing of the Act on trusts, which gave the shareholders the right to receive them, and equally unquestionably the bridge and land were held for public purposes, or the commissioners may be considered as holding the land for such purposes as Parliament might approve. But in no case do they hold the bridge and land in trust for the persons who now claim to vote. The way to read the statute is this, "rendering the trusts applicable to the two distinct species of property (viz., the bridge and land and the statutory tolls) each to the same ends and purposes as before the passing of the Act. That is the way to read the 10th section of 33 & 34 Vict. c. 149. Thus the persons who now claim in respect of these tolls are no better off now than they were at the time that *Tepper* v. *Nichols* was decided. I am therefore of opinion that the revising barrister was right, and that this appeal must be dismissed.

KEATING, J.—I am of the same opinion. In truth, the last Act (sect. 10, subsect. 6) at first appears as though it vested the bridge and land in the committee of management, in trust for the claimants; it, however, only vests the bridge and land in the committee of management, subject to the same trusts as the same were held on at the time of the passing of the Act. The question, therefore, in this case is the same as was adjudicated on in *Tepper* v. *Nichols*. The claimants have gained no additional right since that time. *Tepper* v. *Nichols* is a perfectly satisfactory decision, and, in accordance with that case, the revising barrister was right.

BRETT, J.—I am of the same opinion.

WILLES, J., further mentioned the case of *Mayor of Nottingham* v. *Lambert* (Willes Rep. 111).

Appeal dismissed.

Attorney for appellant, *Evan Hare.*
Attorney for respondent, *W. Gardiner.*

EXCHEQUER CHAMBER.

Reported by J. SHORTT, Esq., Barrister-at-Law.

Monday, Nov. 27, 1871.

(Before KELLY, C.B., WILLES and KEATING, JJ., CHANNELL, PIGOTT, and CLEASBY, BB.)

REG. (on the Prosecution of Thomas Flight) v. THE VESTRY OF ST. LUKE'S, CHELSEA.

Lands Clauses Consolidation Act 1845 (8 *Vict.* c. 18), *s.* 68—*Lands injuriously affected—Special Act containing no provision for compensation—Effect of incorporation in Special Act of Lands Clauses Consolidation Act.*

The effect of incorporating the Lands Clauses Consolidation Act 1845 *in a local Act is to entitle all persons whose lands are injuriously affected by the operations authorised by the special Act to compensation, without any special provision being contained in the local Act for that purpose.*

By certain sections of a local Act, which incorporated so much of the Lands Clauses Consolidation Act as was not modified by or inconsistent with the provisions of the special Act, commissioners were empowered to remove from houses projections into the streets which were existing at the time of passing the Act, and on the rebuilding of projecting houses, to set them back to the line of the street, and the owners, &c., were made entitled to compensation for injuries thereby sustained. By another section, not making any mention of compensation to owners, &c., the commissioners were empowered to alter the level of streets. Certain premises having been injuriously affected by operations carried out under the last mentioned section:

Held (affirming the judgment of the Queen's Bench), that the owner was entitled to compensation by virtue of the provision of the Lands Clauses Consolidation Act.

ERROR from the Queen's Bench.

In this case the Court of Queen's Bench, on the prosecutor's application, awarded against the defendants a writ of *mandamus*, commanding them to take up the award of one Bannister Fletcher, alleged to have been made under the provisions of the Chelsea Improvement Act 1845, and the other Acts incorporated therewith. A return having been made to the said writ, to the effect that the defendants were not by law bound to take up the award, the prosecutor demurred. By consent of the parties on the argument of the demurrer, no judgment was given by the court; and, by rule of court, it was ordered that the facts be stated in the form of a special case for the opinion of the Court of Queen's Bench without any pleadings.

The following are the material portions of the case stated in pursuance of that rule:

The prosecutor is the lessee of certain premises situate in a street formerly called Rances-place, but now called Callon-street, in the parish of St. Luke's, Chelsea, for the unexpired residue of a term of 40 years, commencing from the 25th March 1848, and which premises at the time of the defendants' altering the level of the said street, as hereinafter mentioned, were in the occupation of one George Barnes, as the prosecutor's undertenant. The premises consisted of a house and blacksmith's shop, with a shoeing forge contiguous and attached thereto as part thereof. They fronted on Rances-place aforesaid, and had been for many years used as a blacksmith's shop and shoeing forge. Rances-place is a street within the meaning of the Metropolitan Management Acts, and has been an ancient street, and, before the defendants' Acts hereinafter mentioned, had remained at the same level many years.

The defendants are the vestry of the parish of St. Luke's, Chelsea, and as such are the body entitled to exercise the powers and rights, and liable and subject to the duties and obligations of the commissioners mentioned in the statute of the 8 & 9 Vict. c. cxliii., entitled "An Act for better paving, lighting, cleansing, regulating and improving the parish of St. Luke's, Chelsea (exclusive of the district of Hans-town), in the county of Middlesex, and hereinafter referred to as the Chelsea Improvement Act 1845.

By the 83rd section of the said Chelsea Improvement Act 1845, which Act and the Acts incorporated therewith are to be taken as part of this case, it was enacted that so much of the Lands Clauses Consolidation Act 1845 as was applicable to and was not modified by the said Chelsea Improvement Act 1845, or as was not inconsistent with the provisions thereof, should be held to apply to the improvements by that Act authorized to be made, and should be read and construed as forming part of that Act.

In the month of May 1867 the defendants, acting in execution of the powers vested in them by the aforesaid Act, also under and by virtue of and in pursuance of the powers vested in them by the Metropolis Management Act 1855, and the Metropolis Management Amendment Act 1862, caused the footways in Rance's-place to be improved, and in order to carry out the said improvement, it was necessary that the level of the footway should be altered and raised; and the vestry, in order to effect the said improvement, caused the level of the footway in Rance's-place to be, and the same was altered and raised and heightened, and such heightened footways were flagged and paved; and the effect of the alterations has been to diminish the height of the entrance to the said premises, and especially to the said shoeing forge, to between 3ft. 6in. and 4ft., thus rendering it impossible to lead horses into the said forge to be shod as theretofore, or for a man to walk there from the street, and placing the shop and ground floor of the said premises at a lower level, and thus materially damaging their value, and diminishing and injuriously affecting the value of the prosecutor's estate and interest therein.

A correspondence then took place between the attorneys for the prosecutor and the vestry clerk to the defendants, as to the prosecutor's claim for reasonable compensation for the injury done to his property; and notice was given to the defendants of the appointment of an arbitrator on behalf of the prosecutor. The defendants denied their liability to pay compensation, or to attend before the prosecutor's arbitrator. The reference was then proceeded with before the sole arbitrator appointed by the prosecutor; and on the 13th July 1868 the prosecutor's attorneys received notice from the arbitrator that (as the fact was) he had made his award.

The defendants were thereupon required to take up the award by the prosecutor, but refused to do so, alleging that they were not liable to make any compensation, whereupon the writ of *mandamus* was applied for and such proceedings had thereon as before mentioned.

The question for the opinion of the court was, whether the prosecutor was, under the circumstances of the case, entitled to compensation from the defendants or not. If the court should be of opinion in the affirmative, then judgment was to be entered for the Crown, and a peremptory writ of *mandamus* was to be awarded, commanding the defendants to take up the award, and the prosecutor was to have his costs of suit from the time of the motion for the rule for a *mandamus*. If the court should be of opinion in the negative, then judgment was to be entered for the defendants with like costs of suit.

The Court of Queen's Bench was of opinion that the prosecutor was, under the circumstances of the case, entitled to compensation from the defendants, and awarded a peremptory writ of *mandamus*, commanding the defendants to take up the award, and that the prosecutor should recover against the defendants his costs of suit. Upon this the defendants brought error.

Sir *John B. Karslake*, Q.C. (with him Raymond)

for the defendants.—The prosecutor is not entitled to compensation in the present case. The 83rd section of the special Act no doubt makes applicable so much of the provisions of the Lands Clauses Consolidation Act 1845 "as is applicable and is not modified by this Act, or as is not inconsistent with the provisions hereof," to "the improvements authorised by this Act to be made;" but it is submitted that even if the Lands Clauses Consolidation Act gives a title to compensation in cases where the special Act gives no express title to it, the provisions of that general Act are not by the special Act made applicable to the present case. In the first place it is submitted that sect. 68 of the Lands Clauses Consolidation Act does not in any case give a title to compensation, but only provides a machinery for assessing it where a title to it is conferred by the special Act which authorises the works. That section provides that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l*., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit," &c. This section does not give a title to compensation, and no compensation is intended to be awarded where the special Act does not expressly or impliedly give it. It only supplies a remedy in those cases where a title to relief is given by the special Act; it does not say that wherever lands are taken or injuriously affected the owner of the premises is to be entitled to compensation. It is different in the case of the Railways Clauses Consolidation Act, the 16th section of which provides "that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." In the second place, even if the Lands Clauses Consolidation Act gives a general title to compensation, it does not do so in the present case, for its provisions are incorporated with the special Act only so far as "not modified by this Act, or not inconsistent with the provisions thereof." Now, sects. 124 and 127 of the special Act, which empower the commissioners to remove from houses projections into the street which were existing at the passing of the Act, and also on the rebuilding of projecting houses, to set them back to the line of the street, expressly provide that the commissioners shall make compensation to the owner, &c., in either case; whereas sect. 104 authorises the commissioners to alter the level of streets without saying anything as to compensating the owners of houses. Further, sect. 83 makes applicable the provisions of the Lands Clauses Consolidation Act only to "the improvements" authorised by the special Act. The next succeeding section of the special Act (s. 84)(*a*) provides for taking lands for the purpose of making, widening, and improving streets, which is the leading object of the Act, and the word "improvements" should be read as applying to these alterations only. This would lead to the conclusion that so much only of the Lands Clauses Consolidation Act is incorporated as relates to the taking of lands. In *Ferrar* v. *The Commissioners of Sewers in the City of London* (21 L. T. Rep. N. S. 295, L. Rep. 4 Ex. 277), where compensation was given by the special Act in certain special cases of injury to and interference with property, but no compensation was given for the injurious affecting of lands generally, it was held that the plaintiff, whose premises were injuriously affected by works executed by the defendants under the powers of their local Act, was not entitled to compensation; and the court doubted whether, if the 68th section of the Lands Clauses Consolidation Act had been incorporated with the special Act, compensation could have been claimed under it, the plaintiff not being entitled to compensation by any other statutory provision. The case of *Broadbent* v. *The Imperial Gaslight Company* (7 De G. M. & G. 436), having been referred to in the argument of that case, Hannen, J. observed, "There the Gasworks Clauses Act 1847 (10 Vict. c. 15) was also incorporated, which, by sect. 6, supposing it applicable, gave compensation. It was only necessary, therefore, to go to sect. 68 for the method of redress; and it was not contended that, without the former section, sect. 68 of the Lands Clauses Act would give compensation."

Philbrick (with him *H. Tindal Atkinson*), for the prosecutor, was not called upon.

Kelly, C B.—I am of opinion that the judgment of the Court of Queen's Bench was right, and should be affirmed. The question raised upon the case before us is whether the plaintiff is entitled to the compensation claimed by him by reason of his house having been injuriously affected by the operations of the vestry of St. Luke's, Chelsea, carried on by them under a local Act of Parliament, that is, by the raising of the level of the street in which the claimant's house was situated, so that access thereto became impeded. Now the case turns entirely on the construction of, or rather on the effect of, the 83rd and 104th sections of the local Act, under the latter of which sections the works in question were performed. [His Lordship read the 104th section of the Act.] Under this section alone certainly no compensation is given by the Act of Parliament, nor do we find in the special Act itself any provision, applicable to the particular operations carried on, for making compensation to persons whose property may be injuriously affected by them. But the operations authorised by this section were made under the authority of an Act which incorporates with itself the provisions of the Lands Clauses Consolidation Act, the 63rd and 68th sections of which latter Act

(*a*) *This section* enacts as follows: "Subject to the *provisions of this Act*, it shall be lawful for the commissioners to contract for and agree with the owners of lands particularised in schedule (C) for the absolute purchase for a consideration in money of such lands, or such parts thereof as they shall think fit and proper, and of all subsisting leases therein, and of all rentcharges, annuities, mortgages, or incumbrances affecting any such lands, and all other estates, rights, or interests in such lands of what kind soever, and to enter into and take the same for the wise improving streets within the said parish, and the commissioners are hereby empowered to make, widen, and improve such streets as they from time to time shall deem it such necessary."

do in terms provide how compensation shall be assessed and recovered. There is certainly nothing in the special Act which expressly, or so far as I can see, impliedly takes away any right or excludes any right to compensation for injuriously affecting property given by the general Act. We must look, therefore, to the provisions of the Lands Clauses Consolidation Act which are incorporated with the special Act, and see whether a title to compensation is given by that Act to persons whose premises may be injuriously affected by the operations carried on under this special Act. The section principally referred to is the 68th section of the Lands Clauses Consolidation Act, and that section begins with these words, "If any person shall be entitled to any compensation in respect of any lands, or of any interest therein which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith;" and then follow provisions as to the machinery and procedure by which compensation is to be assessed. Now, it has been observed—and although the observation is somewhat critical in its character I do not say that it is not quite fair to make it—that here no title to compensation is, in express words, given to persons whose property is injuriously affected, the words being, "if any party shall be entitled to any compensation," &c.; but the language of the Act assumes that the party is in fact entitled to compensation by virtue of some Act of Parliament. I forbear to pronounce any opinion as to what would be the effect of this 68th section, if that section alone were included in the special Act in the present case; because I am myself clearly of opinion—and I do not think the matter open to any reasonable doubt—that the numerous provisions as to compensation in the earlier parts of the Lands Clauses Consolidation Act, especially the 22nd and 23rd sections, clearly, expressly, and necessarily confer a title to compensation on any person whose premises are injuriously affected by the operations of any public body. We have only to look at the numerous sections, beginning with the 18th, if not earlier, by which a machinery is provided, by means of which compensation is to be awarded to persons whose lands are injuriously affected. There is a series of enactments under which, where there is no agreement, notices are to be given, claims to be sent in, and a peculiar procedure is provided for cases where the amount is limited; but in all it is assumed that for the lands taken or injuriously affected compensation is to be made to the parties interested. When we come to the 22nd section—supposing that the matter had been left doubtful by the earlier sections—we find this provision: "If no agreement be come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices." Now I put the question to Sir John Karslake during the argument, and I must say that I did not get a satisfactory answer, what effect would, according *to his argument*, be given to the words "injuriously affected?" It is quite clear that the Legislature contemplated two sets of circumstances, first, where lands are actually taken and required for the purposes of the undertaking; and secondly, where lands are not actually taken, but are nevertheless injuriously affected by the execution of the works. Surely the present case comes within the second of these two classes. It appears to me, therefore, that when we find by the 83rd section of the special Act that the provisions of the Lands Clauses Consolidation Act are incorporated, and when we look at the provisions of that Act, whatever doubt might exist if the 68th section had stood alone is removed by the 22nd and 23rd sections. And I cannot but observe that where a case may exist—and the case now before the court may be such a case—in which very serious injury may be done to the premises of the party claiming compensation, we ought to put a liberal construction on the Act of Parliament, and, unless it is made perfectly clear that the language of the various Acts of Parliament is not sufficiently ample to embrace the case in question, we ought to hold the party whose property is injuriously affected—perhaps to a very large extent—entitled to compensation from the public body whose works cause the injury. It is only where we find that there is no provision at all applicable to the case that we ought to hold that any person may sustain an injury without being entitled to compensation for it. Now a number of hypothetical cases and others have been put by Sir John Karslake in his very able argument, in which he says it is clear that no compensation is to be made; one as to the repairing or altering the level of a pavement; and it was urged that from the various statutes referred to authorising those alterations, not only was no provision made for compensating the person inconvenienced, but, on the contrary, the party himself whose property was interfered with has to contribute his portion of the expenses for performing the works. But these are the cases in which it is impossible to suppose, without exaggerating greatly, that any serious injury is done at all. Some slight inconvenience perhaps was sustained, or some slight degree of injury suffered. It is plain that these cases were cases where the injuries were of the slightest kind. But it is impossible to apply the same observations to a case like this, where very serious injury has been sustained. Take the case of such a town as Bath, Newcastle-on-Tyne, or Durham, where the level of the streets varies. Some towns are built on the sides of hills, with steep ascents and descents, and where an alteration of level in the streets would work great hardship to the owners of the houses situated in them. It is quite possible that the pavement might be so raised as to reach the very top of a man's door, so that he would have to alter the whole structure of his house in order to get access to it from the street. It would be impossible to suppose that the Legislature intended to inflict so serious an injury on any individual without enabling him to obtain compensation. Now an argument has been founded on the 124th and 127th sections of the special Act in this case; and it has been urged that, because in these sections compensation is in express terms given for injury done in the cases referred to in those sections, the maxim *Expressio unius est exclusio alterius* applies, and that in the cases where there is no express provision for compensation

made, no compensation is intended to be given. I think if we look at the nature of the inconveniences dealt with by those sections, the argument altogether fails. The 124th section empowers the commissioners to give notice, where a projection or obstruction renders less commodious the passage along any street, to the owner or occupier of the house in front of which such projection or obstruction is placed to remove the same, and in default of his so doing imposes a penalty. This contemplates something which might be considered as a nuisance, and the person inconvenienced is made entitled to compensation. But the observation I would rather make on this section is this, that it might very well be doubted whether the merely bringing back the front of a building could be considered an "improvement" within the meaning of the Act, as the making or altering a street or sewer would undoubtedly be. It may have been doubted by the framers of the Act whether the former could be considered an "improvement" within its meaning, and so, *ex abundanti cautelâ*, they may have inserted this provision. The same observation might be applied to the 127th section. [His Lordship read the section empowering the commissioners, where a house projecting beyond the ordinary line of the street is taken down to be rebuilt, to compel the owner to rebuild it, so that its frontage may be in a line with the rest of the street, and to compensate the owner, should he sustain any loss or damage by his house being so set back.] Well, then, a further argument, and the only one which remains for me now to deal with, is founded on the several sections of the Local Act following the 83rd, which relate in general only to the purchase of lands, and it is said that the improvements contemplated by the 83rd section are only those large and substantial improvements contemplated by the sections following. But I do not know why we should put so limited a construction on the word "improvement," for though that section is followed by sections dealing with large and substantial improvements, it is also followed by sections providing for other improvements of a minor character. Upon all those sections it appears to me that the grounds entirely fail on which it is contended that the plaintiff in the present case is not entitled to compensation for the injury which he has sustained. Under all these circumstances, and taking the 68th and the 22nd and 23rd sections of the Lands Clauses Consolidation Act, and the 83rd and following sections of the local Act, I think that the plaintiff is clearly entitled to compensation, and therefore that the judgment of the court below should be affirmed.

Willes, J.—I am of the same opinion. I do not wish to add anything to the judgment of the Lord Chief Baron, in which I quite agree. I desire only to refer to the case of *Leader* v. *Moxon* (2 Wm. Black. 924.) That was an action on the case against contractors, employed by certain commissioners, who were bound to pave certain streets, for obstructing the doors and windows of six messuages belonging to the plaintiff. Power was given to the commissioners to lay out a new street within the limits mentioned in the Act of Parliament, "so as the same does not obstruct, hinder, *or prejudice the rights or free passage that any person hath to his lands, tenements, or hereditaments;*" and, without any such proviso as the foregoing being annexed, the commissioners were also empowered to "pave, repair, sink, or alter the same in such manner as the commissioners shall think fit." The plaintiff's houses having been interfered with in the same way as the plaintiff's premises have been in the present case, he brought an action on the case for the damage done to him, and it was urged on behalf of the defendants that the power of the commissioners was discretionary in these matters, and that they might do what they thought proper within the limits of the Act; but the court came to the conclusion that the commissioners had not an arbitrary discretion in the matter, but one limited by law and reason; and then went on to say that "had Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, and given an equivalent for the loss that individuals might have sustained thereby." That is, I think, equivalent to what is done in the present case.

Channell, B.—I am of the same opinion.

Keating, J.—I am of the same opinion.

Pigott, B.—I am of the same opinion. I would only add, with reference to the 124th and 127th sections of the special Act, which in express terms give compensation for injuries sustained by persons from the improvements there authorised, that this may be accounted for by the fact that they follow sect. 123, which deals with a class of nuisances for which a penalty is imposed, and in respect of which it was not intended that any compensation should be made to owners.(a) Then the Legislature, dealing in the next section with the case of "all obstructions or projections of a like kind as those before mentioned which have been erected or placed against or in front of any house or other building in any street or public place before the passing of the Act," may have thought that unless compensation were expressly given, it might be considered that it was intended that it should not be given, and, therefore, *ex majore cautelâ*, expressly stated in the 124th section that the commissioners "shall make reasonable compensation to every person who shall incur any loss or damage by such removal or alteration."

Cleasby, B.—I am of the same opinion.

Judgment affirmed.

Attorney for prosecutor, *Ball* and *Son*.

Attorney for defendants, *Lee, Pemberton* and *Co.*

(a) Sect. 123 enacts, "That if the commissioners shall consider any porch, shed, projecting window, steps, cellar, cellar door, window, sign, sign post, sign iron, showboard, window shutter, wall, gate or fence, or any other obstruction or projection hereafter to be placed against or in front of any house or building to be an annoyance, in consequence of the same projecting into, endangering, or rendering less commodious the passage along any street within the limits of this Act, it shall be lawful for them to give notice in writing to the owner or occupier of such house or building to remove such obstruction or projection, or to alter the same in such manner as shall have been directed by the commissioners, or in default thereof such owner or occupier shall forfeit the sum of 40s. for every week that such matter or thing shall not have been removed after such notice as aforesaid."

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, Nov. 11, 1871.

(Before Kelly, C.B., Byles, J., Pigott, B., Lush and Hannen, JJ.)

Reg v. Butterworth.

*Partner—Stealing goods of co-partnership—Indictment—*31 *&* 32 *Vict., c.* 116, *s.* 6.

An indictment framed upon the 31 *&* 32 *Vict., c.* 116, *s.* 1, *alleged that B. was a member of a co-partnership consisting of B. and L., and that B., then being a member of the same,* 11 *bags of cotton waste, the property of the said co-partnership, feloniously did steal, &c., contrary to the statute:*

Held that the indictment was not bad for introducing the word "feloniously."

Case reserved for the opinion of this Court.

At the October Quarter Sessions for the Hundred of Salford, in the county of Lancaster,

Thomas Butterworth was arraigned on an indictment of which the following is a copy:

Lancashire to wit.—The jurors for our Lady the Queen upon their oath present that after the passing of an Act made and passed in the 31st and 32nd years of our lady the Queen entituled "An act to amend the law relating to larceny and embezzlement," Thomas Butterworth the younger, of Heap, in the county of Lancaster, was a member of a certain co-partnership, to wit, a certain co-partnership carrying on the business of and trading as waste dealers, and which said co-partnership was constituted and consisted of the said Thomas Butterworth and of John Joseph Lee, trading as aforesaid, and thereupon the said Thomas Butterworth, at Heap aforesaid, during the continuance of the said co-partnership, and then being a member of the same as aforesaid, to wit, on the seventh day of August, in the year of our Lord one thousand eight hundred and seventy one, eleven bags of cotton waste of the property of the said co-partnership feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown, and dignity.

It was proved that the partnership referred to was a *bonâ fide* trading partnership constituted by agreement between the prisoner and the said John Joseph Lee.

At the close of the case for the prosecution, the counsel for the prisoner objected that the indictment being framed under the statute 31 & 32 Vict. c. 116, s. 1, should have followed the terms of the said statute, and that it did not do so, and that the said indictment disclosed no indictable offence either at common law or under the said statute, and that the prisoner could not legally be convicted upon it.

The court declined to stop the case, but reserved the above objection for the consideration of this Court.

The jury found the prisoner guilty, and the court respited the sentence to the next sessions for the said Hundred of Salford.

The prisoner remains in prison for want of sureties.

The opinion of the Court is requested whether the above indictment is a good indictment under the said statute, and whether the prisoner was properly convicted upon it.

H. B. Higgin, Chairman.

The 31 & 32 Vict. c. 116, s. 1, enacts, "If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property, of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners."

Cottingham for the prisoner.—The indictment is bad, because it does not follow the words of the statute 31 & 32 Vict. c. 116, s. 1. That enactment creates a new offence, one which did not exist at common law. It does not say that the offence shall be a felony, and the indictment is bad for using the word "feloniously." [Lush, J. — If the offence created by 31 & 32 Vict. c. 116, s. 1 is not a felony what is it?] There are offences of stealing which are not felonies, such as dog stealing, and unless the statute makes the stealing a felony, the introduction of the word "feloniously" which is a term of art (*Reg.* v. *Gray*, 9 Cox C. C. 417; L. & C. 365) vitiates the indictment. [Lush, J.—The 24 & 25 Vict. c. 96, s. 3 says, that a bailee fraudulently converting property "shall be guilty of larceny"—this statute says that a partner who shall steal property of the co-partnership "shall be dealt with and tried, and convicted and punished as if he was not a partner."] The indictment should have been for a common law larceny.

Reg. v. *Jesse Smith*, 39 L. J. 112, M. C.; 11 Cox C. C. 511.

The judgment of Willes, J. was also referred to.

Addison for the prosecution, was not called upon.

Kelly, C. B.—The objection to the indictment is really not arguable. The statute expressly enacts that a partner who steals property of the co-partnership "shall be liable to be dealt with, tried, convicted, and punished as if such person had not been, or was not a member of the co-partnership." That is what has been done in this case.

The rest of the Court concurring,

Conviction affirmed.

Reg. v. James King.

Larceny—Property—Evidence.

Prisoner was charged with stealing a mare, the property of E. The evidence was that prosecutor, in presence of the prisoner, agreed to buy of W. a mare for 5*l., and that W. assented to take a cheque for the* 5*l. The prosecutor afterwards sent prisoner to W. with the cheque, and directions to take the mare to Bramshot Farm. On the next day prisoner sold a mare to S., which he said he had bought for* 5*l. Before the magistrate he said he sold the mare to S., with the intention of giving the money to E., but that he got drunk:*

Held, that that was sufficient evidence on which a jury might find that the mare sold to S. was the property of E.

Case reserved for the decision of this Court at the General Quarter Session of the peace for the county of Surrey on Tuesday, the 17th Oct. 1871.

James King was tried on an indictment charging him with feloniously stealing a mare, of the property of William Ellis, upon the following evidence.

William Ellis, of 92, West-street, Bermondsey, corn sampler, on his oath said:

On Friday, 22nd Sept., I saw the prisoner on the Corn Market, in Mark-lane. He told me that he knew where there was a good-bred mare for sale, which would suit the purpose I wanted for breeding. I went to the place, Wilkinson's, St. Mary Axe, and saw the owner of the mare. I agreed to purchase the mare for 5*l*. Prisoner was present. Prisoner came back with me to Mark-lane. I had previously asked Wilkinson if he would take my master's cheque, and he said he would. I gave the prisoner my master's cheque for 5*l*. He was to give the cheque for the mare, and take the mare to my father's farm. I told him the direction on a paper, "Thomas Ellis, Bramshot Farm." Prisoner left me with the cheque. I did not see him till Monday following. On Tuesday the 26th I went to Winkley and Shaw, Green-street, Blackfriars, horse slaughterers. I gave information to the police at Stones End. I found this mare at Winkley and Shaw's. On the following day Shaw gave me this mare. On the evening before I saw the prisoner in custody. I did not give the prisoner any authority to go to Winkley and Shaw. The mare was suffering from an injury; she went slightly lame.

Cross-examined:

I don't think that I should have blamed him if he had found the horse lame and he had brought back the cheque or the money. I knew him two or three months before this transaction. I was told he came to my house on the Tuesday. On the 26th Sept., in the evening, I went with two detectives to the prisoner's house. When I saw the mare at Winkley and Shaw's she did not go more lame.

Re-examined:

I did not give the prisoner any authority to sell the mare to the horse slaughterer. He never told me what he had done with the mare, nor did he give me any money.

George William Shaw, on his oath, said:

I am the firm of Winkley and Shaw. I am a horse slaughterer. I have known the prisoner some time. On a Saturday afternoon in September he brought a horse to my place. The horse was very lame and had a very large wound. He said he bought it on speculation, and found it to be useless. I purchased it. I think he said that he had given 5*l*. for the horse. He asked me to give the most I could for it. I gave him 4*l*. This was on the 23rd Sept., Saturday. On Tuesday following, the 27th, prosecutor called on me. I offered to give up the horse. The horse was taken to the police court. The prisoner was quite sober at the time he sold the horse.

Cross-examined:

I have known him for several years. I believe him to be honest in his position. I have had transactions with him before. He made some remark that he was afraid the society would be at him for taking such a horse about the streets.

Robert Pether, detective M, on his oath, said:

On Sept. 26 I took prisoner into custody. I said I wanted him for stealing a horse. He said he got drunk, met with an accident, and sold the horse to Shaw for 4*l*. 1*s*.

Cross-examined:

I have known the prisoner for years; he is a respectable man.

The prisoner's statement before the committing magistrate was read as follows:

I plead guilty. I found she was too injured, and sold her to Mr. Shaw with the intention of giving the money to Mr. Ellis, but unfortunately I got drunk.

The prisoner's counsel contended that there was not sufficient proof of the indictment; that there was no proof that the prisoner had got the mare from Wilkinson's in exchange for the cheque; and that it was not proved that the mare in question *ever became* the property of William Ellis.

The court, however, left the case to the jury, *but reserved the question* for the decision of the *Court for Crown Cases Reserved*, whether there was sufficient proof that the mare was the property of William Ellis.

The jury returned a verdict of guilty, and the court respited judgment until the decision of the Court for Crown Cases Reserved.

E. RICHARDS ADAMS, Chairman.

Horace Browne for the prisoner.—The indictment charges the prisoner with stealing a mare, the property of William Ellis, but the evidence does not support that allegation. There was no proof that the mare which Ellis saw and contracted for was the same as that which the prisoner took away. The question reserved for this court is, whether there was sufficient proof that the prisoner had got the mare from Wilkinson's in exchange for the cheque, and it is submitted there is not.

Oppenheim, for the prosecution, was not called upon.

KELLY, C. B.—The question was one for the jury. The prisoner had the cheque given to him to go and pay for the mare, and take it to the prosecutor's father, and he, the next day, disposed of a mare to Mr. Shaw. There is no doubt some evidence that it was the mare of the prosecutor, and the sufficiency of the evidence was for the jury.

LUSH, J.—The prisoner's own account was, that he had got drunk and disposed of the money for which he sold the mare, not that the mare was not Ellis's.

The rest of the court concurring,

Conviction affirmed.

Saturday, Jan. 20, 1872.

(Before COCKBURN, C.J., MARTIN, and CHANNELL, BB., KEATING and LUSH, JJ.)

REG. *v.* THOMAS BAILEY.

Larceny of writ—County Court warrant—24 & 25 Vict. c. 96, s. 30.

A judgment debtor whose goods had been levied upon, and were in possession of a County Court bailif, under an execution, forcibly took the warrant from the bailiff and turned him out of possession, in the belief that it was the actual possession of the warrant alone which entitled the bailiff to remain in possession.

Held, that such taking away of the warrant was for a fraudulent purpose, and a felony within the 24 & 25 Vict. c. 96, s. 30, but not a larceny.

CASE reserved for the opinion of this Court by Lush, J.

The prisoner was indicted before me at Oxford, at the last Summer Assizes, under the 30th section of the Larceny Act (24 & 25 Vict. c. 96), which enacts that "whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole, or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, &c., shall be guilty of felony."

The first count of the indictment charged the prisoner with stealing certain process of a court of record, to wit, a certain warrant of execution issued out of the County Court of Berkshire, in an action wherein one Arthur was plaintiff and the

prisoner defendant. Also another warrant of execution out of the same court, in an action Halcombe and Co. against the prisoner.

The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody of certain process of a court of record, to wit, a warrant of execution out of the County Court of Berkshire in an action between Arthur and the defendant; that defendant, intending to prevent the due course of law, and to deprive Arthur of the rights, benefits, and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he (Brooker) having then the lawful custody of it.

It was proved that two actions had been brought in the County Court against the prisoner, in each of which judgment had been given against him, and a warrant of execution issued against his goods. The high bailiff of the court made the levy under these warrants, and, having done so, he handed the warrants over to his deputy bailiff, and left him in possession of the goods.

The prisoner, a day or two afterwards, forcibly took the warrants out of the bailiff's hands and kept them. He then ordered him away, as having no authority to remain there any longer, and, on his refusal to go, forcibly turned him out.

The prisoner was convicted; but, as I entertained a doubt whether these facts supported the count for larceny, and whether, as the prisoner's intention in taking the warrants was not to make use of them, but merely to deprive the bailiff, as he supposed, of his authority; and as the validity of the execution was not affected by his taking the warrants, he was guilty of taking them for a fraudulent purpose within the meaning of the statute, I forbore to pass sentence, and admitted the prisoner to bail till the opinion of this Court should have been taken upon the above points.

Robert Lush.

No counsel appeared to argue on either side.

Cockburn, C.J.—I think that the first count of the indictment which charges larceny will not hold. The facts are these; the prisoner had evidently conceived the notion that it was the possession of the warrant which made the possession of his goods by the bailiff lawful; and that if he could get the warrant away he could denude him of that authority, and the bailiff might be turned out of possession. Under that belief the prisoner forcibly took the warrants out of the bailiff's hands. That was not a taking *lucri causâ*, but for the purpose of preventing the bailiff from having lawful possession. Neither was the taking *animo furandi*. I may illustrate it by the case of a man, who, wishing to strike another person sees him coming along with a stick in his hand, and then rushes at him, takes the stick out of his hand and strikes him with it. That would be an assault, but not a felonious taking of the stick. There is, however, a second count in the indictment which charges in effect that the prisoner took the warrants for a fraudulent purpose. The facts show that the taking was for a fraudulent purpose. He took the warrants forcibly from the bailiff in order that he might turn him out of possession. That was a fraud against the execution creditor, and was also contrary to the law. I am therefore of opinion that it amounts to a fraudulent purpose within the enactment, and that the conviction must be affirmed.

Lush, J.—*I am of the same opinion.* I had a doubt whether or not the taking of the warrant by the prisoner, with the intention of making use of it for his own purpose, was a taking for a fraudulent purpose within the statute, but I am now clear upon the point, and agree with the rest of the Court.

The rest of the Court concurring,

Conviction affirmed.

Reg. v. Newboult and Holdsworth.

Arson—Ownership of house set fire to—Intent to defraud insurance office—Evidence—24 & 25 Vict. c 97, s. 3.

An indictment under 24 & 25 Vict. c. 97, s. 3, for setting fire to a house, shop, &c., need not allege the ownership of the house.

The evidence in support of the intent to injure was, that the prisoner N. was under notice to quit, and a week before the fire was asked to leave, but he did not. And of the intent to defraud, the evidence was that in 1867 *he called on an agent about effecting an insurance, and that in* 1871 *he called on him again and said he had come to renew his policy for* 500*l.*, *and paid* 10*s.*

Held, that the above evidence was sufficient to prove the intent to injure and defraud.

Case reserved for the opinion of this Court by Pigott, B.

The prisoners were tried before me at the last Winter Assize for the West Riding of Yorkshire holden at Leeds on the charge of arson.

The substance of the indictment is as follows:—

First count.—That Joseph Newboult and Benjamin Holdsworth maliciously and feloniously did set fire to a shop of and belonging to the said Joseph Newboult, and then being in the possession of the said Joseph Newboult, with intent thereby to injure, against the form of the statute.

Second count was in the same form, except that the intent laid was to defraud.

The third count stated that the said Joseph Newboult and Benjamin Holdsworth unlawfully, maliciously, and feloniously did set fire to divers matters and things, then being in and under a certain shop there, of and belonging to the said Joseph Newboult, and then being in the possession of the said Joseph Newboult, with intent thereby and by means thereof unlawfully, maliciously, and feloniously to set fire to the said shop, and thereby to injure and defraud: and the said Joseph Newboult and Benjamin Holdsworth, by the overt acts in this count mentioned, unlawfully, maliciously, and feloniously did attempt to set fire to the said building in this count mentioned, under such circumstances, that if the same had thereby been set fire to, they would have been guilty of felony against the form of the statute.

At the conclusion of the case for the prosecution, it was objected on behalf of the prisoners, that as no policy of insurance upon the premises was produced, there was no evidence from which the jury could infer an intent to injure the insurance office.

And secondly, that upon the counts of this indictment, it was not open to the jury to convict of an intent to defraud or injure the owner of the premises, inasmuch as the premises were in the indictment alleged to be "of and belonging to Joseph Newboult" himself, and must hence be taken to be his property.

I refused to stop the case, but reserved the question for this court.

The prisoner Newboult was the master and Holdsworth was the servant in the shop at Leeds-road, Bradford, where a general grocery business was carried on, and where a fire occurred on the 5th Oct. last.

The material evidence on which the counsel for the prosecution relied, to show the intent to injure or defraud, was as to the ownership of the premises as follows:—

John Hey stated that he was a trustee of the premises for the landlady, and that Joseph Newboult was under notice to leave, and should have left on the 5th Sept. last, and that the witness, a week before the day of the fire, had asked him to leave the premises, which he had not done.

And as to the other objection, evidence was given that a notice to produce a policy of insurance (effected by the prisoner Newboult on his stock) was served on him, but too late to be complied with, and I held it was insufficient on that ground.

The counsel then called a witness from the insurance office, who said, "Newboult came to me in May 1867, about effecting an insurance, and that on 30th Aug. of the present year (1871) he came again, and said he wished to renew his policy in Leeds-road for 500*l.* (the same amount), and that he then paid me 10*s.*

The stock of goods on the premises at the time of the fire was of the value of 21*l.*

Both prisoners were found guilty.

And I asked the jury if they believed that Newbolt was tenant of the premises, and, further, whether both prisoners had an intent to injure the landlady? And, also, whether they believed they had an intent to defraud the insurance company.

The jury answered that they found both intents.

The questions for this Court are whether: First, there is sufficient evidence of the existence of an insurance to support the finding by the jury of an intent to defraud the office, and, secondly, whether on these counts, it was competent for the jury to find that there was an intent to injure the owner of the premises. If either of these questions are answered in the affirmative, then the sentence which was passed is to be carried into effect, otherwise a verdict of not guilty is to be entered.

G. Pigott.

Waddy, for the prisoners.—The prisoners ought not to have been convicted, for upon this indictment it was not competent to show that the shop belonged to any other owner than Newboult. The indictment alleges that it was Newboult's shop and belonged to him. [Martin, B. The question is whether you cannot strike out the words "of and belonging to Joseph Newboult?" Is it necessary to allege in the indictment the ownership of the shop?] It is and it has always been alleged in the precedents: (2 East, P. C. 1034, c. 21, s. 11.) In Arch. Crim. Plead. 507, the form of indictment given is "a certain dwelling-house, shop, &c., of J. N., situate." The allegation is necessary for this reason, that it is no offence to set fire to one's own house or shop, unless with intent to injure or defraud any person. [Martin, B.—This indictment is under the 24 & 25 Vict. c. 97, s. 3, and that section says nothing about the ownership of the house, &c., set fire to, but only "whosoever shall unlawfully and maliciously set fire to (*inter alia*) any shop with intent thereby to injure or defraud any person, shall be guilty of felony." All that is necessary is to allege and prove a crime within the words of the Act. [Cockburn, C.J.—And sect. 60 enacts that it is not necessary to allege an intent to injure or defraud any particular person. [Keating, J. It would be sufficient, you say, if it had been alleged merely that the shop was in the possession of Newboult. Lush, J.—The words "of and belonging to" would be satisfied by proof of a week's possession; they merely mean that the occupier had some interest in the shop. The indictment is consistent with some one else also being owner.] Here the ownership is alleged to be in Newboult, and it was not competent to prove ownership in anyone else. Then there was no proper evidence of the policy of insurance. [Cockburn, C.J.—There was abundant evidence of that. The evidence is that he came to the agent in 1867 about effecting an insurance, and that he came again to him in 1871, and said he wished to *renew* his policy for 500*l.*, and paid 10*s.*; that is an admission by him that there was a policy.]

Campbell Foster, for the prosecution, was not called upon to argue.

By the Court.—There was clear evidence that the prisoner had committed an offence against sect. 3 of the Act. The averment in the indictment is not an averment of ownership in fee simple, which it is necessary to prove. It may be rejected as a superfluous averment. There was abundant evidence of the existence of an insurance to support the finding by the jury of an intent to defraud the office.

Conviction affirmed.

Attorneys for the prosecution, *Terry* and *Robinson*, Bradford.

Attorney for prisoner, *J. W. Berry*, Bradford.

Saturday, Jan. 27, 1872.

(Before Cockburn, C.J., Kelly, C.B., Martin, B., Willes, J., Bramwell and Channell, BB., Byles, Keating, Blackburn, and Mellor, JJ., Pigott, B., Lush and Brett, JJ., Cleasby, B., and Grove and Quain, JJ.)

Reg. *v.* Payne.

Evidence — Joint charge — Incompetency of fellow prisoners as witnesses for one another.

After several prisoners jointly indicted are given in charge to the jury, one, while in such charge, cannot be called as a witness for another.

The 14 *&* 15 *Vict. c.* 99, *does not apply to criminal proceedings.*

Case reserved by Keating, J. for the opinion of the Court for the Consideration of Crown Cases Reserved, and directed by that court to be argued before all the Judges.

John Payne, George Owen, Isaac Owen, and Joseph Curtis were indicted before me at the Winter Assizes for the county of Worcester 1871, for that they to the number of three or more, armed with offensive weapons by night, did enter and were on land belonging to Earl Dudley for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th Oct. 1871 the keepers of Earl Dudley discovered a number of poachers upon the Earl's lands taking game. They were armed with stones, bludgeons, &c., and advanced upon the keepers with whom they had a desperate struggle. Ulti-

ie keepers were forced to retire, one keeper ngerously and another severely wounded. risoner Payne and the two Owens were ehended, and on being brought before the tes each set up an *alibi* by way of defence l witnesses in support. Amongst the wit- lled by Payne was the prisoner Curtis, in custody, and he proved having been me at the time in question at a place so om the scene of the affray as to render it le he could have been one of the poachers. th the other witnesses for the prisoners nd over by the magistrates, under 30 & 31 5, but having been afterwards identified the party of poachers he was committed ted with the other three prisoners.

trial all four prisoners were sworn to by witnesses as having formed part of the poachers on the night in question. The y each was, as before the magistrate, an the counsel for Payne proposed to call ner Curtis to prove what he had deposed the justices. I held that he was incom- d could not be called. All the prisoners victed and sentence passed.

e the opinion of the Court of Crown Cases , first, whether a prisoner jointly in- ith another can after they have been charge to the jury be called as a witness her without having been either acquitted ted, or a *nolle prosequi* entered: (*Winsor ueen*, 35 L. J. 161, M. C.; 14 L. T. Rep. 5; *Reg.* v. *Deeley*, 11 Cox C. C. 607.) , whether upon the present form of in- , and under the circumstances of the case, ner Curtis was competent, and ought to n called as a witness for the prisoner (See Russell on Crimes, by Greaves, 1 edit.; Taylor on Evidence, 1178-9.)

prisoner Curtis was a competent witness it have been called on behalf of Payne in ent case, then the conviction is to be or the prisoner to be discharged, other- judgment is to stand.

H. S. KEATING.

Pritchard (*E. H. Selfe* with him) for the —The question mainly depends on the ion of the 14 & 15 Vict. c. 99, s. 3. Sect. 1 Act repeals so much of the 6 & 7 Vict. provides that that Act shall not render t any party to any suit, action, or pro- individually named in the record, &c. . 2 enacts, that on the trial of any issue r of any matter or question, or on an rising in any suit, action, or other pro- n any court of justice, &c., the parties and the persons in whose behalf any t, action, or other proceeding may be or defended, shall except as hereinafter be compelled and compellable to give evi- And then sect. 3 provides that nothing ntained shall render any person who in inal proceeding is charged with the com- of any indictable offence or any offence le on summary conviction, competent or le to give evidence for or against himself ; or shall render any person compellable any question tending to criminate him- rself, or shall in any criminal proceeding y husband competent or compellable to give or or against his wife, or any wife competent llable *to give evidence for or against* her husband." Now, under the 1st section the prisoner Curtis was a competent witness for the prisoner Payne, and there is nothing in the 3rd section which prevents him from being a witness. Since that Act, in *Reg.* v. *Deeley* (11 Cox C. C. 607) where three prisoners were jointly indicted for robbery with violence, and were given in charge to the jury, Mellor, J. allowed two of the prisoners to be called as witnesses for the other one. And in a case at the Shropshire Assizes Pigott, B. also allowed one prisoner to be called as a witness for another on a joint indictment after they were given in charge to the jury. The same course has also been followed by Lush, J. The reason for the incompetency was the ground of interest, and not of being a party to the suit or proceeding: (1 Phil. on Ev. 68, 8th edit.) In *Worrall* v. *Jones* (7 Bing. 395) Tindal, C.J. says that a party to the record would be an admissible witness if he were not interested. [MARTIN, B.—Suppose two persons jointly indicted for murder, what legal interest has one in the conviction or acquittal of the other? Was not the rule that parties to the proceeding were excluded? BRAMWELL, B.—If it was on the ground of interest, that was an objection for the benefit of the party interested which might be waived and the party called, but did anyone ever hear of such a thing being done?] It may be that the rule is qualified to the extent that a party to the immediate inquiry is not admissible. [BLACKBURN, J.—If a prisoner is competent to give evidence for a fellow prisoner, on cross-examination he may be forced to give evidence against himself.] He would be privileged from answering questions tending to criminate himself. In Taylor on Evidence, 1096, it is said that the 14 & 15 Vict. c. 99, which was intended to remove a doubt, has instead created one by the words "Except as hereinafter is excepted" in section 2. [BRAMWELL, B. —My brother, Cleasby B. suggests that that exception points to sect. 4. Is not the rule of construction, that where the Crown is not referred to in Acts of Parliament they do not apply to the Crown, for the Crown is the prosecutor? COCKBURN, C. J.—The words, "other proceeding," in the statute must be construed as *ejusdem generis* with the words preceding "suit, action," and would mean other civil proceeding. The exception in the proviso was introduced (probably in committee), *ex abundanti cautelâ*, and was not intended to enlarge the enactment.] The words of sect. 2 are, any "suit action or other proceeding in any court of justice, or before any person," &c.; and then, sect. 3 goes beyond civil proceedings. The learned counsel then referred to 1 Rus. on Crimes 625. In *Reg.* v. *Smith* (1 Mood. C. C. 289), the wife of one prisoner was was held inadmissible to prove an *alibi* for another prisoner with whom her husband was jointly indicted, on the ground that by shaking the evidence of a witness who had identified both prisoners, she would weaken the case against her husband. But in *Reg.* v. *Moore* (1 Cox. C. C. 59, Maule, J. said, of course a wife could not be examined for her husband, but for another prisoner jointly indicted with him for a burglary she might, and admitted her as a witness. And Wightman, J., so held in *Reg.* v. *Bartlett* (1 Cox C. C. 105.) The modern legislation encourages the calling of witnesses for prisoners; and to facilitate this the 30 & 31 Vict. c. 35, s. 3, provides for their being bound over, and sect. 5 for the allowance of their

expenses. It would be a dangerous rule to exclude co-prisoners as witnesses, as evidence might be shut out by vindictive persons procuring their committal as accomplices. [Cockburn, C.J.—This danger may be obviated by asking permission to have the prisoners tried separately, and then there would be no objection to calling one prisoner as a witness for another with whom he was jointly indicted.] It ought to be a matter of right for a prisoner to be enabled to call a joint co-prisoner as a witness. The giving of the prisoners in charge ought not to raise any difficulty, for the issue is joined when the prisoners plead: (*Reg.* v. *Winsor*, 35 L. J. 121, M. C.; 10 Cox C. C. 276.) [Blackburn, C.J.—The material thing is when the prisoners are given in charge to a jury who are to say whether they are guilty or not guilty. They are the persons who are to determine the issue as well as to hear the evidence. If one prisoner is admissible for another, he must also be admissible against him. The competency of one prisoner as a witness for another is one thing—the privilege not to answer questions tending to criminate himself is another. The refusal to answer only goes to the credit of the witness. Taylor on Evidence, 627 (note), and *Reg.* v. *Jackson and Cracknell* (6 Cox C. C., 525), were then referred to.

Streeten (*Jelf* with him) for the prosecution.—The witness was properly rejected. In *Hawksworth* v. *Showler* (12 M. & W. 47), Lord Abinger says: "Nothing is clearer than this, that a person cannot be a witness who is a party to the record, and affected by the determination of the issue, and that the wife of such a person is equally incapable of being a witness." And Alderson, B., said, "The rule is, that a party upon the record against whom the jury have to pronounce a verdict, cannot be a witness before that verdict is pronounced." The modern statutes have not altered that principle. The 14 & 15 Vict. c. 99, only applies to civil proceedings; and sect. 3 was introduced, lest it should otherwise be thought to extend to criminal proceedings. If Curtis had been allowed to be called as a witness, every word that he said must have been in his own favour as well as in favour of Payne. If a co-prisoner is admissible at all, his fellow prisoner or the prosecutor may compel him to be a witness. [Lush, J.—If he was allowed to be called, he must be cross-examined, and if he declines to answer on the ground that his answers would tend to criminate him, that might have the effect of leading to his conviction. Cockburn, C. J.—Or he might be cross-examined as to his past life, and the result might seriously injure his case. Brett, J.—Is it not a fundamental rule of the law of England that when a prisoner is on his trial, he shall not be examined or cross-examined for or against himself?]

Pritchard in reply, cited *Reg.* v. *Stewart* (1 Cox. C. C. 174.)

Cockburn, C. J.—We are all of opinion that the witness was properly rejected at the trial; and we all agree that the proviso in the 14 & 15 Vict. c. 99, on which the prisoners' counsel relied, was only intended to prevent the statute being supposed to contradict or alter the rule of law as it has existed from the earliest times, according to which rule a party on his trial could not be examined or cross-examined as a witness for or against himself. It is impossible that the Legislature could have intended by such a proviso to do so. And the old law of England in that respect still remains unaltered.

Conviction affirmed.

Tuesday, Jan. 30, 1872.

(Before Cockburn, C. J., Kelly, C. B., Martin, B., Willes, J., Bramwell and Channell, BB., Byles, Keating, Blackburn, and Mellor, JJ., Pigott, B., Lush, and Brett, JJ., Cleasby, B., and Grove and Quain, JJ.)

Reg. *v.* Ward.

Unlawful wounding—Verdict of—14 *&* 15 *Vict. c.* 19, *s.* 5.

To support a verdict of guilty of unlawfully wounding under the 14 *&* 15 *Vict. c.* 19, *s.* 5, *the act must be done maliciously as well as unlawfully.*

Prisoner, who was jealous of persons going in pursuit of wild fowl, fired a gun, while the prosecutor was on the water in his punt in pursuit of wildfowl, about 25*yds. off, to frighten and deter him from again coming into the creek for the purpose of fowling. As the prosecutor slewed his punt round he was struck by the shots from the prisoner's gun, but if he had not slewed the boat round the shot would not have struck him:*

Held, that the conviction of the prisoner for unlawfully and maliciously wounding the prosecutor under sect. 5 *of* 14 *&* 15 *Vict. c.* 99, *was supported by the evidence.*

Case reserved for the opinion of the Court for the consideration of Crown Cases Reserved, by Cockburn, C. J., and directed by that Court to be argued before all the Judges.

The prisoner was tried before me at the last assizes for the county of Suffolk, on a charge of unlawfully, maliciously, and feloniously wounding one William Job Chatten, with intent to do him grievous bodily harm.

The prosecutor, Chatten, and the prisoner were both fishermen, living at Aldebury, in Suffolk, and both were in the habit of going out in punts to shoot wildfowl in a creek of the river Alde.

The manner of using a punt for the purpose of shooting wildfowl is, that the gunner lies with his face downwards in the boat, extending his arms over the sides, and propelling the boat by means of a pair of short paddles, so as to avoid as much as possible being seen by the birds on the water.

On the evening of the 30th Jan. 1871 the prosecutor Chatten, was on the water in his punt in pursuit of wildfowl. Having been out some time, and finding no birds about, he determined to return, and having put his arm out was using the paddle to slew the punt round for that purpose, when he suddenly heard the report of a gun, and at the same time found himself struck by several shots in the left arm and eye, the effect of which was seriously to injure his arm, and so to damage his eye as to render its total extraction necessary a few days after.

There was no doubt that the shot by which the prosecutor was injured was fired by the prisoner. On the prosecutor calling out on being struck, and asking who had fired the shot, the prisoner who was in his punt, about twenty-five yards off, came forward and said he had fired it, adding that, if Chatten had not turned his boat round as he, prisoner, was in the act of firing, the shot would not have struck him. This being so, the question

case was, under what circumstances and
hat intent prisoner had fired off the gun.
s proved that the night was light, so that
and *à fortiori*, a punt on the water could
en plainly seen at a distance of fifty to sixty
and it was positively sworn by the prose-
hat there were no birds about on that even-
rtainly none in the neighbourhood of his
It was plain, therefore, that the prisoner
t fired for the purpose of killing wildfowl.
ence was given from which it appeared that
isoner was extremely jealous of persons
n pursuit of wildfowl on the water where
nt took place, and had on different occa-
sed threatening language to the effect that
ld shoot at birds, if occasion offered, not-
nding other persons might be between
l them; and it was suggested by the pro-
n that the prisoner had intentionally shot
prosecutor with the intent to injure him,
reby prevent his pursuing wildfowl on the
n question in future.
ne other hand it appeared that the prose-
l the prisoner had always been on good
having formerly been shipmates on board
ne pilot vessel.
s admitted by the prosecutor that, on his
out, the prisoner at once came forward,
cribed the fact of the shot having taken
o the sudden change of the position of the
tor's boat—a change of position which was
itted fact—and assured the prosecutor that
ult was purely accidental.
peared that the prisoner had towed the
tor's punt into the harbour, and rendered
ery assistance in getting on shore. The
r received an excellent character for good
; and humanity.
r these circumstances it seemed to be more
e that the prisoner shot off his gun in
ection of the prosecutor's punt, with the
n of frightening him, and so deterring him
gain coming into the creek for the pur-
fowling, rather than that he shot with
nt of doing him bodily harm.
e therefore I left the question of the intent
in the indictment to the jury, I directed
at if they took the more favourable view
ase, they should find the prisoner guilty
wfully wounding.
they accordingly did.
thinking it deserving of consideration
a wounding occasioned by an act done
any actual malice or intention of offering
to the prosecutor, would be sufficient to
te an "unlawful and malicious wounding"
he meaning of the statute (14 & 15 Vict.
5), I reserved that question for the con-
n of this court, and request their judg-
ereupon.
risoner was admitted to bail to come up
gment at the next assizes for the county of
if necessary.

A. E. COCKBURN.

Ife, for the prisoner.—The indictment is
upon the 24 & 25 Vict. c. 100, s. 18, which
inter alia) that whosoever shall unlawfully
iciously by any means whatsoever, wound
son with intent to do grievous bodily
all be guilty of felony. The jury acquitted
ner of the felony, and found him guilty of
lly *wounding under the 14 & 15 Vict. c. 19*,
s. 5. The first question is, what is the meaning of "unlawfully wounding;" must it be done maliciously? It is submitted that it must. Sect. 4 of the 14 & 15 Vict. c. 19, now repealed by 24 & 25 Vict. c. 95, after reciting that it was expedient to make further provision for the punishment of aggravated assaults, enacted that if any person shall (*inter alia*) unlawfully and maliciously cut, stab, or wound any person, he shall be guilty of a misdemeanor, and liable to be imprisoned with or without hard labour for any term not exceeding three years. Sect. 5 enacts "That if upon the trial of any indictment for any felony (except murder or manslaughter), where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged, then the jury may acquit the defendant of the felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding." The misdemeanor of cutting, stabbing, or wounding was provided for by sect. 4, and that is an unlawful and malicious wounding. The verdict under sect. 5 must be of an unlawful wounding, and the only enactment relating to unlawfully wounding was sect. 4. [BLACKBURN, J.—I think that must be so. The dropping of the word "maliciously" in sect. 5 makes no difference.] Then, to support the finding of the jury in this case, there must be evidence of actual malice or malice in law; but there is none. The prisoner had no intention to hit the prosecutor, but only to frighten him. [LUSH, J.—What the prisoner did, did he not do from a bad motive, to frighten him off the ground? Is not that malice? KELLY, C.B.—Does maliciously mean intentionally?] It is unlawful to fire across a highway; but suppose a person on his own land sees a hare running along the adjoining highway, and, seeing no person, fires at the hare, and happens to hit a person coming along the highway? That, though an unlawful act, would not be malicious. [COCKBURN, C.J.—The prosecutor would not have been hit if the boat had not slewed round.] Suppose some boys were to make a bonfire in a field a short distance from a rick of hay, which would be an unlawful act, and the wind were to carry the sparks away and set fire to the hayrick and destroyed it. That would not be a malicious act. The case of *Reg.* v. *Child* (12 Cox C. C. 64; L. Rep. Cr. Cas. Res. 307) was then cited. In *M'Pherson* v. *Daniels* (10 B. & C. 272), Littledale, J., defined malice to be "a wrongful act done intentionally without just cause or excuse. The wrongful act here charged is the wounding." [PIGOTT, B.—I should say the wrongful act was the firing off the gun close to the man's ear.] In *Reg.* v. *Noon* (6 Cox. C. C. 139), Cresswell, J. said, "If the prisoner used the sword intending to do a serious injury, that is such evidence of malice as the law holds to be murder." So in *Reg.* v. *Sparrow* (8 Cox, C. C. 393; Bell C. C. 298), there was evidence of intention to support a count for maliciously inflicting grievous bodily harm. [MELLOR, J.—The prisoner did an unlawful act, *malo animo*, to drive the prosecutor off the ground, which he had no right to do. In Foster's Crown Law, sect. 2, malice is defined as the offspring of a

wicked, perverse, and incorrigible disposition. KELLY, C.B.—Intentional is applicable to the act done.] Here the prisoner's intention was to frighten, but not to hit the prosecutor.

No counsel appeared for the prosecution.

The judges retired to consider their decision.

COCKBURN, C.J., on their return into Court, said: We have considered this case, and are all agreed that, in construing sect. 5 of the 14 & 15 Vict. c. 99, it should be read as though the word maliciously were introduced into it. It is an essential element of a conviction under that section that the act done should have been done maliciously as well as unlawfully. With regard to the question whether in this case the facts stated amount to proof of malice or not, there is a difference of opinion among the members of the Court; twelve out of the fifteen judges are of opinion that there was proof of malice, and that the conviction was right.

Conviction affirmed.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PEAT, Esqrs., Barristers-at-Law.

Jan. 15 *and* 17, 1872.

SINNETT *v.* HERBERT.

Will—Charity legacies—Cy près—Fund standing in bank to trust account—Trusts unascertainable.

Testatrix by her will bequeathed her residuary personal estate to trustees upon trust to be applied "in aid of erecting or of endowing an additional church at A." Neither at the date of the testatrix's will, nor at the time of her death, was there any church answering the description of an additional church at A., either in existence or about to be erected:

Held, that "additional church" was not limited to a church added between the dates of the will and the death of the testatrix.

A bequest for the endowment of a future church is a good charitable gift; and also, having regard to the Church Building Act (43 Geo. 3, c. 108), *by which testators are enabled to give not exceeding 500l. or five acres of land for church building purposes, and to the alternative power given by the will to the executors of applying the fund in aid of erecting or of endowing an additional church, 500l. of mixed personalty might be applied in building an additional church, and the whole of the pure personalty in endowing it.*

An inquiry directed whether the fund or any part thereof could be laid out or employed in aid of erecting or endowing an additional church at A.

Quære, whether the doctrine of cy près applies where there has been a gift to a particular object which fails.

THIS was an appeal from a decision of Bacon, V.C. (Reported 24 L. T. Rep. N. S. 778). The facts were shortly as follows: Mary Morice, spinster, by will bequeathed annuities to certain persons, and charged all and singular her real estates with the payment thereof, and subject to the annuities, she devised her real estate to the Rev. James Hughes in fee. The testatrix also bequeathed several legacies, of which there was one of 3000*l.* to F. R. Roberts and J. Sinnett, upon trust to be applied "in aid of an endowment for the Welsh church now in course of erection at Aberystwith," and the rest of her personal estate, subject to the payment of debts and legacies, she bequeathed to F. R. Roberts and J. Sinnett "upon trust to be by them applied in aid of erecting or of endowing an additional church at Aberystwith," and appointed those gentlemen her executors. The testatrix died in 1866. It was found by the chief clerk that there was not any church answering the description of an additional church at Aberystwith being erected or being about to be erected at the time of the death of the testatrix. The question was whether the gift of the residue for the purpose of endowing a church not in existence was void under 9 Geo. 2, c. 36, as an attempt to bring fresh land into mortmain. Bacon, V.C. having held that the gift of the residue was not intended to provide an endowment except in the event of a church being in course of erection at the death of the testatrix, and that the gift therefore failed, the defendant appealed.

The *Solicitor-General* (Jessel, Q.C.) and *Hemming*, for the Attorney-General, in support of the appeal, contended that a gift to erect or endow was good, and that in this case there was a clear gift to a future additional church. The law of remoteness did not apply to charities. They cited

Attorney-General v. *Bishop of Llandaff*, 2 My. & K. 586;
Philpott v. *St. George's Hospital*, 30 L. T. Rep. 15; 6 H. of L. Cas. 338;
Edwards v. *Hall*, 21 L. T. Rep. 288; 11 Hare 17; 6 De G. M. & G. 74;
Cantwell v. *Baker*, 2 Ves. Sen. 184;
Attorney-General v. *Hyde*, 1 Bro. C. C. 444;
Girdlestone v. *Creed*, 21 L. T. Rep. 124; 10 Hare, 490;
Vaughan v. *Farrer*, 2 Ves. Sen. 181;
White v. *White*, 7 Ves. 423;
Attorney-General v. *Bishop of Chester*, 1 Bro. C. C. 444;
Bennett v. *Hayter*, 2 Beav 81;
Hayter v. *Trego*, 5 Russ. 113;
Loscomb v. *Wintringham*, 13 Beav. 87;
Attorney-General v. *Fisk*, L. Rep. 4 Eq. 521;
Chapman v. *Brown*, 6 Ves. 404;
Marsh v. *Attorney-General*, 2 J. & H. 61;
Russel v. *Kellett*, 3 Sm. & G. 264;
Marsh v. *Means*, 30 L. T. Rep. 89; 3 Jur. N.S. 790;
Cary v. *Abbot*, 7 Ves. 490.

Bristowe, Q.C., *Kay*, Q.C., *Speed*, and *Fellows* for the next of kin, submitted that the court would not hold a fund for an indefinite time. There was a distinction between a general and a particular gift, and where there was a definite gift the doctrine of *cy près* did not apply. They referred to

Clark v. *Taylor*, 21 L. T. Rep. 287; 1 Drew. 642;
Bullock v. *Bennett*, 25 L. T. Rep. 10; 7 De G. M. & G. 283;
Corbyn v. *French*, 4 Ves. 418;
Moggridge v. *Thackwell*, 7 Ves. 36;
Church Building Society v. *Coles*, 24 L. T. Rep. 167; 5 De G. M. & G. 330;
Cherry v. *Mott*, 1 My. & Cr. 131;
Wills Act, 1 Vict. c. 26, s. 24;
New v. *Bonaker*, L. Rep. 4 Eq. 655;
Simon v. *Barber*, 5 Russ. 112;
Russel v. *Jackson*, 10 Hare, 204;
Re Watnough's Trusts, L. Rep. 8 Eq. 272.

The LORD CHANCELLOR (Hatherley).—I really do not entertain any doubt as to what is to be done in the present case. As far as I can judge from what has been stated there is a possibility of a church being built at Aberystwith, and therefore I think it very probable that we may never arrive at the application of the *cy près* doctrine at all. It is plain, from the authorities, that upon the true construction of the will, the bequest itself must be taken to be a

for the purpose of aiding in the erecting additional church or endowing an addi- church at Aberystwith. That is the plain n of the testatrix without reference to any

I differ so far from the Vice-Chancellor, ought that she intended by the direction in l to confine her executors to a case in which hould be either an actual church erected and ng endowment, or a church in progress of a at the time of her death. As to the diffi- nat arises upon the possible remoteness of ntion being carried into effect, I think the the *Attorney-General* v. *The Bishop of* is a complete answer. In that case the int which arises here was suggested. There sum of 1000*l.* left for a good chari- purpose, namely, for the purpose of hing a bishop in the king's dominions in a. There was no bishop in America. The ing only 1000*l.* was not very likely in itself sufficient to establish a bishop. Nothing more remote or unlikely to happen within nable period than the appropriation of that that particular object. The court did not ny application of the fund according to the doctrine; it would not allow the fund to be rith immediately, but said that the fund emain in hand for a time with liberty to "because it is not known that any bishop established." But that the court would e to retain it for ever, waiting until a should be appointed is, I think, a very l proposition. I was pressed with the y which would arise in a case where the doctrine might possibly apply, as to what done if, after a very long period, the fund seem to be applicable to its purpose in of charities. Undoubtedly there is case se where, if there is anything *in esse* to the fund of the testator can be properly , an inquiry has been directed as to whether d can be applied in the way directed. the last of that class of cases was in which the testator wished a socialist to be established. There the court held t to be purely bad under the Statute of in. It then directed an inquiry as to what nciples of this particular socialist school order to see whether the principles, so contained anything objectionable with re- the ordinary principles of religion. I sup- ere would be the same sort of inquiry that eed in the case of *Thompson* v. *Thompson*, he testator left a fund for the appointment fessor to teach his opinions as contained in ator's printed books which nobody at that d ever read. It was therefore necessary to em, and it being found on the inquiry that as nothing contrary to morality or religion inions contained in those books, the trust was on ordered by the court to be carried out. st inquiry always is, whether the thing s pointed at can be achieved. If it can, all of *cy près* is at an end, and it is premature nything on the subject. The course, there- t seems to me the plain one to take upon part of this case is to direct an inquiry bers whether or not the funds which are lly given to the trustees for the purpose g in erecting a church or endowing a at Aberystwith, can be so laid out and d, or any, and what part thereof, can be so laid out and employed. Then with regard to the question as to the 500*l.*, I do not entertain any doubt about it. The case stands thus:—Supposing there is nothing in the way of the question of pure or impure personalty, the testatrix having given the whole of her residuary estate for the purpose of aiding in erecting an additional church, or in endowing an additional church, the executors and trustees would be authorised either in applying the whole in erecting a church, or in endowing a church, or such part as they thought fit in erecting, and such part as they thought fit in endowing. The way in which I distinguish this case from that of *Girdlestone* v. *Creed* is this;—In that case there was direction to lay out the money in building and endowing. That is to say, they were bound both to build and endow. It being found, however, that there was a certain quantity of impure personalty, it was held in that case that it was a gift which was entirely void.

Bristowe, Q.C.—In *Girdlestone* v. *Creed* it was not land.

The LORD CHANCELLOR.—It was money mixed with land.

The *Solicitor-General*.—Mixed personalty.

The LORD CHANCELLOR.—Pure personalty, but with a direction to build a church. Is that it?

Bristowe, Q.C.—I think it was all pure personalty. The testatrix bequeathed a fund for building and endowing churches. There was a previous fund, of which she was the collector.

The LORD CHANCELLOR.—In that case, in the first place the fund would be handed over to those persons who apparently would not be the trustees, but who would be entitled to the property on trust for building and endowing. They would be at liberty as far as they had a fund which was suitable for those purposes, to do both; and, therefore, they might employ it in a legal way, by either building or endowing at their option. Supposing it to be left to trustees, there are two things that they must do. They must both build and endow. If it went into a general fund there would arise the question, how much was to be devoted to building and how much to endowment. There was no particular direction by the testatrix as to what was to be done in either the one or the other respect. But for the saving statute, the bequest for the building and endowing of schools and churches would, upon several authorities, have been a totally void bequest, because the one bequest could not be separated from the other. Then comes a separate statute which says that you can, to the extent of 500*l.*, apply money towards the building of churches, and the court has said that that can be done. An ingenious argument has been put forward which is this: "Building and endowing" is bad because some part must be employed in building and some part in endowing, but there is a statute which says that 500*l.* may be employed in building. There is then something ascertained which you can hold, and the remainder, therefore, might well have been held good. The Vice-Chancellor being of opinion that there was an option to take one fund to build and apply the other to endowing, it might have been said, "Now I will take the 500*l.* for building (I do not want more), and I will lay out all the rest in endowing." But the difficulty remains that there is nothing in the testatrix's will which directed any such apportionment at all. The statute carries over 500*l.* of her money, but she gives the whole. The court

cannot construe the trust by referring to the statute, any more than it can construe a trust by an ordinary reference to the Statute of Mortmain. The will must be looked at and construed irrespective of the statute, and when it is found that there is a trust for building and endowing, it is altogether gone. Then, that being gone, the statute must be looked at which saves 500*l.* out of the wreck, which sum can be applied towards building. But you have not brought yourself a bit nearer any intention as to how much more or how much less should be employed in building. It is not because the statute says that 500*l.* may be taken out of it, that it is to be said that the testatrix's intention was to employ only 500*l.* in building, and to leave the rest for endowing. She imposes upon the trustees a double duty. In consequence of their not being able to be separated, and saying that so much shall be applied in the discharge of one duty, and so much in the discharge of the other, it has been held, on decided cases, to apply to both. Therefore the argument which has been so ingeniously put forward on behalf of the respondents, does not touch a case in which the testatrix has said, "You may take as much of my personal estate as you like, or of my estate, including mixed and pure personalty, and may apply it in such a way as you think fit, either towards building or endowing." If there were any statute at all on the subject, it would authorise them to employ it in such a manner or according to such proportions as they thought fit. Then, the statute being brought into play, it is found that the one thing is utterly prohibited by the existing Statute of Mortmain; and, therefore, the whole scheme would have failed; but the choice being given of devoting the fund to one of two purposes, the whole will be saved for the legitimate purpose, another statute having interposed, enacting that a testatrix may give 500*l.* of a mixed fund, or give the whole mixed fund. The Court of Chancery taking care to draw out the 500*l.*, and to say that all the rest is void under the statute, and the executors being placed in possession of two funds—one of the pure personalty, and 500*l.* of mixed personalty—I do not see any reason why they are not to devote the fund in their hands to either of the two purposes to which the testatrix has directed it to be placed. Mr. Bristowe contended that this was not the way in which the intention ought to be carried into effect; but I think the true construction is that you are to place in the hands of trustees all that they may use for either of the purposes which the testatrix has mentioned. You place in their hands, therefore, all her pure personalty and so much of the mixed personalty as applies to the 500*l.*, and hand over the rest to the next-of-kin. When you have done that, they may apply the 500*l.* if they think fit, wholly in building, and the whole of the other fund, which is pure personalty, towards the other object which the testatrix had in view. Upon that point it has struck me that something might be said as to leaving it to the option of trustees (which the court always objects to very strongly) to say how much shall go to the next-of-kin and how much shall not. The court holds it to be the duty of the trustees to carry out the intentions of the testatrix as they best can. I think it would be the duty of the trustees in this case to apply the fund in the same manner as it would be the duty of trustees to do in the case of infants, when they are directed to apply it towards their maintenance in the most beneficial manner. In this case it will be the duty of the trustees to carry out the intentions of the testatrix as effectually as they can. I shall reverse the order of the Vice-Chancellor so far as it is appealed from, and declare that the sum of 500*l.* and no more shall be set apart by the trustees and executors, out of the impure personalty, towards aiding in erecting an additional church at Aberystwith, and the whole of the pure personalty towards the endowing of such additional church, subject to the inquiry hereinafter directed; and without prejudice to any question in case that inquiry should be answered in the negative. There must be reserved further consideration. It is important that it should be reserved, because then there can be a full discussion if it is found in the negative. It is possible that it may be found in the affirmative. I think I ought to add something to the inquiry. I do not see why the next of kin should be present at that inquiry, because that is really only a matter between the Attorney-General and the estate.

Bristowe, Q. C.—I presume your Lordship would not object to their attending if they chose, at their own expense.

The LORD CHANCELLOR. — No. Probably the better way will be to say that the next-of kin need not be served with a summons to attend the inquiry, but to be at liberty to attend at their own expense. The costs of appeal to be costs in the cause.

Solicitors for plaintiff, *E. Baldon*, agent for *F. R. Roberts*, Aberystwith.

Solicitors for defendants, *Jones*, *Blaxland*, and *Co.*; *Raven* and *Bradley*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barristers-at-Law.

Saturday Jan. 27.

MANNING v. GILL.

Criminal lunatic—Settlement to avoid forfeiture inoperative.

A person under a charge of felony previous to his trial conveyed all his real estate to his brother, reserving a life interest only, and assigned to his brother all his personal estate absolutely. He was acquitted of the charge on the ground of insanity:

Held, that the settlements were inoperative on the grounds of the lunacy of the settlor, because they were executed under a misapprehension, and because the event which they were framed to meet had not happened.

THIS was an application that a sum of money standing to the credit of the cause might be transferred to the petitioners under the following circumstances.

In 1857 Andrew Gill stabbed a man so that his life was for some time in danger, but he afterwards recovered; for this offence he was tried at the Taunton Spring Assizes of 1857, and found not guilty on the ground of insanity, and was ordered to be imprisoned during Her Majesty's pleasure.

At the time of committing this offence Andrew

Gill was entitled to certain real and personal estate under the will of his father.

On the 30th March 1857 Andrew Gill executed shortly before his trial two deeds; by the one he conveyed all his real estate to his brother Robert Gill in trust for himself (Andrew) for life, with remainder to his said brother Robert in fee, and by the other he assigned all his personal estate to his said brother Robert absolutely.

Part of the income arising from the real estate had been paid to Andrew Gill to provide him with comforts while in the Criminal Lunatic Asylum at Broadmoor, but the residue thereof, together with the income arising from the personal estate, had been accumulated.

Robert Gill, who died in March 1867, by his will devised and bequeathed all his real and personal estate to trustees in trust to be divided as therein mentioned among his three children.

In May 1869, a suit was instituted for the administration of Robert Gill's real and personal estate, and by an order made in July 1871, it was ordered that the amount of the personal estate, together with the accumulations of interest and income from the real estate which the testator, Robert Gill, held under the assignment from his brother Andrew Gill, be paid into court.

The petitioners, who were the persons interested under the will of Robert Gill, now applied that the fund in court might be transferred to them, alleging that they were absolutely entitled thereto under the deeds of the 30th March 1857, and the will of Robert Gill.

From the evidence it appeared that Andrew Gill (who was still confined as a lunatic) was a person of naturally weak intellect, but sane except when excited by anger or drink, on which occasions he would lose all control over himself, and would not be accountable for his actions. The solicitor's clerk who prepared the deeds stated that having explained to Andrew Gill that the effect of his conviction would be that his property would be forfeited to the Crown, he authorised him to prepare the deeds, and that before executing them he read them over and explained them to him, and that at the time of executing them, Andrew Gill was of sound mind, and fully knew and understood their contents and effect, and freely executed the same.

Kay, Q.C. and *Freeling* were for the petitioners.

Smart, for Andrew Gill's guardian.—The settlor was not of sufficiently sound mind to make this settlement, nor was the effect of it explained to him: (*Phillipson* v. *Kerry*, 9 L. T. Rep, N. S. 40; 11 W. Rep. 1034.) It was also made under the misapprehension that in case of conviction a forfeiture of his property would thereby be avoided (*Birch* v. *Blagrave*, Amb. 264; *Davies* v. *Otty*, 12 L. T. Rep. N. S. 789; 34 L. J. 252, Ch.), whereas it would have been void as against the Crown: (*Saunders* v. *Wharton*, 11 W. Rep. 276.)

W. W. Karslake, *F. Webb*, and *Badcock* appeared for other parties interested.

Kay, Q.C, in reply. Although this settlement might have been fraudulent as against the Crown, it is binding on the parties themselves.

Shaw Jeffery, 13 Moo. P. C. C, 432, 454.
Phillpotts v. *Phillpotts*, 10 C. B. 85.

The settlement is neither void nor voidable.

The VICE-CHANCELLOR said: It is clear, upon the evidence, that Andrew Gill, from the age of ten years, was always a person of weak intellect, and incapable of managing himself or his affairs. In 1857 he was tried for stabbing a man, and was acquitted on the ground of insanity. Previously to his trial he executed a voluntary settlement of all his property, the only motive in his mind being to prevent a forfeiture in case he was convicted. Robert Gill, in whose favour the settlement was made, never touched any of the money, as he was aware that he was merely a trustee of the property for his brother. I cannot order payment of this money under such a title as that of the petitioners. The deed under which they claim was purely voluntary and executed under a total misapprehension of the law, and, moreover, the event which it was framed to meet, viz., his conviction, never happened. The deed is inoperative, and the petition must be refused.

Solicitors: *William Moon*; *William Smith* and *Co.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Friday, Nov. 16, 1871.

REG. *v.* GLYNNE AND OTHERS.

Bastardy—Affiliation order—Quashed on appeal—Want of corroborative evidence — Decision of quarter sessions — Res judicata — 7 & 8 Vict. c. 101; *8 & 9 Vict. c.* 16.

The adjudication of a court of quarter sessions, quashing an affiliation order after the merits of the case have been heard on appeal is final, and bars any subsequent application to justices in respect of the same cause of complaint.

The mother of a bastard child took out a summons, in obedience to which the person therein alleged to be the putative father appeared before three justices, who after hearing both parties and witnesses on either side, made an affiliation order upon the defendant, against which he appealed to quarter sessions. There the respondent and two witnesses, on her behalf, were examined and cross-examined, and at the close of her case the court decided that no sufficient corroborative evidence had been given to support her testimony, and, therefore, quashed the order. She afterwards applied to justices and obtained another summons to the defendant, but when the case was about to be heard his counsel submitted that it was res judicata. The justices agreed in thinking that the decision of the quarter sessions was conclusive, and refused to hear the case.

Held, that they were right.

RULE calling on certain justices of Flintshire, and William Smith, to show cause why the justices, or any two or more of them, should not adjudicate upon a summons dated the 5th May 1871, and issued on the application of Louisa Jackson, alleging William Smith to be the putative father of a bastard child born of her body.

The facts contained in affidavits were as follows: On the 9th Jan. 1871, Louisa Jackson was delivered of a bastard child. She took out an affiliation summons against William Smith, who appeared in pursuance thereof before three justices for the county of Flint, sitting at Hawarden, on the 9th Feb.

Evidence was given by and on behalf of the

mother and the alleged putative father; and the justices made an order upon Smith for the payment of half-a-crown a week for the support of the child, together with costs. He appealed to the quarter sessions holden at Mold.

On the 8th April the appeal was heard, and after the respondent and two witnesses called for her had been examined and cross-examined, counsel for the appellant submitted that there was not sufficient corroborative evidence to comply with the provisions of 8 Vict. c. 10, s. 6.

The justices consulted together, and the chairman then said: "The opinion I am about to give is shared in by a majority—a large majority—of the magistrates, which of course is of great importance in a case of this kind. We are now not here to say whether the magistrates at Hawarden were right or wrong, as they had a very different class of evidence to deal with. But what we have to consider is, whether the evidence of the respondent is corroborated, with regard to the main issue, in any material point? A large majority of us are of opinion it is not, and therefore we do not call upon Mr. Smith to reply; the order is consequently quashed. We are bound to take the case as it is presented to us, and that is our decision." The appellant was ready with witnesses to be examined if necessary.

After the determination of the appeal, the respondent obtained a new summons against the appellant in respect of the same subject matter of complaint.

On the 25th May the case came on again for hearing, when the counsel for the appellant objected that it was *res judicata*, and the justices decided that the quashing of the first order by the quarter sessions was final, and refused to hear the case.

The *Attorney-General* (Sir J. D. Coleridge, Q. C.) and *McIntyre* showed cause.—The finding of the court of quarter sessions was conclusive, and no subsequent application to other justices could be made. That court must "hear and determine" according to law: (8 & 9 Vict. c. 10, s. 6.) (*a*) In *Rex* v. *Tenant* (2 Ld. Raym. 1423) the defendant, upon whom an order in bastardy had been made, appealed to the quarter sessions; and the justices at the quarter sessions, upon full hearing of the merits, discharged the order of the two justices, but bound the defendant by recognisance to appear at the next quarter sessions, as it was supposed under an apprehension that better evidence might be procured against him. After this the same two justices made a new order upon the defendant for keeping the bastard child, which last order being removed into the Court of Queen's Bench was there quashed, for as it was said the two justices "having made an order upon the defendant to keep the child, as reputed father, and that order being regularly discharged upon an appeal, upon hearing the merits, the defendant was legally acquitted, and cannot be drawn in question again for the same fact." In *Reg.* v. *Jenkins* (Cas. temp. Hard. 301), where two justices had made an order in bastardy, adjudging that the man against whom the application had been made was not the putative father of the child, and acquitted him of the same, Lord Hardwick held that they had no power to make such an order, and said: "If this matter had been examined at the sessions, as it may be; originally by virtue of stat. 3, Car. 1, c. 4, s. 16, it was said that they might have made an order to discharge him, which would be a good order and final; and that therefore by parity of reason the two justices may do the same, for it was said that the words of the statute, which gives sessions jurisdiction, are referring to the manner of proceeding by two justices, and this objection did at first appear to have some weight, for it was true it was determined in *Slater's Case* (Cro. Car. 470) and *Pridgeon's Case* (Cro. Car. 341, 350) that two justices or a second sessions could not reverse an order of discharge made before at the sessions." And after also citing *Rex* v. *Tenant* (2 Str. 716; 2 Ld. Raym. 1423): "But none of these cases come up to this, for in all of them the order which was taken to be final was made by the sessions, which is the last resort in all these cases, and therefore it was a right resolution; but when their opinion was given, it should not be drawn over again by the same court or by two justices. It would be absurd, when two justices have power by law to make original orders, and the sessions have power upon appeal from those orders, as well as by original application, that two justices might alter their orders when those very orders of alteration may be reversed by the quarter sessions, and it is reasonable that the order of sessions should be conclusive" (p. 302). There are undoubtedly numerous cases it which it has been held that the decision of justices at petty sessions is not conclusive, *e.g.*, *Reg.* v. *Bridgman* (15 L. J. 44, M. C.), but they do not apply. In *Reg.* v. *The Justices of Buckinghamshire* (18 L. J. 114, M. C.) an application for an affiliation order was heard and dismissed. The mother of the bastard child having removed to another county, made a fresh application at a petty sessions there. Wightman, J. (for Erle, C. J.) says: "A former decision upon the merits in favour of the putative father was an answer to the application, provided it was made out by evidence. This evidence the petty sessions were bound to hear and decide on. It is clear that they had jurisdiction to dismiss the application if the answer was proved; it follows that they had jurisdiction to grant the application and make the order if the proof in their estimation failed" (p. 116). [BLACKBURN, J.

(*a*) By 8 Vict. c. 10, s. 6, after reciting that by 7 & 8 Vict. c. 101, s. 3, it is enacted that where any woman shall apply to the justices at a petty session for an order upon the person whom she shall allege to be the father of her bastard child, such justices shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the said mother be corroborated in some material particular by other testimony to the satisfaction of the said justices, they may make such order as is therein set forth; and reciting that power is thereby [s. 4] given to the putative father to appeal to the general quarter sessions of the peace against such order, but it is not therein set forth what evidence the said general quarter sessions may hear at the trial of such appeal and doubts have been raised as to whether the said mother can be heard by the said court of quarter sessions; it is enacted that on the trial of any such appeal before any court of quarter sessions the justices therein assembled . . . shall hear the evidence of the said mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects, according to law, but shall not confirm the order so appealed against unless the evidence of the said mother shall have been corroborated *in some material* particulars by other testimony to *the satisfaction of* the said justices in quarter sessions assembled.

Reg. v. *Gaunt* (16 L. T. Rep. N. S. 379; p. 2 Q. B. 466).] Where the application missed, but not on the merits, the woman ıpply again. *Reg.* v. *Harrington* (12 W. R. vill doubtless be cited *contra*, but see per ırn, C. J. and Blackburn, J. therein. It eld in *Reg.* v. *Machen* (8 L. J. 213, M. C.), here justices in petty sessions have heard plication for an order of affiliation and d to make any order, on the ground he evidence of the mother was not cor- ıted in some material particular, the mother ; barred from making a second applica- Lord Denman, C.J., delivering judgment, "The cases cited at the bar were all cited in *. Jenkins* (*sup.*), and the court took the ction between the decision of a court of ns which is final, and a mere dismissal of an ation by justices out of sessions;" and he d the dismissal of an application at petty ns to a nonsuit in an action, but added: "We ır from saying that the dismissal is to have eight." All the reasons adduced to show he dismissal by justices at petty sessions is nclusive tend to prove that the decision of ırt of quarter sessions is so. In none of the ed cases on the subject, from the earliest to ıost recent of them, does it appear that an ation has ever been made after an adjudica- ıt the quarter sessions to justices in petty ns. He referred to *Anonymous Case* (1 Vent. With respect to the case *Ex parte John son* (19 L. T. Rep. 114; 16 Jur. 726), cited to the es who entertained this second application, erk of the peace for Durham has furnished h an affidavit stating that the orders then in ion were quashed, on the ground of in- lity and defects appearing on the face of the ırders respectively, and that the merits were vestigated.

ewether in support of the rule.—At the hear- y the justices in petty sessions the putative 's testimony was heard, but at quarter ns he did not give evidence, for a nonsuit, as e, was prayed. [BLACKBURN, J.—There was ind of nonsuit; the finding of the suit ated to a verdict. It was like a case in a ıal court, where the prosecutor fails to give ıce and the prisoner is acquitted.] The thought there was a lack of corroborative ıce, that does not conclude the merits. In . *Harrington* (12 W. R. 420) Cockburn, C.J. "I am disposed to agree with the view n out by the judgment of the court in *Reg.* v. *m* (14 Q. B. 74), that where an application of ind has been dismissed on the ground of of corroborative evidence required by the e, that is not a decision upon the merits, but ther in the character of a nonsuit." And *leg.* v. *Gaunt* (L. Rep. 2 Q. B., at p. where Blackburn, J. remarks: "in *Reg.* *arrington* the Chief Justice and I both, ık, said that the previous inquiry was no ıte bar, although the matter had been fully ; but that the justices on a second inquiry to attach so much weight to the previous on as to make it in an ordinary case practi- conclusive." It must be remembered that oman cannot appeal to quarter sessions, but an has the advantage of being able to do so, f bringing the order up whither, perhaps, she t take her witnesses, *either because she cannot* defray their expenses, or because they may be ill or dead when the appeal is tried. That court is restricted by the same rules in sect. 8 of 8&9 Vict. c. 10 as the petty sessions are, therefore the dismissal of an application by either tribunal has a like effect. The case may have been fully heard at one petty sessions and dismissed, but it has been decided that the applicant may renew her complaint. Yet if the argument for the defendant is to prevail, it will follow that the quarter sessions may do perhaps on less evidence that which the justices below cannot, viz., bar any further proceedings by the mother. He cited

Reg. v. *Brisby*, 18 L. J. 157, M. C.; 2 C. & K. 962;

BLACKBURN, J.—I think the rule must be discharged, and (as there were no grounds for this application) with costs. The old law, which seemed to be fairly well established by a number of cases prior to *Reg.* v. *Jenkins* (Cas. temp. Hard. 301), was, that where an order had been applied for at quarter sessions (I am not speaking of applications to justices out of sessions), and the matter had been adjudicated upon, that decision finally bound the parties, and there could be no new trial, as the adjudication was that of a final court; for *interest reipublicæ ut sit finis litis*. The judgment delivered in *Reg.* v. *Tenant* (2 Ld. Raym. 1423; 2 Str. 716) amounts to a conclusive decision on that very question. There, quarter sessions had decided the case on the merits, and whether that makes a difference is another point to consider. Then in *Rex* v. *Jenkins* (*sup.*) an application had been made to justices out of sessions, and they had refused it, but from the terms of the order it appears that they assumed a power to render the defendant free for ever; and on that the decision of Lord Hardwicke, that where the matter was before magistrates not in quarter sessions the judgment was not final, proceeded. But Lord Hardwicke, so far from overruling the cases he cites from Ventris and Croke, and *Reg.* v. *Tenant* (*sup.*), expressly recognises them, and says, although in quarter sessions an order is final, yet when the case is laid before the justices out of sessions, it is but in the nature of an application for an order, and may be renewed from time to time. Whether that reasoning is sound or not, it is clear he does make that distinction, and his ruling was again confirmed in *Reg.* v. *Machen* (14 Q. B. 74, 18 L. J. 213, M. C.), and that again in *Reg.* v. *Gaunt* (L. Rep. 2 Q. B. 466); and it is now settled in this court as far as it can be that the application to justices out of sessions dismissed by them is not a bar to a subsequent application. In such a case as *Reg.* v. *Gaunt* (*sup.*), in which it appeared that an order adjudging a man to be the putative father of a bastard child had been obtained on evidence given before the justices by persons subsequently convicted of perjury in giving such testimony, the order was held not to be final, expressly on the ground that, as the former order was shown to have been made on false testimony, much weight ought not to be attached to the former order, and to the opinion I there expressed I adhere. The judgment was solely on the ground that the justices had jurisdiction; but although the order seemed perfectly conclusive, yet when it was shown to have been granted on the evidence of perjured witnesses, they should not be concluded by it. Then the same thing, although not so clearly expressed, appears in *Reg.* v. *Harrington* (*sup.*). If the former order were obtained on some slip, too, it would have less

weight than if on formal hearing and proper evidence. And I apprehend that is all the Chief Justice said, viz., that the hearing was not on the merits; simply that the former decision was given on evidence that was not so strong, would not be sufficient to prevent its being treated as a practical estoppel, so as to be conclusive. I apprehend that when the quarter sessions have decided on the merits, then, according to all the authorities, the decision of quarter sessions would be a final bar—if it was on the real actual merits, *i.e.*, on the facts, it would decide the matter for ever (not so if it rested on a matter of form, which would not be merits; it is, however, unnecessary to decide that). But when the quarter sessions entered upon this case and heard it, whether it was that the evidence offered in corroboration did not satisfy them, or that the woman did not produce any evidence of corroboration, or the evidence was otherwise deficient, their decision, which was practically a verdict, was as much on the merits as a verdict of acquittal in a criminal court. Therefore I think the order of the quarter sessions final. I know of no case to the contrary, and there is the very strong ground of convenience for saying that it is so, for I think that where the parties have gone before two justices, and there is no appeal, and they have decided, it may well be said they might go before other two justices. But where the case is before the quarter sessions on appeal, the first decision having been in favour of the woman, it is still a rehearing before the superior tribunal, and it would be very inconvenient that where the appellate tribunal have heard the case on the merits it should be capable of being re-opened before two justices, from whom there would be an appeal to the same quarter sessions. That having been the construction adopted from the time of Lord Hardwicke, I see no reason to deviate from it, and, consequently, I am of opinion that the justices have acted rightly, and this rule must be discharged.

MELLOR, J.—I am of the same opinion. The law, as it was, is accurately stated in Nolan on the Poor Laws, vol. 2, p. 315—"An order of filiation was made by two justices, and afterwards discharged by the sessions upon appeal, after the merits were fully heard; neither two justices, nor a subsequent sessions, can make a new order for this matter against the same person, for being legally acquitted, he cannot be drawn in question again for the same fault. And it would be absurd that when two justices have power by law to make original orders, and when the sessions have power upon appeal from those orders, as well as by original application, that two justices should have power to alter their orders, when those very orders of alteration might be reversed by the sessions." That was the state of the law formerly. Then came the statute of Victoria, and now we must look at sect. 6 of 8 Vict. c. 10, which declares what shall be done at the hearing of an appeal at quarter sessions, and it is necessary to determine what is a hearing on the merits. Now, the words of the section prescribe that the justices on an appeal at quarter sessions "shall hear the evidence of the mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other *respects according* to law, but shall not confirm the *order so appealed* against unless the evidence of *the said mother* shall have been corroborated in some material particular by other testimony to the satisfaction of the said justices in quarter sessions assembled." I think that the Attorney-General rightly stated the effect of that qualification to be that they were to proceed at quarter sessions as before the justices below, but that they should not confirm the order unless corroborative testimony to the satisfaction of the court were adduced. I quite agree with my brother Blackburn, who said that on the appeal against the order either party may go into evidence, and if he fails to produce sufficient corroborative evidence, the magistrates are the judges, and, when they have heard the general merits of the case, and such other corroborative testimony as has been offered, if any be offered, then I think it is to all intents and purposes a hearing on the merits. In every case cited to the contrary it appears that the judgment was not that of quarter but of the petty sessions, which is a plain ground of distinction between those cases and the present. When rightly considered, therefore, I think those cases were correctly decided. I come, therefore, to the conclusion that the decision of the quarter sessions quashing the affiliation order was final, and that the matter could not be again investigated by the justices against whom this rule was obtained.

LUSH, J.—I am of the same opinion. Neither party was concluded by the decision of the petty sessions. If they decline to make an order the woman cannot appeal, and therefore it has, I think, been rightly held that she is entitled to renew her application. If on the other hand an order is made, the man adjudged to be the putative father of the bastard child has a right to go to quarter sessions. Then it is both reasonable and convenient to suppose that the decision of the quarter sessions, being a court of appeal, must be binding on the parties. If Mr. Merewether's argument were to prevail, the woman might now go before the very same magistrates who made the order, with the very same evidence she advanced at quarter sessions, and it would be competent for them to come to a different conclusion from that arrived at by the latter court, and so, in effect, to overrule the decision of the superior tribunal. It is impossible that that could be the intention of the Legislature in framing the statute, and I think the judgment of the court of appeal was final and binding. If there had been no authority on the matter I should have come to the same conclusion. But this will not conflict with the other cases; it is in accordance with them. The adjudication of the quarter sessions was a decision on the merits. As to that point, I have never had a moment's hesitation in forming my opinion. It was a judicial conclusion deliberately arrived at in this matter on evidence, and on the very most important point in the case.

HANNEN, J.—As I did not hear the whole of the arguments, I refrain from giving any opinion.

Rule discharged.

Attorneys for the prosecution, *Blakeley* and *Beswick*, for *J. P. Cartwright*, Chester.

Attorneys for the defendants, *Merediths, Roberts*, and *Mills*, for *Helps, Parker*, and *Birch*, Chester.

SECOND COURT.

Jan. 22 *and* 24, 1872.

SIMPSON (app.) *v.* WELLS (resp.)

*on of highway— Conviction — Claim of custom—Statute sessions—*5 *&* 6 *Will.* 4, 72.

dant placed a stall for refreshments upon a footpath during a statute sessions for the of servants, which took place close by. statute sessions had been held regularly year for nearly fifty years, and it had e custom on these occasions to have stalls on tpath.

t petty sessions convicted the appellant of ting a highway under 5 *&* 6 *Will.* 4, *c.* 50,

the conviction was proper; that this claim by the appellant did not oust the justices' tion; and that there could not be a legal for such a custom.

a case stated by three of Her Majesty's of the peace in and for the parts of n the County of Lincoln under the Statute ict. c. 43, for the purpose of obtaining on of the court on questions of law which ereinafter stated.

etty sessions holden at the justice room ton, in and for the division of Winterton d parts, on the 16th June last, an informa- complaint preferred by Joseph Wills, of n, aforesaid, superintendent of police er called the respondent), against James of Winteringham, in the said parts, hereinafter called the appellant), under the Act of 5 & 6 Will. 4, c. 50, charging he the said James Simpson on the last at the parish of Winterton, in parts, unlawfully and wilfully did ob- ie free passage of a certain public ere situate by then and there placing a on, contrary to the form of the statute ase made and provided, was heard and d, the said parties being then present. n such hearing the appellant was duly of the said offence, and adjudged for his ce to forfeit and pay the sum of 1*s.*, to nd applied according to law, and also to said respondent the sum of 10*s.* 6*d.* for in that behalf. And if the said several e not paid forthwith, it was ordered that be levied by distress and sale of the goods ls of the said appellant, and in default it distress the said appellant was adjudged prisoned in the House of Correction at the said parts, and there be kept to hard the space of fourteen days, unless the al sums and all costs and charges of the ss and of the commitment and convey- said appellant to the said House of Cor- ould be sooner paid.

ereas the said appellant, being dissatis- this determination, upon the hearing of information and complaint, as being in point of law, had, pursuant to sect. 2 d statute (20 & 21 Vict. c. 43) duly writing to have stated and signed a case rth the facts and the grounds of such tion as aforesaid for the opinion of this hath duly entered into a recognisance d by the *statute in that behalf*;

The said justices, in compliance with the said application and the provisions of the said statute stated and signed the following case :—

Upon the hearing of the information and complaint it was proved, on the part of the respondent, that on the 9th May last the appellant had erected a stall on the public footpath, by the side of the public carriage way, in the parish of Winterton, upon which he had ginger-beer, biscuits, and other kinds of confectionery for the purpose of sale to the servants attending the statute sessions; and that such stall was supported by tressels which stood on the raised path made and used for foot passengers, and separated from the carriage way by a channel or gutter by which the water was carried down the street. The top of the stall projected about three feet over the footpath, and the path was obstructed by the tressels on which the stall stood, and also by the top of the stall which projected over it, so that passengers on the footpath were unable to pass along freely, and several of them had to leave the footpath and go on the carriage road. The distance between the stall and the buildings in the street was not more than three feet.

The 9th May, the day on which the alleged obstruction took place, was the day of holding the annual statute sessions at Winterton for hiring servants, and a large number of persons were assembled. The statute sessions are held annually at Winterton a few days prior to the 13th May. The day for holding such statute sessions was formerly fixed by the chief constable, and since the office of chief constable was abolished, the local board for the parish of Winterton have fixed the day on which the statute sessions is annually held. The statute sessions for hiring servants is of great antiquity, and was accustomed to be held when the statute of 5 Eliz. c. 4, was passed: (See sect. 48 of that statute.)

On the part of the appellant it was contended that the statute sessions was a fair, and it was proved that it had been regularly held at Winterton for more than twenty years; and that during the period of twenty years stalls had been erected on the footpath on the statute or fair day without interruption; and that was a sufficient answer to the information for obstructing the footpath. In support of this proposition, the appellant's attorney quoted the cases of *R.* v. *Smith* (4 Esp. 109) and *Elwood* v. *Bullock* (13 L. J. 330, Q. B.).

It was also objected on the part of the appellant that as he claimed a *bonâ fide* right to do the act complained of, the jurisdiction of the justices was ousted. In support of this proposition, the appellant's attorney quoted the case of *R.* v. *Cross* (3 Camp. 224); *R.* v. *Ward* (4 A. & Ell. 405); (see *Arnold* v. *Blaker*, L Rep. 6 Q. B. 436).

The justices, however, being of opinion that the said statute sessions was not a fair, as contended by the appellant, and that no *bonâ fide* claim of right had been shown on his part, overruled the said objection.

The appellant then called several witnesses, who proved that the said statute sessions had been held at Winterton regularly for nearly fifty years; that at such statute sessions it had been the custom to have stalls on the highway; that the appellant's stall had been fixed where it stood by the authority of two persons appointed by the Winterton Local Board to arrange the stalls as well as they could for the convenience of the public; and that there was 17ft. 3in. of the carriage way open to the

public after the stalls were fixed, in addition to the space between the stalls and the buildings.

On the part of the respondent it was contended that even if there were a custom to erect a stall on the highway on the Winterton statute day, such custom was not good, unless sufficient space was left for the public to pass; and quoted the cases of *Elwood* v. *Bullock* (13 L. J. 330, Q.B.), and *Goring* v. *Barfield* (11 L. T. Rep. N. S., C. P. 270.)

The justices being of opinion that the said statute sessions was not a fair or market within the meaning of the case quoted by the appellant's attorney, and that the stall erected by the appellant on the footpath was an obstruction to the highway within the meaning of the Highway Act (5 & 6 Will. 4, c. 50, s. 72) convicted the appellant. The questions of law arising out of the above statement are –

Whether under the circumstances the claim made by the appellant was sufficient to oust the justices' jurisdiction in the matter of the said information, and if not, whether the said conviction was legally and properly made by the said justices.

Cave (with *Field*, Q.C.) for the appellant, contended that as this was a legal custom, and it ought to have been inferred by the justices to have existed from time immemorial, the justices should have given effect to the claim of right. The right presumption was that the highway had been dedicated to the public, subject to the placing of these booths during the statute sessions.

Elwood v. *Bullock*, 6 Q. B. 383.

R. v. *Smith*, 4 Esp. 11.

The respondent did not appear.

Cur. adv. vult.

Jan. 24.—BLACKBURN, J. delivered the judgment of the court (Blackburn and Quain, JJ.). We think this is not a case in which a claim of right could be set up by the appellant. In the case of a regular market or fair for the sale of goods, there may be a valid right of persons to erect stalls in the market place or street. But these statute sessions are not on the same footing as a fair for the sale of commodities. The origin of the statute fairs was that the justices first fixed the rate of wages, and then notice was given that all persons might attend, and hire themselves according to those rates. But there was no greater reason for saying that persons on those occasions could set up stalls and obstruct the highway than that they could do so on the occasion of holding assizes or quarter sessions. We think there could not be a legal origin for such a right, and the conviction was therefore proper.

Judgment for respondent.

Attorneys for appellant, *Scott* and *Co.*

Jan. 27 *and* 29, 1872.

REG. *v.* THE LORDS OF THE TREASURY; *Ex parte* THE JUSTICES OF LANCASHIRE.

Mandamus—Costs of prosecutions—Statutory obligation of Lords of the Treasury.

By 7 *Geo.* 4, *c.* 64, *ss* 22 *&* 23, *an order for the payment of costs of prosecutions may be made by the courts before which they are tried. By sect.* 24 *the order for payment is to be made by the officer of the court upon the Treasurer of the county, who is thereby authorised and required upon sight of every such order forthwith to pay the money in such order mentioned, and shall be allowed the same in his accounts. By sect.* 26 *the justices at quarter sessions were to make regulations as to costs.*

By 14 *&* 15 *Vict. c.* 55, *ss.* 4 *&* 5, *the power of quarter sessions to regulate costs of prosecutions was transferred to the Secretary of State.*

By the Annual Appropriation Acts since 1835 *there has been a grant of a gross sum each year for charges formerly paid out of county rates.*

By 29 *&* 30 *Vict. c.* 39, *s.* 14, *when any sum shall have been granted to her Majesty by an Act of Parliament to defray expenses for any specific public services, it shall be lawful for her Majesty from time to time, by her royal order, under the royal sign manual, countersigned by the Treasury, to authorise and require the Treasury to issue, out of the credits to be granted to them on the Exchequer accounts, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted.*

The accounts of costs of prosecutions in the county of Lancaster, after having been duly taxed by the proper officers, and paid out of the county rate, were re-taxed by officers of the Treasury, and part of them were disallowed. The justices of the county obtained a rule nisi for a mandamus to compel the Lords of the Treasury to pay the disallowed balance to their treasurer.

Held that the Lords of the Treasury had no right to tax these costs after they had been allowed by the proper officers; but that this court had no jurisdiction to issue a mandamus to compel the Lords of the Treasury to pay the balance.

Manisty, Q.C., had obtained a rule *nisi*, calling upon the Lords Commissioners of Her Majesty's Treasury to show cause why a writ of *mandamus* should not issue directed to them, commanding them to issue a Treasury minute on authority to the paymaster of civil contingencies, or other proper officer, directing and authorising him to pay, or cause to be paid, to Henry Alison, the treasurer of the county palatine of Lancaster, the sums specified and claimed in affidavits upon which the rule was moved.

It appeared from the affidavits of the deputy clerks of the peace, and the treasurer of the said county, that during the half year ending the 31st Dec. 1870, the costs of all prosecutions in the said county were, upon the charges made by the respective prosecutors in their bills of costs, duly taxed by the proper officers in the county, and under the direction of the courts before which the respective cases were tried. Orders of court in the usual form for the payment of sums expended for these prosecutions at assizes and quarter sessions, including adjudications under the Criminal Justice and the Juvenile Offenders Acts, were duly presented to the county treasurer, who paid the amounts directed by the said orders out of the rates of the said county. The accounts of these payments, amounting to 6747*l.* 11*s.* 9*d.*, with all receipts, documents, certificates, and vouchers, relating thereto, were transmitted to the Lords of the Treasury on the 26th Jan. 1871. On the 7th Sept. 1871, the sum of 6646*l.* 19*s.* 3*d.* was paid to the county treasurer by the Lords of the Treasury; the balance between these two amounts was taxed off, and disallowed by the Board of Examiners of Criminal Law Accounts; and although applications were made by the clerks of the peace, both by letter and in person, the Lords of the Treasury

refused to pay this balance, or any part of it, to the County Treasurer. It was stated upon affidavit that it was believed the amount granted by the Appropriation Act 1870 to defray the charges for prosecutions formerly paid out of the county rates, and for other like charges, had not been entirely expended, but the Lords of the Treasury had in their hands a sufficient amount of the said sum to defray the balance claimed on behalf of the county of Lancaster.

The amounts taxed off by the examiners consisted of charges for certificates of previous convictions in cases of acquittal or confession of guilt; of counsel's fee for settling indictment in a perjury case, ordered by Cleasby, B.: of counsel's fees for consultation; of the costs of second indictments not mentioned in the calendars; of the costs of trials of prisoners whose names did not appear in the calendars; and of travelling and other expenses of witnesses, disallowed for various reasons.

The *Solicitor-General* (Jessel, Q. C.), *Brown*, Q. C., and *Archibald*, on behalf of the Lords of the Treasury, showed cause.—This is a case in which a *mandamus* will not lie. Where the Legislature has constituted the Lords of the Treasury as individuals, to be mere trustees for persons entitled to money specifically granted, the Lords of the Treasury are subject to the jurisdiction of the courts, but in no case can a court of justice interfere with ministers of the Crown acting in that capacity. If a *mandamus* could apply to a matter of this kind, the management of the public funds would be transferred from the ministers of the Crown to this court. First, therefore, this grant is made to the Lords of the Treasury, as servants of the Crown, and they are not subject to a court of law concerning it; secondly, even if a *mandamus* to the Lords of the Treasury were within this court's jurisdiction, there is no statutory obligation upon them to pay the sums here claimed. The rule asks to compel the issue of a Treasury minute, *i.e.*, to interfere with the executive management of the Treasury Office. [COCKBURN, C. J.—The minute is only the means for obtaining payment; if there is a duty to pay, it is proper to ask for the performance of a preliminary step.] But there is no duty to pay; the statutory provision relied upon is that contained in schedule B of the Appropriation Act 1871 (34 & 35 Vict. c. 89.) "Part 7. Civil Services. Class iii. Schedule of sums granted to defray the charges of the several Civil Services herein particularly mentioned, which will come in course of payment during the year ending on the 31st March, 1872, viz.:" .... "No. 2. For prosecution at assizes and quarter sessions in England, formerly paid out of county rates, including adjuditions under the Criminal Justice and the Juvenile Offenders Acts, sheriff's expenses, salaries to clerks of assize and other officers, and for compensation to clerks of the peace under the Criminal Justice Acts, and other expenses of the same class, 201,173*l*." This Act is passed annually with the object of restraining the servants of the Crown from expending the sums voted upon other objects than those specified, but does not impose any duty to pay the whole of the amounts. Indeed the amounts are only estimates for the future, and as appears from the preamble to the Act the total is granted to Her Majesty towards making good the supply. The title is "An Act to apply a sum out of the consolidated fund to the service of the year ending 31st March, 1872, and to appropriate the supplies granted in this session of Parliament." To appropriate does not mean to set aside the whole sum specified for particular payments, but to limit its expenditure, or so much of it as is necessary, to those payments only. [COCKBURN, C. J.—When the expenditure is duly incurred for the purpose specified, surely the Appropriation Act was intended to provide that the expenditure should be defrayed out of this sum.] All that the Act says is—the Crown shall not employ this sum for another purpose. It is not by this Act, but by resolution of the House of Commons, that this money gets to the hands of the Lords of the Treasury: (Exchequer and Audit Departments Act 1866 (29 & 30 Vict. c. 39) s. 14). Thirdly, assuming the Treasury to be subject to the jurisdiction, and the words of the Act to create an obligation to pay the whole sum granted to the objects mentioned, there must be a discretion inherent to the grant of a sum in gross, belonging to the Ministers of the Crown, who have the disposal of it. *Mandamus* will not lie against a person upon a matter concerning which he may exercise a discretion. [BLACKBURN, J.—Not so: Where a discretion is given by statute we can compel its exercise. Here, as the Treasury, by making no answer to the affidavits, refuse to enter upon the merits of the claim, we must assume that they have plenty of money to discharge all claims which are made upon them.] The Board of Examiners of Criminal Law Accounts was created by the Treasury in the year 1857, and a salary has been annually granted to the members, by resolution of the House of Commons. For fifteen years therefore, the practice of taxing these costs has obtained, and the estimates have been made upon the results of the practice; if the amounts claimed by the counties were paid in full, the grant in the Appropriation Act would not be sufficient. The first reported case of a *mandamus* against the Lords of the Treasury was in the year 1855, in the matter of Wm. Carmichael Smyth (4 A. & E. 286). There the rule for a *mandamus* was made absolute, but it was so made expressly upon the ground that the Lords of the Treasury had admitted that the money for paying the amount asked for was in their hands, having been paid to them under an Act of Parliament for the use of Mr. Smyth. There was no appeal from such a decision of this court at that time, but it appears in the argument of a later case, viz., *Rex* v. *Lords of the Treasury, Ex parte Hand* (6 N. & M. 512), that the decision would have been questioned in a court of error, had the forms of law permitted. Here the grounds of that case do not exist. [COCKBURN, C. J.—In that case, as in this, the money was voted in other sums.] The provision then in force for regulating payments by the Treasury was 4 & 5 Will. 4, c. 15, s. 13, which has been repealed by 29 & 30 Vict. c. 39, s. 46. Coleridge, J., who took part in the *Smyth* case, made some remarks concerning it in the case of *the Baron de Bode* (6 Dowl. 792), and called attention to the particular facts which were expressly the reason for granting the rule. He also calls attention to three other cases reported in the same volume, as being consistent with the first, although in all of them the *mandamus* was not allowed to issue. They were *Re Hand* (4 A. & E. 984); *Re Smyth* (p. 976); *Ex parte* Ricketts (p. 999.) More lately, application was made by way of mandamus to

recover an apportionment of the annuity granted to Queen Adelaide, the widow of William IV.; but although Lord Campbell is reported (16 Q. B. 361) to have thought the application for a *mandamus* regular, that opinion cannot be taken as a judicial decision, because the Attorney-General expressly waived all objection to the form of the remedy. Moreover, at all events, it is no authority for this case, for Lord Campbell based his opinion upon the sect. 13 of 4 & 5 Will. 4, c. 15, which has been since repealed. The last application of this kind for a *mandamus* was made against the East India Company to obtain alleged arrears of pay: (*Ex parte Napier*, 18 Q.B. 692.) All the previous cases were there reviewed by Lord Campbell, and the court refused the rule. In the argument of *Ellis* v. *Earl Grey* (6 Sim. 220), a case in the Exchequer, not reported, *Oldham* v. *The Lords Commissioners of the Treasury*, was mentioned, in which the assignee of a pension filed a bill to compel the Lords of the Treasury to pay him a new pension which had been granted by the king in lieu of the assigned pension which had been revoked. Graham, B., who delivered the judgment of the court, said, "This bill proceeds on the ground of the fundamental jurisdiction of the court over the consolidated fund; and the purpose of the bill is to call on the court to dispose of the money which has been placed by Parliament at the disposal of the king himself. The jurisdiction of the Court of Exchequer extends only to the reaching the moneys which come into the Treasury, while they are *in transitu*; but after Parliament has disposed of them, and they have reached their destination, the jurisdiction of the barons ceases; and here the king alone can order the payment of the money. The money is granted to the king, his assessors and assigns, and the king himself must be sued by petition of right, if this money is to be got at." There are several American authorities to the same effect, and they may be taken as of greater weight against the jurisdiction here claimed than the English cases, for the ministers in that country occupy positions of more direct and independent power than the heads of departments here. *Brashear* v. *Mason* (6 Howard's Rep. Sup. Ct. U. S. 92) was a rule for a *mandamus* to compel the United States Secretary of the Navy to hand over arrears of pay to an officer of the Texan navy, alleged to have accrued after the annexation of Texas. Nelson, J., in delivering the opinion of the court said at p. 100, "The Constitution provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law. (Art. 1, s. 9.) And it is declared by Act of Congress (3 Stats. at Large, p. 689, s. 3), that all moneys appropriated for the use of the war and navy departments shall be drawn from the Treasury by warrants of the Secretary of the Treasury, upon the requisitions of the secretaries of these departments, countersigned by the second comptroller. And by the Act of 1817 (3 Stats. at Large, p. 367, ss. 8, 9), it was made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. And all warrants drawn by the Secretary of the Treasury upon the treasurer shall specify the particular appropriations to which the same shall be charged; and the moneys paid by virtue of such warrants shall in conformity therewith, be charged to such appropriations in the books kept by the comptrollers; and the sums appropriated for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and no others: (2 Stats. at Large, p. 535, s. 1.) In the case of *Mrs. Decatur* v. *Paulding* (14 Peters, 497) it was held by this court that a *mandamus* would not lie from the circuit court of this district to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due to her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear in that case affirmatively on the application that the pension fund was ample to satisfy the claim. The fund also was under the control of the secretary, and the moneys payable on his own warrant. Still the court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the secretary on the ground that the court below had no jurisdiction over the case, and therefore the question not properly before this court on the writ of error. The court say that the duty required of the secretary by the resolution was to be performed by him as the head of one of the executive departments of the Government in the ordinary discharge of his official duties; that in general such duties, whether imposed by Act of Congress or by resolution, are not mere ministerial duties; that the head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by *mandamus* act directly upon the officer, and guide and control his judgment and discretion in matters committed to his care in the ordinary discharge of his official duties. The court distinguish the case from *Kendall* v. *The United States* (12 Peters, 524), where there was a *mandamus* to enforce the performance of a mere ministerial act, not involving on the part of the officer the exercise of any judgment or discretion. The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy. Besides, the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it. The secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and, if not enough, how it shall be apportioned among the parties entitled to it. These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the Government, to the payment of whose demands the particular fund is applicable, are interested as well as the Government itself. At most the secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it; and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned. It will not do to say that the result of the proceeding by *mandamus* would show the title of the relator to his pay, the

amount, and whether there were any moneys in the Treasury applicable to the demand; for upon this ground, any creditor of the Government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ; and the proceeding by *mandamus* would become as common in the enforcement of demands upon the Government as the action of assumpsit to enforce like demands against individuals." The first important Act of Parliament relating to the payment of taxation of the costs of prosecutions was 7 Geo. 4, c. 64, which provided by sects. 22 and 23 for an order by the court for payment of expenses of prosecutions. By sect. 24 the order for payment was to be made out by the officer upon the treasurer of the county "who is hereby authorised and required, upon sight of every such order, forthwith to pay to the person named therein, or to anyone duly authorised to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts." By sect. 26 the justices at quarter sessions were to make regulations as to costs and expenses of prosecutions. Each county continued to make regulations for its own costs until 1851, when by 14 & 15 Vict. c. 55, s. 4, the power of quarter sessions to regulate costs was repealed, and by sect. 5, a Secretary of State may make regulations instead.

Manisty, Q. C. and *Gorst* supported the rule.—No answer being made on behalf of the Treasury to the affidavits upon which the rule *nisi* was granted, it must be assumed that there are funds in the management of the Lords of the Treasury sufficient to satisfy all these demands. It is admitted that no remedy except *mandamus* exists, by which the justices of counties can recover from the Treasury the balance of these costs disallowed by the examiners. It seems that down to the year 1752 there existed no provision for the costs of prosecutions. In 2 Hale's Pleas of the Crown, 282, it is said, "That which is a great defect in this part of judicial administration is, that there is no power to allow witnesses their charges, whereby many times more persons grow weary of attendance, or bear their own charges therein, to their great hindrance and loss." By 25 Geo. 2, c. 36, the reasonable expenses of prosecution for any felony were to be allowed to the prosecutor out of the county stock, if he petitioned the judge for that purpose; and by 27 Geo. 2, c. 3, poor persons, bound over to give evidence were likewise entitled to be paid their charges, as well without conviction as with it. By 7 Geo. 4, c. 64, the expenses of prosecutions were to be regulated by justices at quarter sessions. Nine years afterwards, in the Appropriation Act 1835 (5 & 6 Will. 4, c. 80), sect. 17, there is an allowance of "110,000*l.* for charges hitherto paid out of county rates for 1835." This amount was granted for the purpose of discharging by the country half of the costs incurred by the several counties. In the year 1846, the grant by the Appropriation Act (9 & 10 Vict. c. 116, s. 18. was 239,000*l.* for "charges formerly paid out of county rates." This was to the 31st March 1847, and the grant was made to cover the whole of the costs of prosecutions incurred by the counties. In 1847 the grant for the remainder of the year was 388,000*l.*; the grant for 1848 was 348,000*l.*; in 1849, 258,000*l.*; in 1850, 240,000*l.*; in 1851, 200,000*l.* In this year, by 14 & 15 Vict. c. 55, ss. 4 & 5, the power of regulating the costs of prosecutions was transferred from the quarter sessions to the Secretary of State, and lists of costs were framed by Sir George Grey under these provisions on 9th Feb. 1858, and on 14th Feb. 1863. In the year 1857, and for several previous years, the amount appropriated for prosecutions at assizes and quarter sessions was 250,000*l.* In the year 1858, the first after the appointment of the Board of Examiners of Criminal Costs, the amount was 150,000*l.*; in 1860, 100,000*l.* This amount increased in subsequent years, and other charges were included in the appropriation; the words in the Consolidated Fund (Appropriation) Act 1870 (33 & 34 Vict. c. 96), Schedule B, Part 7, under which this claim is made, are "Civil Services —Class iii. Schedule of sums granted to defray the charges of the several Civil Services herein particularly mentioned, which will come in course of payment during the year ending on the 31st March 1871; viz.:" . . . . "2. For prosecutions at assizes and quarter sessions in England, formerly paid out of county rates, including adjudications under the Criminal Justice and the Juvenile Offenders Acts, sheriffs' expenses, salaries to clerks of assize, and other officers, and for compensation to clerks of the peace under the Criminal Justice Acts, and other expenses of the same class, 200,633*l.*" [COCKBURN, C. J.—You need not trouble yourselves to argue any question except our jurisdiction to interfere.] At present then it will be sufficient to show that this is a case for a return to the *mandamus*; on that point there is no distinction between this matter and that of *Smyth* (4 A. & E. 286). Although sect. 13 of 4 & 5 Will. 4, c. 15, s. 13, has been repealed, its provisions are re-enacted in 29 & 30 Vict. c. 39, s. 14, which is, "When any sum or sums of money shall have been granted to Her Majesty by a resolution of the House of Commons, or by an Act of Parliament, to defray expenses for any specified public services, it shall be lawful for Her Majesty from time to time, by her Royal order under the Royal sign manual, countersigned by the Treasury, to authorise and require the Treasury to issue, out of the credits to be granted to them on the Exchequer accounts as hereinafter provided, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted." By paying some of the charges for those prosecutions the Lords of the Treasury admit that all necessary preliminaries required by this Act have been completed, and that they hold the money for the purpose to which it is appropriated. By sect. 6 of 14 & 15 Vict. c. 55, "the amount of such costs, expenses, or compensation, shall be ascertained by the proper officer of the court, according to the regulations made under this Act."

COCKBURN, C.J.—If this case were one in which we in this court could exercise jurisdiction, we should not hesitate to grant a *mandamus*. Nothing can be more anomalous and unsatisfactory than the present system of allowing the costs of prosecutions. Everyone will agree that the expenses of prosecutions ought to be borne by the public. It is essential that these costs should not fall on the persons who have suffered individual injuries, which are injuries to the public also; because experience shows that if the expense is to fall on individuals they will not prosecute effectively. The old system was that the costs should be paid out of the rates upon the counties, and

they were taxed by proper officers. As far back as 1836 this arrangement was altered, and it was settled that half the expenses should be paid out of the revenue of the country, and in 1847 the whole of the expenses were thrown upon the revenue. The same system of taxation, however, still continued, and the same officers conducted it —that is, the clerks of the peace or the clerks of assize. The Lords of the Treasury, however, thought proper to introduce an excrescence upon the law. They have taken upon themselves for the last fourteen years to review the taxation by the proper officers. I am far from saying that the taxation of costs ought not to be vigorously controlled. It would be a monstrous abuse if prosecutors were allowed by taxing officers to extort from the public purse money not properly expended; but it is a very different thing indeed to say that, instead of taxing on the spot, where all the circumstances attending the prosecution are known, and after the matter had been properly investigated by the proper officers, two gentlemen sitting in London should, by the sole authority of the Treasury, review the taxation and strike off whatever, in the exercise of their discretion, they should think fit to disallow. I am at a loss to conceive what is their supposed authority to tax and disallow bills already properly allowed. The monstrous inconvenience of such a course is palpable. Such gentlemen are naturally, in order to show the usefulness of their office, disposed, whenever they have opportunity, to disallow items. But they can not have the same means of forming a proper judgment as those who taxed the bills on the spot, and who are acquainted with all the circumstances. It seems monstrous and anomalous that when the court before which the criminal actions have been prosecuted think it necessary, for the due administration of justice, to order particular expenses to be paid, that then two gentlemen sitting in London should override the authority of the court. It is, however, quite another thing to say that this court has jurisdiction to interfere with it, and it is not because it may be an unsatisfactory state of things that, therefore, there is any remedy except by petition to the Queen or to Parliament. We must start with this unquestionable principle, that where a duty has not been performed by the Crown, this court cannot affect to have any power to command the Crown to do it. The thing is out of the question. We are the court of the Sovereign, and have no power to command the Crown. And where persons are acting as servants of the Crown they may be amenable to the Crown, whose servants they are, but not to us in the exercise of our prerogative jurisdiction. Therefore the question comes to this—whether the Lords of the Treasury, when this money gets into their hands, receive it, and are bound to apply it, as the servants of the Crown. Now there can be no doubt that we must look upon them as the servants of the Crown. The money is voted by Parliament to the Crown. It is true that the money is appropriated to a specific purpose, and it can be applied to no other. It is also true that the particular mode of obtaining the money is prescribed by statute. But when the money is paid to the Treasury it is paid to them as the servants of the Crown; and though, according to the Appropriation Act, they were bound to apply the money—upon proper vouchers being produced—to the payment of these costs, and had no authority to retax the costs, still I cannot see any duty on them to do what, no doubt, they ought to have done, except as servants of the Crown, in which capacity alone they received the money. Though, therefore, I think they have made a great mistake, and though I think the present state of things extremely anomalous and unsatisfactory, I regret to say that, according to the true principle on which this court's prerogative jurisdiction is and ever has been and ought to be administered, I do not see how we can issue the writ of *mandamus*. The duty of the Treasury is a duty they owe to Parliament and the Crown, and we cannot enforce it in any legal proceeding.

BLACKBURN, J.—I have come to the same conclusion. If we had power to grant the writ, I think it would be right to issue it, as the Treasury have undoubtedly made a mistake. The House of Commons have the exclusive control over the public purse. The House of Lords is practically without authority in such matter, Now, so long as any provision of the House of Commons is, so to speak, *in fieri*, it cannot be brought into this court, but where the money is once granted, the matter is then a bygone thing; it has become an Act of the Legislature, and we must construe it. The Appropriation Act of 1871 regulates what is to be done, and can be altered only by the King, Lords, and Commons. The Commons have by that Act power to vote nothing but what was heretofore payable out of the county rates. Now, what does that mean? Notwithstanding the contention of the Solicitor-General, my view is still unshaken that the meaning is this, viz., that when once these sums have been duly taxed by the proper officer the county is bound to pay them. The officers may have been liberal, or they may have been stingy, but the county is bound to pay what they have allowed. Then the effect of the Appropriation Act was to indemnify the county against expenses, which they are still bound to pay, but which they would not be recouped, but for this Act. The meaning, then, is, the money should be applied to pay those costs which the counties have been obliged to pay. What was done, in fact, was this, though a particular bill had been duly incurred and taxed on the existing law, and consequently the county was bound to pay it, the Treasury have assumed to advise Her Majesty not to appropriate money to pay back this sum to the county. Now that seems to me very bad advice, being in effect advice to disregard an Act of Parliament. There is a difference, however, between bad advice and malicious advice. Here, no doubt, the advice was honest, though no intelligible ground has been shown for it, but it was advice that ought not to have been given and ought not to have been followed. Had there been a statutory obligation upon the Treasury, I think we ought to have granted a *mandamus*, for I think that the treasurer of the county rate, who has been obliged to pay the sum originally allowed, has a clear pecuniary interest, and is therefore entitled to say that he is grieved by this conduct of the Treasury, and is the proper person to promote proceedings in this court. But it is a general principle of all law that where there is an obligation upon a principal it cannot be enforced against the servant. *Mandamus* will not lie against a servant of a railway company, because the company which employ him have failed to fulfil

duty. There is also the familiar case of surs of highways, where, though the parish ıt be made liable, neither can they. law does not employ a *mandamus* to ɔe a duty of the Queen, and where her nts are merely authorised by her, we ıt enforce such an obligation. Such is the ıf all the cases from the time of the case of ?ost Office, in Lord Holt's time, where he ed himself, but where it was held that the naster-General was not liable for non-delivery ters by a carrier. So also it has been held the party aggrieved could not sue the Queen ɔ captain of a man-of-war for running down er vessel. Where the wrong-doer is the nt of the Queen, and the duty is to her and e House of Commons, and nothing more, a *mandamus* to enforce that duty cannot go. wherever the duty is imposed by Act of ıment, I must disclaim the doctrine of the tor-General that any person, however high ation, is not amenable to the jurisdiction of ourt. That is, wherever there is a duty to persons, but I cannot find that such is the ıere. No doubt in *Smyth's* case it appears Lord Campbell, then Attorney-General, ad- the Crown to yield, and in the case of v. *Lords of Treasury* (16 Q. B. 357), he ;ht the 13th section of 3 & 4 Will. 4, c. 15, ı specific duty on the Crown. But that is, perhaps, doubtful, and, at all events, statute is now repealed. Mr. Gorst argued great ingenuity that the statutes now in impose a statutory duty upon the Treasury ɔ public; yet I was unable to see, in following through the several sections, but that the y is granted to the Queen, and there is ng to show that the Lords of the Treasury ore amenable to third parties than servants money placed in their hands to pay weekly or with a credit at a banker's, who clearly ıt be proceeded against for not applying it as ed. On that ground only, therefore, I think nnot let this *mandamus* go.

LLOR, J.—I am of the same opinion. The t Acts of Parliament, have made no change ɔ relation of ministers to the Crown; though ealousy of Parliament has defined the con- ıs within which they are to act, and ses an indirect authority over them. Still a clear principle that we cannot make perform a duty which they owe to Crown. But I entertain no doubt what- that the money really belongs to the ies. I remember when the first remission ntroduced by Sir Robert Peel as a set-off ɔ landed interest. First, the scale was settled justice, with consent of a judge of assize; vards the justices had power to settle the of costs, and a competent person was sent l to look after the taxation in the interests of ublic. But now, when the costs are taxed, is an obligation on the county to pay them ı they cannot resist. There is no power by ɔ review that taxation when once made. The t of the authority of the Treasury is to require r vouchers that the money so taxed has been ɔt paid. They have got money from Parlia- for the specific purpose of defraying these ses. The true construction of the Act is that unds rated are appropriated to the payment ese sums so far as they go; and I am, therefore, entirely of opinion that the Treasury have misunderstood its duty in altering the quantum; but for the reasons already stated, I think we cannot grant a *mandamus*.

LUSH, J.—I am of the same opinion. The applicants have failed to make out any duty between the Treasury and them. The Treasury is not accountable to this court, and there is nothing in the Acts to make them so. I think, nevertheless, their practice of retaxing and reducing the sums allowed is a violation of the Act of Parliament. Before 1865, I should have had greater difficulty in saying what the meaning of the Appropriation Act was, whether of the whole or of part of the sum allowed; but the words of those Acts have been altered since then, I presume intentionally.

COCKBURN, C.J.—I may add that there could be no objection to the sending officers by the Treasury to assist in and control the first taxation of costs, as was done when the system of regulation by the Secretary of State commenced. Or steps might be taken to secure more consistent taxation throughout the country, by means of more definite regulations. When, however, the taxation has been completed by proper officers, the Treasury can have no right to tax the costs again.

Rule discharged.

Attorneys for applicants, *Ridsdale, Craddock* and *Ridsdale*, for *Burchall, Wilson*, and *Hulton*, Preston.

Attorney for defendants, *The Solicitor to the Treasury.*

BAIL COURT.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

Tuesday, Jan. 30, 1872.

(Before BLACKBURN and QUAIN, JJ.)

WILLMER v. THE MAYOR, ALDERMEN, AND BURGESSES OF LIVERPOOL.

5 & 6 *Will.* 4, *c.* 76 (*Municipal Corporation Act*)—*Police—Costs of prosecution to vindicate character—Borough fund—Certiorari.*

Articles having appeared in a newspaper censuring an inspector of borough police, an intimation was given to him by the watch committee that he ought to take steps to vindicate his character, whereupon he instituted proceedings in a police court for libel against the publisher of the newspaper which were withdrawn upon an apology being made at the suggestion of the magistrate.

The watch committee made an order for the payment to the inspector out of the borough fund of the costs he had incurred in the above-mentioned proceedings; and the council of the borough confirmed the order.

A rule nisi for a writ of certiorari to bring up and quash the order having been granted on the application of the publisher of the newspaper, who, as a ratepayer, objected to the payment:

On cause shown:

Held, that the payment was not such as the Watch Committee were by the Municipal Corporation Act (5 & 6 *Will.* 4, *c.* 76) *authorised to order, and that, therefore, the rule must be made absolute.*

RULE calling upon the Town Council of the borough of Liverpool to show cause why a writ of *certiorari* should not issue to bring up an order or resolution of the town council dated the 5th April 1871, whereby the sum of 31*l.* 10*s.* was ordered to

be paid to Christopher Southwell to reimburse him the costs incurred in a prosecution for libel against Charles Willmer.

It appeared from affidavits used on the motion for, and argument of the rule, that Southwell was an inspector of the Liverpool Borough Police Force, and had been in that capacity employed in the inspection of public-houses, and it was part of his duty to make inquiries as to the character of persons who applied to the justices of the borough for victuallers' licences.

Acting on information which eventually proved to be incorrect, he recommended an applicant at a licensing sessions as a fit and proper person to receive a licence. The inspector had known the applicant some years before, and was then aware that he was not of good character, but had forgotten the fact when he made the favourable report to the licensing justices.

Several articles subsequently appeared in a newspaper of which Charles Willmer was proprietor and publisher, containing serious reflections on the conduct of the inspector in the abovementioned matter. An intimation was given to the latter by the members of the watch committee as well as by the head constable of Liverpool that it was his duty to vindicate his character; whereupon he took proceedings for libel against the defendant in the Liverpool Police Court. On the suggestion of the magistrate there presiding an apology was made by the defendant and accepted on the part of the prosecution.

The inspector afterwards made an application to the watch committee that the legal expenses he had been put to in clearing his character from the aspersions of the defendant, might be repaid to him.

On the 14th March 1871 the watch committee passed a resolution to reimburse Southwell the costs which he had incurred in the aforesaid proceedings for libel.

On the 5th April following the resolution was confirmed by the town council, who ordered the treasurer of the borough fund to make the payment resolved upon by the watch committee. The borough was then possessed of a surplus fund more than sufficient to satisfy the amount, derived from sources other than rates, and available for the public benefit of the inhabitants and improvement of the borough.(*a*)

Willmer, as a ratepayer of the borough, formally objected to the payment ordered; and upon his motion, by counsel, the above rule was granted, against which

Milward, Q. C. and *Herschell* showed cause.—The words in sect. 82, "all other charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force . . . ." are comprehensive enough to include the payment in question. In *Reg.* v. *Thompson* (4 Q. B. 900; 5 Q. B. 477), it was held that, under the above section the council of a borough cannot make an order that the treasurer shall pay the costs of defending borough constables on a prosecution incurred by them in the discharge of their duty. Such order must be made by the watch committee, with the approbation of the council, and Patteson, J. said, "I am far from saying that the watch committee might not have ordered payment of these expenses under sect. 82; but they have not done it." Here, however, they have done so with the approbation of the council, and it therefore follows that the order is valid. These were the ordinary expenses of keeping the police force in good repute, and, as there was a surplus of the borough fund, it could "be applied under the direction of the council, for the public benefit of the inhabitants" by sect. 92 (*Reg.* v. *The Mayor of Sheffield*, L. Rep. 6 Q. B. 652), and consequently to defraying these costs, which were incurred for the sake of the inhabitants who are assuredly benefited by the police force being efficient and respected. It could not be argued that if these costs had been occasioned by the inspector clearing his private character, they should be defrayed out of the borough fund. But this prosecution for libel was instigated by his superiors, and undertaken by him expressly for the purpose of vindicating his official character, and so preserving the police force from obloquy, an act just as much done in his official capacity as if he had travelled a long distance to give evidence against an offender, in which case any extra cost of his journey could undoubtedly be repaid to him. "Salaries, wages, and allowances," are the payments which the treasurer is by sect. 82 empowered to make under the direction of the Watch Committee. Then suppose this inspector had been overworked, could he not be justly remunerated by virtue of the enactment? [BLACKBURN, J.—Possibly. If he had done more work than usual they might order a gratuity to be given to him.] Then surely this sum might be allowed as a payment made for the purpose of rendering the force efficient. The Watch Committee rightly thought that an officer with an imputation resting upon

(*a*) By 5 & 6 Will. 4, c. 76 (The Municipal Corporation Act), s. 76, "The council of a borough are required to appoint a sufficient number of their own body, who, together with the mayor, shall be the watch committee, of whom three shall be a quorum; and the watch committee are required to appoint a sufficient number of fit men to be sworn in and to act as constables."

By sect. 77, "The watch committee may from time to time frame such regulations as they shall deem expedient for preventing neglect or abuse, and for rendering such constables efficient in the discharge of their duties; . . ."

Sect. 82 enacts "That the treasurer of every borough, appointed under this Act, shall pay to the constables of such borough appointed under this Act, such salaries, wages, and allowances, and at such periods as the watch committee for such borough shall, subject to the approbation of the council, direct, and the council shall order to be paid also any extraordinary expenses which such persons shall appear to have necessarily incurred in apprehending offenders, and executing the orders of any justice of the peace having jurisdiction within such borough, such expenses having been first examined and *approved by such* justices; and the said treasurer shall *also pay such further sums* as the watch committee shall, *subject to the approbation* of the council, award to any of the persons belonging to the said constabulary force, as a reward for extraordinary diligence or exertion, or as a compensation for wounds or severe injuries received in the performance of their duty, or as an allowance to such of them as shall be disabled by bodily injury received, or shall be worn out by length of service; and all other charges and expenses which the watch committee shall subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this Act."

Sect. 92 directs the application of the borough fund to certain purposes, and provides that "in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied under the direction of the council, for the public benefit of the inhabitants and improvement of the borough."

him could not so well perform his duties, and required him to take steps to free himself from a libellous accusation on his public character, which tended to impair his usefulness. They did not believe the charges made against him, and therefore retained him in the force. Consequently it was for the public benefit, and not for the sake of his private character that the proceedings were instituted.

Kirby appeared in support of the rule, but was not called upon to argue.

BLACKBURN, J.—This is an application for a *certiorari* to bring up an order made by the town council, and recommended by the watch committee of Liverpool, to pay the costs of a certain prosecution, and that such an order may be brought up by writ of *certiorari*, and examined by this court, if it be an order which they had no right to make, is quite clear. It is also unquestionable that such a writ might be granted on the application of a person likely to suffer by the making of the order. No doubt the applicant in the present instance, who, as one who has to bear the burthen of the rates, would suffer, although perhaps to an almost infinitesimal degree, by the order complained of, has a right to come here for a writ of *certiorari*. Now the watch committee has the control of the police, and sects. 82 and 86 of 5 & 6 Will. 4, c. 76, state what may be paid out of the funds at their disposal, viz., "salaries, wages, and allowances." I cannot say that the payment in question is an "allowance," a term which, in my opinion, would rather apply to sums granted for coals, candles, and such things, or possibly might extend to pensions, but certainly not to the costs of a criminal prosecution. Then we read on, "any extraordinary expenses . . . . incurred in apprehending offenders, &c. . . . . compensation for wounds," &c., and, finally, "all other charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this Act." We must construe those comprehensive words as *ejusdem generis* with the preceding ones. The expenditure must be for the purposes of the constabulary force at large. But here an individual constable has been accused of personal misconduct while acting as constable, and in one sense that may be said to affect the whole force. It, however, seems to me that the Watch Committee have here ordered a sum of money to be paid which they had no right to order. Mr. Milward argued that, there being a surplus in the borough fund, the order for payment falls within the 92nd section, which, after appropriating the fund for specific purposes, enacts that "In case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough," but it is of course quite out of the question to say that this cost was incurred for the "improvement of the borough," or for the public interest of the inhabitants. It was not. And if it did not come within the 82nd section it was manifestly not within sect. 92. I think, therefore, that the *certiorari* should go; then there will be a further motion to quash it, and cause shown before the whole court, when there will be more opportunity of fully reviewing the facts, and it may be that the full court will take a different view of them. At present I feel very certain that this was an order which could not properly be made.

QUAIN, J.—I am of the same opinion, and think that the *certiorari* should go in this case. It appears that the inspector received an intimation that it was his duty to vindicate his character, which had been aspersed. Upon that intimation, and without the full sanction of the watch committee, he instituted proceedings. I say without authority, because, from the case of *Reg.* v. *The Town Council of Stamford* (4 L. Rep. Q. B. 900, note) it appears that such sanction should be procured. The watch committee gave no such sanction. Moreover it is to be observed that the stipendiary magistrate before whom the proceedings were taken, said that the inspector was "to blame for having forgotten a thing which he ought not to have forgotten, and which it was his business to remember." Therefore the remarks of the newspapers were to a certain extent justified as to that. Now, I cannot find any general words in section 82, which would include such a payment as that ordered in the present case, nor can I discover any express words that would enable the watch committee to order it. The proceedings taken by the inspector were solely for the vindication of his private character. Nor do I think it comes within the terms "for the public benefit of the inhabitants and the improvement of the borough," in sect. 92. In the case of *Reg.* v. *The Mayor of Bridgwater* (10 A. & E. 28), a libel had been published of an alderman for an act done by him in the execution of his duty as alderman, and he filed a criminal information, and wanted the expenses thereof to be paid out of the borough fund. But the Court of Queen's Bench held that that was not a public purpose, and made absolute a rule for a *certiorari* to bring up an order for payment of the expenses. It appears to me a stronger case, and seems to govern the present one. I cannot say that the expense of the vindication of the inspector of police from a charge of this kind (the watch committee having exonerated him from it in limited terms by finding that he did not do the act complained of wilfully) should be imposed upon the public funds of the borough.

Rule absolute.

Attorney for the defendant: *Wright* and *Venn*, agents for *Raynor*, town clerk, Liverpool.

V. C. MALINS' COURT.

Reported by G. I. F. COOKE and T. H. CARSON, Esqrs., Barristers-at-Law.

Feb. 13 *and* 14, 1872.

CRUIKSHANK *v.* DUFFIN.

Vendor and purchaser—Mortgage by executor to building society—Exercise of power of sale—Specific performance.

An executor took shares in and became a member of a building society to obtain advances for the purposes of his executorship, and mortgaged certain leaseholds belonging to his testator to the society to secure the advances and his subscriptions on the shares.

The society sold the property under the power of sale in the mortgage, but the purchaser raised the objection that the mortgage was invalid.

Held, that the mortgage was valid so far as it was a security for the advances actually made to the executor, but that the clauses purporting to secure to

the society the payment of instalments due by the executor as a member were inoperative.

JACOB AMOS, by his will, dated the 28th Jan. 1867, appointed Joseph Amos his executor. The testator was at the time of his death entitled to, amongst other leasehold properties, a leasehold house, situate in Alfred-street, Bermondsey.

By an indenture of mortgage, dated the 28th Jan. 1869, and made between the said Joseph Amos (the mortgagor), therein described as a member of the Temperance Permanent Benefit Building Society, of the one part, and the trustees of the society of the other part; after reciting that the said mortgagor was desirous of borrowing the sum of 450*l.* for the purposes of the executorship, and had applied to the directors of the said society to lend him that sum in respect of his fifteen advanced shares therein for the term of twelve years, and had proposed to assure the said leasehold premises at Bermondsey to the said trustees to secure the repayment of such sum in accordance with the rules and bye-laws of the said society, and had also offered to pay a premium for such advance, which, being calculated according to such rules and bye-laws, amounted to the sum of 47*l.* 5*s.*, and according to such rules and bye-laws was to be added to and treated as part of the principal sum so advanced—it was witnessed that in consideration of the sum of 450*l.* then paid to the mortgagor out of the funds of the society, being the full amount of his said fifteen advanced shares therein, the mortgagor demised to the trustees the said leasehold premises at Bermondsey for the residue of the term granted by the lease thereof, except the last two days, by way of mortgage for securing the discharge by the mortgagor in some manner authorised by the rules or bye-laws of the said society of the sum of 497*l.* 5*s.* (being the aggregate amount of the said cash advance and premium), and of all fines, interests, and other sums (if any), which before such discharge might become payable by him or them to the said society under its rules or bye-laws, or by virtue of the said indenture, or in any other way. And it was by the said indenture agreed that if three of the monthly subscriptions therein provided for should be in arrear, or in case of the non-observance by the mortgagor of any agreement, covenant, rule, or bye-law therein contained or incorporated by reference, or if the mortgagor should become bankrupt or insolvent, the trustees should have powers of distress and entry as therein mentioned, and also a power to sell the said premises by public auction or private contract. Under the rules and bye-laws of the society the mortgage could be redeemed at any time on payment of the balance of the principal due, with interest, up to the 30th June or 31st Dec. next ensuing the payment, and of the current year's premium on the shares. The said Joseph Amos had never had any connection with the said society, except in respect of the said fifteen shares, which he took solely for the purpose of qualifying himself to obtain the advance of 450*l.*, which he required to enable him to pay off certain mortgages made by his testator to other building societies, and to pay his testator's debts, and for repairs to the said leasehold premises. Joseph Amos, besides being executor, was tenant for life of part of the said leasehold premises at Bermondsey, and he obtained the consent of the other tenant for life to the said mortgage.

On the 14th April 1870, the trustees of the society, acting under the power of sale in the mortgage, put up the premises for sale by public auction, when the defendant was declared to be the purchaser for the sum of 515*l.*, upon which a deposit was duly paid.

Upon investigating the title the purchaser raised the objection that the mortgage was not such a security as Joseph Amos, in his character as executor, was justified in making, and accordingly declined to complete the contract.

The trustees then filed the present bill for specific performance.

Cotton, Q.C. and *T. Smith Osler*, for the plaintiffs.—We have a perfectly good title. It is well settled that an executor may not only mortgage his testator's assets, but may also give the mortgagee a power of sale:

Russell v. *Plaice*, 18 Beav. 21;
Bridges v. *Longman*, 24 Beav. 27;
Re Chawner's Will, L. Rep. 8 Eq. 569; 22 L. T. Rep. N. S. 262;
Earl Vane v. *Rigden*, L. Rep. 5 Ch. App. 663.

This being so, no objection can be raised on the ground that in this case the mortgage is to a building society. There is no *devastavit* here.

Glasse, Q. C. and *Lindley*, Q. C., for the defendant, the purchaser.—The purchaser cannot take under this power of sale, which is invalid and *ultra vires*. The Acts relating to building societies do not provide for their undertaking business of this character. The executor has done that with the assets of his testator which he had no authority to do. He had no right to give a power of sale, on the principle *delegatus non potest delegare*. The executor has entered into personal covenants which are inconsistent with his office. This mortgage amounted to a *devastavit*. In *Sanders* v. *Richards* (2 Coll. Ch. C. 568), before Knight Bruce, V.C., a title under a power of sale granted by an administratrix to a mortgagee was not enforced against a purchaser. That case has never been overruled or doubted, and it was not cited in *Re Chawner's Will*. At all events this is a doubtful title, which the court will not enforce against a purchaser, especially as the *cestui que trusts* are not parties: (*Webb* v *Kirby*, 7 D. M. & G. 376.)

Cotton, in reply.—In *Sanders* v. *Richards*, Knight Bruce, V.C., did not decide this point, because the administratrix and the *cestuis que trust* were not before the court. As to this being a delegation of a power, in *Russell* v. *Plaice*, the Master of the Rolls says that a power of sale must not be considered as a delegation of a power of sale, but as a creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but of the persons interested in the mortgage, that is, a power to render the mortgage effectual; and that the right to create this power is incidental to the authority of the executor to mortgage. For the purposes of selling the estate of the testator, the executor is the absolute owner, and has all the power incidental to that character. *Russell* v. *Plaice* is recognised as a sound authority in *Earl Vane* v. *Rigden*. Here the recitals show that the executor mortgaged as executor and nothing else. No one would take a mortgage without a power of sale. The court will not refuse to compel a purchaser to accept a title simply because the point raised may be doubtful:

Alexander v. *Mills*, L. Rep. 6 Ch. App. 124; 24 L. T. Rep. N. S. 206.

The VICE-CHANCELLOR.—This is a bill for the

specific performance of a contract to buy a leasehold house, which was put up for sale by public auction on the 14th April 1870 by the plaintiffs. There is no question as to the general title whatever, which is admitted, I understand, to be good. The whole question turns upon the validity of the power of sale, under which the plaintiffs sold the property. The property belonged to one Jacob Amos, who died some time ago, and appointed his brother, Joseph Amos, his executor. The mortgage in question was executed by the executor, Joseph Amos, and contained a power to sell, undre which the property has been put up for sale, and under which it is now proposed to make the title. The question is whether the power of sale is a valid power. If it is, there must be a decree in favour of the plaintiffs. If it is an invalid power, then the bill must be dismissed, and, I suppose, with costs. Then is this, or is it not, a valid power of sale? That the same power which grants a mortgage of property may create a power of sale is not disputed by the defendant's counsel. It is very true that it was formerly held by Knight Bruce, V.C. in the case of *Sanders* v. *Richards* (*sup.*), that where a power of sale was given to an executor upon a mortgage, the title under that power of sale could not be forced upon a purchaser. That case, I find, is cited by Lord St. Leonards in his Treatise on Vendors and Purchasers, 14th edit. p. 390 (note), as an authority. But I think — indeed the learned counsel for the defendant has not disputed it — that the doctrine laid down in that case can no longer be maintained as the rule of the court, for in the case of *Russell* v. *Plaice* (*sup.*) the Master of the Rolls decided directly the contrary, namely, that a good title could be made under a power of sale created by an executor. That case of *Russell* v. *Plaice*, having been cited before the Lord Chancellor and the Lords Justices in the case of *Earl Vane* v. *Rigden* (*sup.*), was commented upon by the Lord Chancellor, who expressed his approbation of it, and I therefore think it may be considered as an authority upon the point. There is another case, before myself, of *Re Chawner's Will* (*sup.*), in which I was applied to under Lord St. Leonards' Act to give the opinion of the court whether an executor could, in creating a mortgage, properly give a power of sale. I then held that he might; and in doing that I acted on what I am now told is the universal understanding of the profession, that in every mortgage there must be a power of sale, for otherwise the money is hardly obtainable. I think, therefore, it must now be considered as settled that there is no extrinsic objection to an executor giving a mortgage with power of sale. If, therefore, this had been an ordinary mortgage, I understood Mr. Glasse in opening the case for the defence to say that he would not have raised the objection, but would have accepted the title. Then the objection to this power of sale is this, that it is, in point of fact, a mortgage in the usual form of a mortgage to a permanent benefit building society. The general constitution of those societies is well known in this court. This is the first case that I have seen in which an executor, for the purpose of executorship, has become a member of such a society. But it appears that the executor, in taking that course, was not taking a course which he supposed would be disapproved of by his testator, for I find the testator, who was a man in a humble station of life, having leasehold property, did that which is usually done by persons in his station of life — became a member of a permanent benefit building society; and I find by the abstract of title which has been furnished that in 1860 he mortgaged this very property, by an indenture, dated the 9th Oct. 1860, to the trustees of the Southwark Auxiliary Permanent Benefit Building Society in consideration of certain advanced shares, and so on. We know what that means. A man subscribes for a certain number of shares; he has certain monthly instalments to pay on them, and certain fines in default of payment. Upon paying his instalments, and any fines he may become subject to, he becomes a member, and entitled to be advanced. This testator was advanced the sum of 345*l.* by that society. He then executed a mortgage in the usual form to the "trustees, their executors, administrators, and assigns, for the time being of the society, for the residue of the term, less three days, at the rent of a peppercorn, free from all incumbrances, and subject to the rules and regulations of the society in respect of mortgage securities, and also to the provisoes therein contained." That was a mortgage, in the usual form, and precisely to the same effect as this, namely, to secure payment of the fees and monthly instalments, and any fines to which he might become subject by their non-payment. That mortgage, like the present, is also redeemable, as all mortgages are, upon payment of the principal, and, for want of notice, of a certain amount of specified interest. In the case of every mortgage carrying interest half yearly, after the time for redemption is over, any mortgagor can redeem his mortgage by paying the mortgagee six months' interest for want of notice. So in this case, the mortgage being in the form I have stated is redeemable at any time by payment to the society of the amount remaining due, together with interest for the current half year. That, therefore, is a form of mortgage which I cannot regard as being objectionable, and which certainly would not raise any fatal objection to the validity of the transaction. The amount of interest secured to the society is not complained of, considering the nature of the property. It is about 6½ per cent., which I cannot consider, with reference to this kind of property, as an inordinate amount of interest, and, indeed, no objection has been taken on that ground. There was an objection taken which at first struck me as being of very serious importance, namely, that this deed is made a security not only for the repayment of whatever might become due from the borrower, Joseph Amos, in his character as executor, but also of all fines and sums of money which might become due from him individually as a shareholder in this society. That at first sight struck me as very objectionable for this reason—the deed recites the lease, and it recites the will, and then it recites that the mortgage is for the object of borrowing the sum of 450*l.* for the purposes of the executorship. It is, therefore, distinctly shown on the face of the deed, that this property is trust property which the executor is dealing with as a trustee, and then the ordinary rules of this court make it absolutely impossible that an executor can give a security upon trust property for his own individual debt. The truth is, that the clause making the mortgage a security for all fines and other sums due from Amos, as a share-

holder, was allowed to remain in because it is a clause usually inserted where persons take shares in their own individual right. But it being perfectly clear that the deed could only be a security for that which was borrowed by Amos, as executor, I think that is a totally inoperative clause destroyed by the contents of the deed itself, and that the objection to the power of sale, so far as it depends upon the rules of the court, is entirely removed. That being out of the way, what are the real objections to this power of sale? I say again, this is the first instance I have known of an executor, in his executorship capacity, becoming a member of one of these societies. It did for some time strike me that there were serious objections to it, but when the point comes to be looked into, I do not find there is much in it. This is a kind of property on which there would very likely be very considerable difficulty in borrowing money. It is an important circumstance that when the testator wanted money he himself resorted to a building society. Why, then, should his executor not do the same? It may have been a foolish thing on the part of the executor to render himself individually liable for these fees and fines. It may be a very foolish thing for the executor to enter into a covenant to pay money which no executor, in creating a mortgage, would ordinarily render himself personally liable by covenant to pay; but if he chooses, in creating a mortgage, to render himself individually liable to pay money, no one would say that that is an objection to the mortgage, or an objection to the power of sale which it contains. The result of this is, that this executor, having property in his hands which, I must assume, he felt confident would be, an indemnity to him, becomes a member by taking a certain number of shares in this society by which he becomes liable for certain monthly payments. He says: "I have the property to resort to; there is the power of sale, and I do not mind incurring that risk; therefore, I will individually become liable to pay these instalments. I have the property to resort to; I can at any time redeem by paying half a year's interest, and that is a risk which I am willing to run." Therefore, although this is a building society, notwithstanding the able arguments which have been addressed to me—and the case has been very ably argued on both sides—I come to the conclusion that I can look at the transaction as a mortgage with a power of sale which does not arise in any unreasonable way, and which can only be exercised in default of payment of the instalments. It is not a power exercisable in the same way as powers of sale which are contained in ordinary mortgage deeds. It being considered that an executor may in general create a mortgage with a power of sale, I have only to look upon the whole, and to say this is a mortgage with a power of sale. For the reasons I have stated I do not think there is any substantial objection to it. Although it is the duty of the court to give every due weight to objections to title, and to be very careful that it does not force upon a purchaser a title which he may not be able to hold; yet upon the other hand, I think, it is equally important that persons who enter into contracts of this kind should be compelled to perform *them. Mr. Cotton* has drawn my attention *particularly to a case* which was decided by the *Lords Justices, in* which I am glad to say they, more than they have done in some other cases, have shown an inclination not to give way to frivolous objections to title; I mean the case of *Alexander* v. *Mills* (*sup.*). I am of opinion, therefore, that, having regard to all the circumstances, this is an objection which has no substantial foundation; and upon the whole, I come to the conclusion that the power of sale is well created and has been well exercised, and that there must be a decree for specific performance.

Cotton.—Of course, to make the defendant's title better, he must pay the costs.

Glasse objected.

The VICE-CHANCELLOR.—Knight Bruce, V.C. who is a great authority upon the subject, says that for the sake of the title the purchaser ought to pay the costs. As Mr. Glasse objects to pay them, I cannot say that I think the point was so unreasonable an objection to take that I ought to make the purchaser pay the costs of the suit. I confess that my opinion has undergone considerable fluctuation during the arguments. I therefore make no order as to costs.

Solicitors for the plaintiffs, *Shaen, Roscoe,* and *Massey.*

Solicitors for the defendant, *H. F.* and *E. Chester.*

Friday, Feb. 17, 1872.

Re BRISCOE'S TRUSTS.

Charitable gift — Insufficient description—Latent ambiguity—Parol evidence.

Testator bequeathed 1000*l. to The Victoria Hospital. There was no hospital strictly answering this description, and the legacy was claimed by* (1) *The City of London Hospital for Diseases of the Chest, which was situate at Victoria-park, and* (2) *The Victoria Hospital for Sick Children, which was situate in Chelsea. It appeared that the testator had subscribed to the former, and taken an interest in it, and that he sometimes called it "the Victoria Hospital." It was alleged on the other hand that the Victoria Hospital for Sick Children was the only one publicly known as "The Victoria Hospital," and it appeared that letters so directed were always forwarded there by the Post-office.*

Held, that the description in the will was not sufficiently complete to exclude parol evidence; and the court holding it to be clear that the money was intended for the hospital in Victoria-park, ordered it to be paid accordingly.

JOHN BRISCOE, by his will, dated the 4th Aug. 1870, bequeathed a legacy of 1000*l.* to the Victoria Hospital. The testator died on the 16th Aug. 1870.

On inquiring it was found that there was no hospital which accurately answered the above description; but there was a hospital called the "Victoria Hospital for Sick Children," situate at Gough House, Queen's-road west, Chelsea, in the county of Middlesex. The legacy was also claimed by the City of London Hospital for Diseases of the Chest, situate at Victoria-park.

The executors accordingly paid the money into court and a petition was presented by the treasurer of the latter hospital for payment of the money to him.

It appeared from the evidence in support of the petition that between the year 1850 and 1864 the testator gave donations to the City of London Hospital for Diseases of the Chest to an amount which entitled him to be a life governor of that hospital. It also appeared that he recommended

nts to the hospital, that he corresponded with fficers of the hospital, and that his wife visited . The name of the testator had been pub- l as a steward at the annual dinners of the tal. It was stated that in speaking of this tal he was accustomed to call it "The Vic- Hospital," and that in giving instructions he legacy in his will he spoke of the "Vic- Hospital in Victoria-park."

om the evidence filed by the respondents, on f of the Victoria, Hospital for Sick Children, was situated in Chelsea, it appeared that estator had been solicited to take an active in the establishment of that hospital, and that nnual reports had been regularly forwarded m. It was stated that letters intended for fficers of the hospital were frequently ad- ed "Victoria Hospital," and that letters so ssed were always delivered at the hospital in ea by the Post-office authorities. A test so addressed and posted in the Victoria- district had been delivered at the hospital in ea. According to the Guide to the London ties the only institutions in the names of the word "Victoria" occurred were the Victoria Patriotic Asylum and the Victoria ital for Sick Children. It was alleged that ords "for sick children" did not form any of the name of the letter, and that its real was the Victoria Hospital. It was contended, fore, that inasmuch as there was one charity which completely answered the description in ill, parol evidence was not admissible to ex- the gift.

ton, Q.C. and *Romer*, in support of the peti- eferred to

Kilvert's Trusts, L. Rep. 12 Eq. 183; 24 L. T. Rep. N. S. 823; s. c. on appeal, 20 W. R. 225;
Charter v. *Charter*, 25 L. T. Rep. N. S. 575.

rson, Q.C. and *A. E. Miller*, Q.C. for the ria Hospital for Sick Children.

ed, for the executors.

nming, for the Attorney-General.

VICE-CHANCELLOR said that a testator having athed 1000*l.* to the Victoria Hospital, the was claimed by two parties. The petitioner sented the City of London Hospital for ses of the Chest, which was situate at Vic- park; and the respondent represented the ria Hospital for Sick Children, which was e in Chelsea. The claim of the latter was ed on this, that it was the only hospital answered to the description of the Victoria ital. The former claimed on the ground that gh the name of this hospital was not the Vic- Hospital, yet that name was frequently applied and it was known as such by the testator. weight no doubt was to be attributed to the ent derived from the name of the hospital elsea, and it was supported by the principle had been laid down in *Re Kilvert's Trusts*, lows: "Wherever a bequest, whether made erson or a charity, is perfect and unequivocal its parts, no parol evidence is admissible to n it; and if in the present case there had a society completely answering the descrip- n the will, that society must have taken the ." If then the description in the will of the y had been complete and unequivocal, that would have applied, and parol evidence would been inadmissible. Thus if the words "for hildren" had been added *to the words* "the Victoria Hospital," then there would have been no doubt. The words of the will would have unmis- takeably included the hospital in Chelsea as the object of the gift, and excluded the hospital in Victoria-park, and it would have been impossible to go out of the words of the will. But the de- scription was general—"the Victoria Hospital," and these words might have meant in the mind of the testator either of these hospitals. Now his Honour had to ascertain what was in the mind of the testa- tor, for this was the principle which had been applied in *Kilvert's Trusts*, and had also been applied in that case by the Lords Justices, though with a slightly different result. It was clear in the present case that the testator intended the legacy for one of these two hospitals. The hos- pital in Victoria-park had a general object; but the hospital in Chelsea confined itself to the treat- ment of sick children. The evidence showed that for twenty years the testator had given donations to the hospital in Victoria-park, that he was a life governor, that he had allowed his name to be used as a steward at their dinners, and that in every possible way he had supported it and taken an interest in its welfare. The evidence on behalf of the respondent on the other hand did not amount to more than that the testator had been asked to sub- scribe to the hospital in Chelsea. It was not shown that he had ever subscribed one penny to it; he scarcely knew of its existence, and he was a total stranger to it. Now, did the testator intend to give this legacy to a charity which he supported, or did he intend to give it to a charity of which he knew nothing? It was a question of intention, and his Honour had no doubt as to what the testator really intended. The cardinal rule in the con- struction of wills was to ascertain the intention, and to carry that into effect, if possible. The re- spondent had this legal point in his favour, that the words used by the testator were a more accu- rate description of the hospital in Chelsea than of the hospital in Victoria-park. Parol evidence of the instructions given by the testator for his will could not be received; but, looking at the words of the will itself, his Honour was clearly of opinion that when the testator used the words "Victoria Hospital" he meant the hospital situate in Victoria- park. The argument on behalf of the respondent had really been a general argument in favour of charitable objects. Where a testator had imperfectly described a charity, it was a rule that in order to ascertain what charity was meant, the court would take into consideration what the charities were with which the testator had been connected, and in which he had been interested. It was always the wish of the court to hand over the gift to a charity with which the testator had been connected, rather than to a charity to which he was a stranger, even though the latter might be more accurately de- scribed. His Honour had applied these rules in the cases of *Coles' Will*, which was only reported upon a question of legacy duty (22 L. T. Rep. N. S. 221), and he should also apply them in the present case. While, therefore, he thought that if the testator had used the words, "The Victoria Hos- pital for Sick Children," the respondent would have been entitled; yet, inasmuch as the testator had used only the words, "The Victoria Hospital," the money must be paid to the petitioner. The costs of all parties would be paid out of the fund.

Solicitors: *Fox and Robinson*; *Rowen and Bradley*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barrister-at-Law

Feb. 27 and 28, 1872.

TELFORD v. METROPOLITAN BOARD OF WORKS.

Right of re-purchase—Scheme under Metropolitan Commons Act 1866 in contravention of right—Injunction to restrain promotion of scheme—29 & 30 Vict. c. 122, ss. 6, 14, 15.

A court of equity will not restrain a person from applying to Parliament on public grounds; but where a man is acting in violation of a contract personal to himself, and with which public interests have nothing to do, the relief which the court would grant if no question were raised about Parliament, will not be refused on the ground that an application to Parliament is about to be made.

D. and F. purchased the interest of the lords of the manor in a common, with a view of dedicating the same to the public as a recreation ground, and by the deed of conveyance rights of re-purchase were reserved to the owners of certain equitable interests in the common, in case the whole of the common should not be so dedicated. D. and F. subsequently transferred the purchase to the Metropolitan Board of Works, upon the terms expressed in the above conveyance. The board presented to the Inclosure Commissioners a memorial under the Metropolitan Commons Act 1866 praying that a scheme might be prepared for the dedication of the common to the public, and it was stated in the memorial that part of the common might be advantageously sold by the board

The commissioners having requested the board to prepare a scheme, a scheme was prepared by them in one of the provisions of which power was given to the board to acquire any rights of re-purchase affecting the common, first making compensation for the same, and also power to sell or let a certain part of the common. This scheme was afterwards published by the commissioners as a scheme under the Act.

On a bill filed by one of the parties to whom a right of re-purchase had been reserved on the original conveyance to D. and F., an injunction was granted restraining the board from promoting or supporting the above scheme, or any other scheme inconsistent with the terms on which the common was conveyed to D. and F., and from doing anything to prejudice the right of re-purchase reserved to the plaintiff.

THIS was a suit to restrain the Metropolitan Board of Works from promoting a scheme under the Metropolitan Commons Act 1866, for converting Tooting Beck Common into a public park or recreation ground.

The plaintiff was entitled to certain lands which had been laid out for building adjoining Tooting Beck Common. He was also entitled to an equitable interest in one-twelfth part of an undivided moiety of Tooting Beck Manor, the legal estate in which moiety was vested in Henry Willis, as trustee under the will of Elizabeth Keymer, for the plaintiff and certain other parties. The fee simple of the remaining moiety of Tooting Beck Manor was vested in Robert Hudson.

On the 30th Nov. 1866, a memorial was presented to the Metropolitan Board of Works by *Berish Drew*, Philip William Flower, and William Carpmael (since deceased), stating that on behalf of the inhabitants of Streatham, they had entered into negotiations with the lords of the manor of Tooting Beck with a view to preserving the common of Tooting Beck for the use of the inhabitants of the metropolis; and that ultimately they had agreed on their own responsibility to purchase the manorial rights. The memorial stated that since this agreement the Metropolitan Commons Act 1866 had come into operation, by which the Metropolitan Board of Works was empowered to act as the local authority in respect to all commons within the metropolitan area; and the memorial prayed that the Board would take such action as should ensure the said common being dedicated to the public as an open space for recreation.

At a meeting of the Metropolitan Board of Works, held on the 30th Nov. 1866, the above memorial was referred to the works and general purposes committee for consideration, and on 3rd April 1868, that committee reported, that in their opinion it was desirable that the board should comply with the prayer of the memorial, and take steps for securing the common for public advantage. A resolution of the board was passed in accordance with the opinion of the committee to the effect that the board should acquire the interest of the lords of the manor in the common of Tooting Beck, with a view to a scheme being prepared and sanctioned under the Metropolitan Commons Act 1866, for the advantage of the metropolis. And the matter was referred back to the works and general purposes committee to carry out the necessary arrangements.

The agreement for the purchase by the memorialists, Drew and Flower, of the rights of the lords of the manor in Tooting Beck was carried into effect by an agreement, which was dated 10th July 1868, and made between Hudson of the first part, Willis of the second part, the persons beneficially interested under the will of Elizabeth Keymer (including the plaintiff) of the third part, and Drew and Flower of the fourth part. The agreement recited that the plaintiff was largely interested in lands adjoining the commons or waste lands belonging to the manor of Tooting Beck, and that it was considered by him that it would be greatly to his interest that such commons or waste lands should not be built upon, and on that ground he had been induced to enter into that agreement, and recited also that the other persons beneficially interested under the will of Elizabeth Kymer, also considered that it was for their interest that such commons or waste lands should not be built upon, and on that ground had been induced to enter into that agreement; and Hudson and Willis, with the consent of the persons parties thereto of the third part, thereby agreed to sell, and Drew and Flower agreed to purchase, at the price of 10,200*l.*, the said manor of Tooting Beck, with its appurtenances, subject to (amongst others) the following stipulations:—

9. In the event of the commons or waste lands belonging to the said manor not being given or dedicated to the public as a park or recreation ground under the provisions of an Act of Parliament, entitled, "The Metropolitan Commons Act 1866," or any other Act of Parliament, and in such way that no part thereof be at any time without the consent in writing of the said Charles Telford" [and of the other persons interested under the will of Elizabeth Keymer], "their respective executors, administrators and assigns, sold or let, or building or any other lease, for the purpose of building

the expenses of making or maintaining the said park, or for any other purpose whatsoever, and so that no house or any other building be erected on such commons or waste lands except such lodges or other buildings as may be necessary for the maintenance or management of the said park or recreation ground within a period of five years from the date of the conveyance to the purchasers, then at the expiration of such period of five years, the said Charles Telford shall purchase, and the present purchasers shall convey to him, one undivided 24th part or share of the hereditaments and premises hereby contracted to be sold at or for the price or sum of £425, being an amount equal to that which he the said Charles Telford, will receive under this contract of the said sum of £10,200.

And a similar right of pre-emption of their respective shares of the manor was reserved to the other persons interested therein under the will of Elizabeth Keymer.

10. The contract for purchase by the said several parties mentioned by the 9th Article shall not interfere with the power of the parties hereto of the 4th part, or the survivor of them, or his heirs or assigns, as lords or lord of the said manor, to memorialise the Inclosure Commissioners for England and Wales and the Metropolitan Board of Works, or the local board, as the case may require, to cause or authorise the said commons to be enclosed under the provisions of the Metropolitan Commons Act 1866, provided that the scheme be not inconsistent with this agreement, and to act in all respects as lords or lord of the said manor in relation to such enclosure. And all parties hereto shall, if and so far as may be necessary, concur in the memorial and consequential proceedings under the Act.

11. If at any time within the said period of five years the dedication in manner aforesaid of the said commons or waste lands to the public shall be found to be, in the opinion of the purchasers, or of the survivor of them, impracticable, then the purchasers, or the survivor of them or their or his heirs or assigns shall be at liberty to give the respective vendors aforesaid, or the heirs, executors, or administrators of such of them as shall be then dead, notice in writing that the appropriation and dedication of the said commons and waste lands in manner aforesaid to the public has been found to be impracticable, and immediately upon the giving of such notice the provisions in the 9th Article shall come into operation and take effect as if the said period of five years had then expired and the commons and waste lands had not been dedicated to the public in manner aforesaid."

By a deed of conveyance dated the 17th Dec. 1868, the manor of Tooting Beck was conveyed to Drew and Flower. The deed was executed by Hudson and Willis, but the plaintiff and the other persons interested in the manor, under the will of Elizabeth Keymer, refused to execute the deed on the ground that the provisions were not in accordance with the agreement of the 10th July 1868. Accordingly an indenture dated the 31st May 1869, was indorsed upon the deed of the 17th Dec. 1868, and executed by all the persons interested, by which provisions substantially the same as those contained in the agreement of the 10th July 1868, were incorporated with the deed of conveyance.

On the 2nd Dec. 1868, in anticipation of the purchase by the Metropolitan Board of Works of the said common from Drew and Flower, a draft memorial from the Board to the Inclosure Commissioners of England and Wales was settled by counsel on behalf of the board. The memorial prayed for the preparation of a scheme, under the Metropolitan Commons Act 1866, respecting Tooting Beck Common, and was similar to the memorial set out below, except that no mention was made therein of a proposed sale, by the board, of any part of the common.

On the 8th *Feb. 1869, a meeting* of the Works and General Purposes Committee of the Metropolitan Board of Works was held, at which a report of W. W. Smith, the solicitor of the Board of Works relating to the purchase of the manorial rights in Tooting Beck Common was read. Mr. Smith discussed the form of the contract to be entered into for the purchase of these manorial rights by the board, and also mentioned a suggestion which had been made by the solicitors of Messrs. Drew and Flower that it would be advantageous to the board to sell a small piece of the waste of the manor which had been separated from the rest of the common by the West London and Crystal Palace Railway. Mr. Smith further drew attention to a report which had been made in Nov. 1866, as to the purchase of Tooting Beck Common, by Mr. Vulliamy the superintending architect of the board, which stated that if the board could sell certain parts of the common it might expect to be recouped 4000*l.* or 5000*l.* towards the purchase money.

On the 12th Feb. 1869, a meeting of the Board of Works was held, at which the report of the committee on the purchase of the manorial rights in Tooting Beck Common from Messrs. Drew and Fowler was presented. The contract for the purchase and also the draft memorial to the Inclosure Commissioners which had been settled by counsel as above-mentioned, were approved.

The contract for the purchase of the manorial rights was carried into effect by an agreement which was dated the 25th June 1869, and made between Drew and Flower of the one part, and the Metropolitan Board of Works of the other. This agreement recited the above-mentioned agreement of the 10th July 1868, and that the last mentioned agreement was entered into by Drew and Flower, with the knowledge and approval of the Metropolitan Board of Works, to the intent that the commons or waste lands belonging to the said manor might be dedicated to the public as a park or recreation ground under the provisions of the Metropolitan Commons Act 1866. And that the said manor and premises were conveyed to Drew and Flower by an indenture dated the 17th Dec. 1868, subject to stipulations authorised by the said articles of agreement as modified or explained in an indenture dated the 31st May 1869, indorsed on the said conveyance. And that the Metropolitan Board of Works intended to take proceedings under the Metropolitan Commons Act 1866, in reference to the said commons or waste lands. And by the agreement of the 25th June 1869, it was agreed between the parties thereto that Drew and Flower, in pursuance of the object with which they bought the said manor, and to the intent that the same might be dedicated to the public as above mentioned, would transfer their purchase of and all their interest in, the said manor, commons, and waste lands under the thereinbefore recited agreement and conveyance, and the indorsement thereon respectively, to the Board of Works, and the said Board of Works would accept the transfer thereof upon the terms mentioned in the same agreement, and all the terms of the agreement should be considered as embodied *mutatis mutandis*, in the agreement now in statement, Drew and Flower assuming the place of the vendors, and the said Board of Works assuming the place of the purchasers in the recited agreement. And it was also agreed that Drew and Flower should, if required by the board,

concur in the memorial to be presented by the board under the Metropolitan Commons Act 1866, for a scheme in reference to the said commons or waste lands, and in all consequential proceedings under such Act, and the said board should defray all the costs and expenses of Drew and Flowers, as well as of the board, in relation to such proceedings. A proviso was also contained in the agreement of the 25th June 1869, which enabled the Metropolitan Board of Works to determine that agreement, in case at any time before a scheme as to the said commons or waste lands should have been confirmed by Act of Parliament, the board should be of opinion that there would become payable under a scheme under the said Act in respect of any rights and interests not comprised in the said therein-recited agreement sums exceeding the sum of 4000*l.*, or in case a scheme as to the said commons or waste lands should not receive the sanction of Parliament under the said Act within three years from the date of that contract.

Having regard to the suggestions by the solicitor of Messrs. Drew and Flower as to the sale of a part of the common, and also to Mr. Vulliamy's report, it was considered desirable to introduce into the memorial to be presented by the board to the Inclosure Commissioners some reference to such a sale. The draft memorial was accordingly again settled by counsel on behalf of the board; and ultimately, in July 1869, a memorial was presented to the commissioners, of which the material parts were as follows:—

To the Inclosure Commissioners of England and Wales.

The Memorial of the Metropolitan Board of Works,

Sheweth,—That your memorialists, by the Act entitled the Metropolitan Commons Act, are declared to be, and are empowered to act thereunder, as the local authority of the metropolis in respect to all commons which are wholly or in part within the area defined by the Metropolis Management Act 1855.

That the common of Tooting Beck is within such area. The said common consists of about 144 acres, exclusive of the portions thereof occupied by two railways which run through it.

That Messrs. Beriah Drew and Philip William Flower, both residing within the parish of Streatham, some time since entered into an agreement with Messrs. Robert Hudson and Henry Willis, the lords of the manor of Tooting Beck, and the other persons interested under the will of Elizabeth Keymer, to purchase for the sum of 10,200*l.* the manor of Tooting Beck, with its rights, members, and appurtenances. . . . .

That it was represented to your memorialists by the said purchasers, that their object in making the said purchase was the having the said common dedicated to the public as a place of recreation, and such purchasers applied to your memorialists to take their purchase off their hands.

That your memorialists, having taken the matter into their consideration, and considering that the case was one in which a scheme might properly and with great advantage to the public be applied for under the provisions of the said Act, have entered into a contract with the said purchasers, the effect of such contract being substantially to take their place under the first-mentioned contract, your memorialists reserving power to cancel the agreement should a scheme not be obtained.

That the said purchase includes the purchase in fee-simple of the said common with the exception of the rights following. . . . . There is a small piece of the common separated from the remainder thereof by the West London and Crystal Palace Railway, which might be advantageously sold or let by the board, provided certain rights of pre-emption in case of the common not being wholly devoted to public purposes, should not be an obstacle to their so doing, and it may be desirable to deal with this in any scheme under the said Act.

Your memoralists pray that you will be pleased to take this memorial into your favourable consideration, and will direct such examination and inquiry as you may think necessary or proper in relation to the subject-matter thereof, and that if on examination and inquiry you should think fit so to do, you will be pleased to prepare the draft of a scheme under the said Act respecting the said common, and that thereupon such proceedings in reference to such draft scheme as are in that behalf provided by the said Act may be taken and had, and that a scheme may be finally settled and approved of by you in such form as you may think expedient as will be in conformity with the said Act, provision being made therein for your memoralists acquiring and making compensation for the rights above mentioned.

On the 17th Aug. 1869, a letter was written by order of the commissioners to the board, requesting the latter to prepare and forward a draft scheme under the Metropolitan Commons Act 1866, for the dedication of Tooting Beck Common to the public.

A draft scheme was accordingly prepared on behalf of the board in Oct. 1869, and having been approved at a board meeting held on the 10th Dec. 1869 was forwarded to the commissioners on the 15th Dec. 1869.

In May 1870 a printed draft scheme was issued by the commissioners, which purported to be a draft scheme pursuant to the provisions of the Metropolitan Commons Act 1866 for the establishment of local management with respect to Tooting Beck Common. Such scheme was in all respects identical with that prepared on behalf of the Metropolitan Board of Works. It recited the agreement of the 10th July 1868 and the agreement of the 25th June 1869; and recited also that the commons or waste lands belonging to the said manor were delineated on the plan annexed to the schedule to the scheme, and were in such plan coloured green and blue respectively; and that the piece of common delineated on the said plan and coloured blue, being of small extent, and being separated from the other and larger portion of the said commons or waste lands by the West London and Crystal Palace Railway, its dedication to the public would be of but slight advantage, and being property which could be sold or let to advantage, it would be more desirable if the same were sold or let with a view to the proceeds arising therefrom being applied in manner thereinafter mentioned; and that under the circumstances aforesaid it was desirable that such powers to sell or let such small piece of common should be conferred on the Metropolitan Board of Works as thereinafter appeared. And recited that it was intended that the Metropolitan Board of Works should carry into effect the said agreement of the 25th June 1869, and take a conveyance to the board of the said manor and premises thereby agreed to be sold, and should acquire all estates, interests, and rights of a profitable or beneficial nature, in over or affecting the said commons or waste lands, making or providing compensation for the same (if necessary) as provided by the 15th section of the Metropolitan Commons Act 1866. The material provisions which were proposed by the draft scheme were as follows:—

From and after the completion of the said purchase by the board, the portion of the commons or waste lands delineated on the said plan, which is thereon coloured green (which portion is in this scheme referred to as "the common"), shall be, and is hereby dedicated to the public, as a park, common, or recreation ground, and shall for the purposes of this scheme, be regulated and managed by the board.

The powers of the board generally as to appointing officers and servants, and paying them under the

al Acts applicable to the board, shall apply to all
persons as, in the judgment of the board, may be
sary and proper for the preservation of order on,
he enforcement of bye-laws, with respect to, the
common, or recreation ground, and otherwise for
urposes of this scheme. And the board may make
for regulating the duties and conduct of the several
s and servants so appointed and employed, altering
wise as occasion may require.
board may drain, inclose by fences, plant, beautify,
prove the common as may be necessary. No house
y other buildings shall be erected on the common,
such lodges or other buildings as may be neces-
or the maintenance or management of the said park,
on, or recreation ground. The board may from
e time erect on the common such lodges and other
ngs as may be necessary for the maintenance or
gement of the said park, common, or recreation
d.
board shall frame bye-laws and regulations for the
ntion of nuisances, and the preservation of order on
rk, common, or recreation ground, and particularly
venting the deposit of rubbish on, and the illegal
, cutting, felling, and sale of turf, soils, bog-wood,
, sand, loam, clay, gorse, furze, fern, brushwood,
nd the like, from the park, common, or recreation
d.
purchase and other moneys which shall become
le under the said agreement of the 25th June 1869,
l other compensation which shall become payable
this scheme, and all expenses which have been
y incurred by the board in relation to this scheme,
e memorial for a scheme, and all costs and ex-
which shall hereafter be incurred by the board in
nt the execution of this scheme, shall be deemed to
enses of the board in the execution of the Metro-
fanagement Acts, and be raised accordingly.
the powers of the board as to borrowing contained
Metropolis Management Act 1855, and the Metro-
Management Amendment Act 1862, as varied by
Metropolitan Board of Works (Loans) Act 1869, shall
to this scheme, but the total amount borrowed
purposes of this scheme shall not at any time
20,000*l.*; but such sum shall be in addition to the
f ten millions sterling referred to in such last-
ned Act.
withstanding the stipulations and rights of pre-
n subject to which the said manor and premises
e conveyed to the said Beriah Drew and Philip
n Flower, as aforesaid, it shall be lawful for the
to purchase and acquire such rights of pre-emption,
aking compensation for the same, such compensa-
ense of difference to be ascertained and provided
ner mentioned in the 15th section of the Metropo-
Commons Act 1866. And after payment of such
nsation, such stipulations and rights of pre-emption
ase to be binding or exercisable to and for all
and purposes whatsoever, as if the same had never
ade or reserved, and at any time thereafter but
ore the board may exercise the powers contained
clause next hereinafter contained
board may sell and dispose of that portion of the
mmon or waste lands which is delineated and
d blue on the said plan, or may let the same or any
parts thereof either upon building or other leases,
erwards sell and dispose of the land or lands so
ject to lease or leases thereof, and all moneys arising
m sale, letting, or other disposition of the said
coloured blue, shall be paid to the board (a
under the seal of the board being hereby made a
nt discharge to the purchaser or any other person
the same) and may be applied by them in or
s payment of any purchase and other moneys
made payable as expenses of the board, and shall,
s not so applied, be carried to and form part of
nsolidated Loans Fund, and be applied as provided
37th section of the Metropolitan Board of Works
) Act 1869.

land coloured blue, referred to in the draft
e, and which it was thereby proposed to
ow the board to sell or let, was the part of
mmon separated from the remainder by the
London and Crystal Palace Railway, as to
le of which a suggestion had been made by
the solicitors of Messrs. Drew and Flower, as above mentioned, and to which a reference had also been made in the memorial to the commissioners. This piece of land immediately adjoined the building land to which the plaintiff was entitled.

The scheme was promoted and supported by the Metropolitan Board of Works, and it was alleged in the bill that they intended to apply to Parliament for an Act to confirm the above scheme under the provisions of the Metropolitan Commons Act 1866.

On the 24th June 1870, the plaintiff filed a bill against the Metropolitan Board of Works and Drew and Flower, charging that any opposition to the above scheme on his part either before the Inclosure Commissioners or in Parliament would, whether successful or not, be attended with considerable cost to the plaintiff, for which he would have no adequate remedy, and to which he ought not to be exposed. The bill prayed that the Metropolitan Board of Works and the other defendants, their respective officers, servants, and agents, might be restrained from promoting or supporting the aforesaid scheme, or any other scheme under or purporting to be under the provisions of the Metropolitan Commons Act 1866, whereby a part only and not the whole, of Tooting Beck Common aforesaid, or other the commons or waste lands of the said manor, should be dedicated to the public as a park or recreation ground, or whereby any part of Tooting Beck Common, or other the commons or waste lands of the said manor, should be sold or leased or made saleable or leasable, without the plaintiff's consent, or which should be otherwise inconsistent with the provisions contained in the agreements of the 10th July 1868, and the 31st May 1869, and from doing or causing or permitting to be done any other act or thing whereby or by means whereof the right of purchase, reserved as aforesaid to the plaintiff by the said agreements, or either of them, might be defeated, taken away, or prejudiced.

The material sections of the Metropolitan Commons Act 1866, being those referred to by the Vice-Chancellor in his judgment, were as follows:

6. A scheme for the establishment of local management with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common, and to the making of bye-laws and regulations for the prevention of nuisances, and the preservation of order therein, may be made under this Act, on a memorial in that behalf, presented to the commissioners by the lord of the manor or by any commoners, or by the local authority, or in case of a common extending into the districts of two or more of the bodies described in the first schedule to this Act, then by any one or more of such bodies.

14. Every scheme shall state what rights (if any) claimed by any person, or class of persons, are affected by the scheme, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been in relation thereto consented to by that person or class of persons, or any of them.

15. No estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common, shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme, without compensation being made or provided for the same, and such compensation shall, in case of difference, be ascertained and provided in the same manner as if the same compensation were for the compulsory purchase and taking or the injurious affecting of lands under the provisions of the Lands Clauses Consolidation Act 1845, and the Lands Clauses Consolidation Acts Amendment Act 1860.

16. If any person claiming any estate, interest, or right in, over, or affecting the common to which any scheme relates, is dissatisfied with any determination made or implied by the commissioners, or by the scheme concerning any estate, interest, or right in, over, or affecting the common, every such person may obtain a decision thereon in an action at law in the manner provided by sect. 56 of the general Act to facilitate the Inclosure and Improvement of Commons, passed in the session of the eighth and ninth years of the reign of her present Majesty, chapter one hundred and eighteen.

Kay, Q.C. and *Stevens* for the plaintiff, contended that the Inclosure Commissioners were exceeding the powers given them by the Metropolitan Commons Act 1866 in issuing a scheme containing the clauses of which the plaintiff complained. If the court would restrain the commissioners from issuing such a scheme, it would also restrain the Metropolitan Board of Works from promoting it. The court had jurisdiction to grant such an injunction.

Speer v. *Crawter*, 17 Ves. 216;
Prewin v. *Lewis*, 4 Myl. & Cr. 249.

It was alleged by the board that they were acting as the local authority under the Act. But their action was really based upon the private interest which they acquired under the agreement of the 25th June 1869.

Eddis, Q.C. and *Charles Hall* for the defendants, the Metropolitan Board of Works.—First, the injunction prayed would be entirely nugatory, as the matter has passed out of our hands; the Inclosure Commissioners are the persons who are acting, and who ought (if anybody) to be restrained. Secondly, we say that we are acting in this matter as the local authority under the Act, and this is really an application to the court to interfere with a body having public powers for the purpose of performing public duties. No injunction will be granted to restrain such a body from making an application to the Legislature for a public purpose.

Heathcote v. *North Staffordshire Railway Company*, 2 Mac. & Gor. 100;
Stockton and Hartlepool Railway Company v. *Leeds*, 2 Phil. 666;
Lancaster and Carlisle Railway Company v. *North Western Railway Company*, 2 K. & J. 293;
Steele v. *North Metropolitan Railway Company*, L. Rep. 2 Ch. 237; 16 L. T. Rep. N. S. 192;
London, Chatham, and Dover Railway Arrangement Act; Ex parte Hartridge, L. Rep. 5 Ch. 671; 20 L. T. Rep. N. S. 718.

W. Morris and *Casson* for the defendants Drew and Flower.

The VICE-CHANCELLOR.—I have no reason to doubt that the Board of Works have acted as they think right in the discharge of a public duty. I desire to make no observation which can in the least cast any imputation upon them for anything that they have done. The plaintiff also, as it seems to me, has acted for the clear protection of his legal rights. No attempt has been made, and no attempt could well be made, to find fault with any part of the conduct that he has thought it right to pursue. Having said that, the case is one which in its nature and elements is of the simplest possible kind. One of several persons, proprietors of Tooting Common, being also an owner of land which had been laid out for building purposes, *and who, therefore*, is naturally interested in *the condition* in which Tooting Common shall *be kept—he* and the other owners enter into *a contract* with two gentlemen, who seem to have acted from public motives, for the sale to them of Tooting Common, in order that it might be (for that was the ultimate object) devoted to the recreation and enjoyment of the public. That being his plain object, and the object of all the other landowners, and having in view his own interests also as an owner of land laid out for building purposes, he and they enter into the agreement which is stated in the bill. The agreement is as plain as it need be; perhaps it might have been expressed with greater distinctness, but it is sufficiently plain. The object of it is to provide, after regulating the terms of the purchase, that if by any accident the objects which the vendors have in view cannot be accomplished, namely, dedication to the public, and not omitting, as I cannot omit, circumstances which appeared of special interest to Mr. Telford, the plaintiff—if those objects cannot be accomplished, then the right to have back again that which they agreed should be sold should be reserved to the vendor, without reference to the particular nature of this property. That is a stipulation which a vendor might easily make in almost any instance of this kind. That is the agreement, and the plain agreement. If it is not dedicated to public purposes in the way that is shadowed out rather than expressed in the agreement, then we are to have it back again. Upon those terms Mr. Drew and Mr. Flower make this purchase. After having made the purchase, they communicate to the Metropolitan Board of Works, which is properly called the local authority by the Act of Parliament, that they have made this purchase; and in a memorial, which is in evidence, they state their motives for making the purchase, the object which should be accomplished by its being completed, and suggest to the Metropolitan Board of Works that in the discharge of their public duty they cannot do better than take the bargain off their hands. The Metropolitan Board of Works took that view of the subject themselves; and then we find an instrument set out in the pleadings which is as distinct as anything can be, namely, a contract between the Metropolitan Board of Works and Mr. Drew and Mr. Flower, which is made with reference to the original agreement. In express and explicit terms the Metropolitan Board of Works contract that if they became the purchasers (for in certain events they might not) they will take it in the same manner, and with the same rights and no other, and subject to the same obligations as Mr. Drew and Mr. Flower would have been if they had continued the owners. If Mr. Flower and Mr. Drew had remained the sole owners of this property, could it be argued for a moment that they could have shuffled off this obligation which they had taken upon themselves at one time? Of course no such contention could have been raised. Can it be said, since the Metropolitan Board of Works were competent to contract, and have contracted to be in the very shoes of Mr. Drew and Mr. Flower, that they can relieve themselves from the obligation which they have contracted? I cannot see any reason in law—certainly there cannot be any in morals or justice—why they should be heard to say so, or why they should say so. I take it that unless there is some principle beyond the law, or some rule with which I am unacquainted which shall be applied in favour of the Metropolitan Board of Works, there can be no grounds upon which they can be heard to say that they are entitled to do

anything which is in contradiction of this very plain agreement. The proceedings which took place afterwards are all quite inconsistent with it. The first memorial to the Inclosure Commissioners which is drawn up recognises the rights of the vendor. By the time the second memorial came to be drawn up, another view had occurred to the Metropolitan Board of Works. I cannot shut my eyes to the fact, although it has not been much dwelt upon, that it is in evidence that Mr. Vulliamy in his report had suggested to the Metropolitan Board of Works that that part of the land which is coloured blue, and which is the subject of this suit, might be profitably employed by them for the purpose of building, which would have been wholly subversive of the intention of the parties who entered into the agreement, and plainly detrimental to the interests of the public. Now that notion having been suggested, if that was the origin of it, whether that was regular or not, they in their new memorial addressed to the Inclosure Commissioners suggest that they might make useful employment of some part of the land which is not wanted for public purposes, and they have in view that the proceeds of it might be applied in diminution of the purchase money which they had paid. Now upon this application, when the commissioners were desired, as under the Act of Parliament it seems it ought to be original with them, to prepare a draft scheme, they requested that a scheme should be prepared. It is in consequence of that request that the memorialists took upon themselves, not unwillingly I dare say, to prepare that scheme which was afterwards submitted to the commissioners, and in which that stipulation which the plaintiff objects to was introduced. To say that the commissioners have suggested this would be merely to do violence to the very plain facts of the case. For saying that even in the memorial itself there is any pretence on the part of the Metropolitan Board of Works, in the discharge of public duties, to acquire the land and to get rid of the obligation, there is no foundation whatever. The Metropolitan Board of Works have only a plain duty to perform. The Act of Parliament points it out distinctly, and as distinctly points out the duty of the commissioners. What the Metropolitan Board of Works want, in plain English, is to make money by this transaction. They do not conceal it. If they had attempted to do so it would have been in vain, because it is plain upon the face of it. They say they are acting in pursuance of the Commons Inclosure Act of 1866. Now see what the nature of the Act of 1866 is. It first of all takes away the power which the Inclosure Commissioners had to inclose commons. There is to be no inclosure of metropolitan commons, but instead of that, to maintain the useful objects which the Legislature have in view, the commissioners are authorised to make schemes for the management of commons. The first section having taken away the power to which I have referred, the sixth section, which seems to me to be most important, is this. (His Honour read the sixth section of the Act.) That is the only power which I can find. The memorial presented to the commissioners does not follow that provision of the Act of Parliament. It is not that they desire the approbation of the commissioners either for the local management or the expenditure of money in draining, levelling, and improving the common, all of which are perfectly within their power, but what they do ask is this: We have entered into an agreement to buy as if we were individuals (not in the exercise of our powers as the Metropolitan Board of Works) for a sum of money this common; we desire your assistance under this Act of Parliament for draining, levelling, managing, preparing bye-laws, and so on; and, besides that, we beg to communicate that, although the Act of Parliament gives you no power to deal with this subject at all, yet, if by twisting further words (which are hereafter to be referred) to you can put us in a way to make some money by this transaction, we desire to have the authority, protection, and guarantee of your power in order to enable us to do that thing. We did enter into a bargain; we are tired of it, we think we can make money by breaking it, and we ask you to help us to do that. That is the plain English of the transaction. The Act of Parliament is invoked. The Act of Parliament provides, with perfect reason and propriety, the means by which it shall be done. The commissioners ought to have prepared the scheme themselves. It is of no great importance that they did not, but they trusted the Metropolitan Board of Works to make the scheme. For two months after that they were to receive objections in writing, but no question arises about the time, because the objections were sent in in sufficient time. They are to consider any suggestion or objection that may be made. (His Honour then read the 14th section of the Act.) The scheme here referred to is a scheme for the establishment of local management, and expenditure of money in draining and levelling, and making bye-laws for the preservation of roads, and so on. What other scheme is contemplated by this Act of Parliament? The meaning of the word "scheme" in the 6th section is in point of fact confined to a scheme of this nature; and I am of opinion that it must be so confined in every other provision of the Act of Parliament upon which so much reliance has been placed. They are wholly inapplicable to this case. (His Honour then read the 15th section of the Act.) Then by the 16th section, if any person claiming any estate, and so on, shall be dissatisfied with the determination of the commissioners, then they may bring an action under the old Act of Parliament. I was at a loss during the argument to find out for myself any reason why the Metropolitan Board of Works could, with any reason, ask the commissioners (under the pretence that there was some interest, profitable or beneficial, the extinction of which was necessary to making that scheme) that the only scheme which the Act of Parliament authorised to be made should be abrogated, or that the persons who had entered into that agreement should be absolved from the performance of it. In my opinion there is nothing in the Act which at all justifies any such view of the case. The main stress of the argument which Mr. Eddis has urged so ably and so fully is, that no such relief as the plaintiff asks in this case can be given to him, because it would in fact be restraining an application to Parliament by a public body in the discharge of a public duty, and in which public interests are concerned. I thought that the law on this subject was at least as well settled as any other law of this court. You cannot restrain a man from going to Parliament on public grounds; you cannot usurp that authority which rests only

with the Legislature; you can shut no man's mouth; but if he is going on in violation of a plain contract, which is personal to himself, with which the public interests have nothing whatever to do, you cannot under the pretence that he is going to Parliament refuse the relief which, if there were no question about Parliament, this court would be bound to give. That I take to be this case. I am not sure that there ever will be any application to Parliament. I am quite sure that there is no application to Parliament now in sight, because the commissioners, although they have been induced, to a certain extent, to adopt the draft scheme which has been sent them, have done so only for the purpose of inviting objections which may be made to it. In most express terms by their draft scheme they invite objections to be made to it; they take on themselves no responsibility; they have not exceeded their authority, or confirmed in the slightest degree any scheme which is laid before them. On the contrary, on the face of their scheme, which is not their affair, but the affair of the defendants, the Metropolitan Board of works, they state broadly the grounds by which anybody who might read the paper might see that these objections might be taken. They furnish information, and then ask if anybody has any objection to make to it. That is all that passed; that is the state of things so far as the Inclosure Commissioners are concerned. I do not find any fault with the Inclosure Commissioners. They have performed a sort of ministerial office in the manner which might be expected from them. They seem, moreover, if I may take the liberty of saying so, and I only make the remark because they are absent persons, to have properly exercised their discretion in the matter. They have not decided in favour of the one or the other, but have left the whole matter entirely open. I cannot consider that this case is within the scope of those authorities which have been referred to, all of which decisions, be it observed, were pronounced by the court with evident reluctance, and dislike, only yielding to what is the law and authority of this court; but their own sense of right ran directly opposite to it. I can find no certain necessity for going to Parliament. Nothing in the injunction which is here asked, either in terms or effect, seeks to control the power which the Metropolitan Board of Works, or any body else in this country, has to go to Parliament for the purpose of obtaining an Act, if they can, to authorise them to do the thing which they wish. I am obliged, admitting the entire and full authority of all those cases, to disregard them as inapplicable to this case. The real question in this suit is whether the Metropolitan Board of Works can, by a strong hand, by the construction which they put on this Act of Parliament, which I think is a wrong one, and which is unusual, place this plaintiff in this position;—that he must go before the commissioners, fight his battle with them as best he can, and then, in the event of a Bill being carried into Parliament, present his petition against it there, and there encounter difficulty, trouble, and expense, which no success would adequately recompense him for; and that for no reason *but because the* Metropolitan Board of Works *have taken it into* their heads that they can *make a profit out* of this piece of land purchased, and make a profit in a manner different to that which was contemplated by them when they entered into the contract, and totally opposed to that power which the Act of Parliament enables them to derive from the purchase which they have made. Mr. Charles Hall argued that, being the local authority, it was in their power to present a memorial to the commissioners whenever they thought fit. I cannot restrain any lawful power which they may possess; but in granting the injunction, as I do, in the terms in which it is prayed by the bill, I simply preserve a plain, honest, distinct contract between a vendor and purchaser, and refuse to permit the purchaser to take more under the contract than he fairly bargained for, or intended to pay for. An injunction must therefore be granted in the terms of the prayer of the bill, and the costs of the plaintiff must be paid by the Metropolitan Board of Works. The costs of the defendants, Drew and Flower, will be paid by the plaintiffs, who will add them to their own.

Solicitors: *Charles Stevens*: *W. W. Smith*; *Wilson, Bristowe*, and *Carpmael*.

Feb. 9, 10, *and* 13, 1872.

PRESTON *v.* THE CORPORATION OF GREAT YARMOUTH.

Corporation—Mortgage of rates—Local Act—Provision for repayment by ballot—Right of mortgagee to repayment of principal — Account — Receiver.

The corporation of a borough were, by their local Act, authorised to raise a certain sum of money for the purposes therein mentioned, by mortgage of the general district rates. In the form of mortgage prescribed by the Act no time was specified for the repayment of the money; and the only mode of repayment mentioned in the Act was that the corporation should yearly and every year pay off 100*l.*, *at the least, of the moneys borrowed on the credit of the Act, and the particular mortgage to be paid off was to be ascertained by ballot.*

On a bill filed by a mortgagee to have the principal moneys owing to him paid off and for a receiver,

Held, that the mortgagee was not entitled to be paid the principal sums owing to him, except by the means and in the manner provided by the local Act.

Semble, the court will not appoint a receiver of parish rates.

THIS suit was instituted by Isaac Preston on behalf of himself and all other the mortgagees of the general district rates of the town of Great Yarmouth, except such of the mortgagees who did not wish to be paid off, against the corporation of that town, and Mary Leeds, who represented the mortgagees who did not wish to be paid off.

By the Great Yarmouth Local Act (50 Geo. 3), certain commissioners were appointed to carry the Act, which was entitled "An Act for the better Paving, Lighting, Cleaning, and Watching the Town of Great Yarmouth, in the County of Norfolk, and for Removing Nuisances and Annoyances therein, and for making other Improvements in the said Town," into execution.

For the purpose of raising money to defray the charges and expenses of obtaining the Act and carrying the same into execution, it was (by sect. 76) enacted that the commissioners should, and

they were thereby authorised and required, once in every year to rate and assess the several landlords and owners, and the several tenements and occupiers of all houses, buildings, and other hereditaments within the town of Great Yarmouth which were rated or assessed to the relief of the poor of the parish, in any sum not exceeding 2*s.* 6*d.* in the pound. By sects. 78 and 84, provision was made for the appointment, by the commissioners, of assessors for making the rates and assessments from time to time, and of collectors for receiving, levying, and recovering payment of the same. By sect. 96 it was enacted that in order to enable the commissioners to carry the Act into immediate execution it should be lawful for them from time to time to borrow such sum or sums of money so as that the sum borrowed should not at any one time exceed in the whole the sum of 20,000*l.*, as they should judge necessary for the purposes of the Act, upon the credit of the rates, assessments, and moneys to be made, levied, collected, and received by virtue of the Act, and by writing under their hands and seals to assign all or any part of the said rates, &c., to such person or persons as should lend or advance any money thereon as a security for the principal money to be advanced, with interest for the same.

By the form of mortgage prescribed by the Act the commissioners granted and assigned unto the mortgagee such proportion of the rates to be raised and collected by virtue of the Act, as the sum advanced should bear to the whole sum borrowed "to be had and holden" until the sum advanced, with interest, should be repaid and satisfied; but there was no time specified in the mortgage for the repayment of the principal moneys so advanced. All the assignments were to be numbered consecutively, and "every such security shall be good, valid, and effectual, and shall entitle the person or persons to whom the same shall be made his, her, or their executors, administrators, and assigns, to the payment thereof, and to all profit and advantage thereof, according to the true intent and meaning of this Act."

The commissioners were also empowered by sect. 97 to raise any part of the money to be borrowed by virtue of the Act by granting life annuities.

By sect. 99 it was enacted that the commissioners should yearly, and every year after the expiration of three years from the commencement of the Act, pay off and discharge the sum of 100*l.* at the least of the moneys borrowed on the credit of the Act, together with the interest due thereon; and the particular mortgage to be paid off was to be ascertained by ballot, but nothing therein contained was to be construed to extend so as to enable or require the commissioners to pay off and discharge any of the annuitants until all the other creditors on the rates should be paid off and discharged.

The next section provided that if the commissioners could at any time borrow money at a lower rate of interest than the assignments which should be then in force should bear, it should be lawful for them to charge the rates with such sum of money as they should think proper, to pay off and discharge the assignments bearing a higher rate of interest. And it was enacted (sect. 101) that all the moneys to arise by virtue of the rates, &c., to be levied by virtue of the Act, and which might be borrowed *on the credit thereof*, or advanced for annuities, should be paid to the treasurer to the commissioners, or such other person as they should appoint, and should be applied in the first place in paying and defraying the charges and expenses incident to the obtaining and passing of the Act, and in the next place in carrying out the purposes for which the Act was passed, "and for such other uses and purposes as are herein expressed, and for no other use, intent, or purpose whatsoever."

In exercise of the powers contained in this Act, the commissioners in the year 1837 borrowed various sums of money, amounting altogether to about 15,000*l.*

By an order of the General Board of Health, made in pursuance of the provisions of the Public Health Act 1848, and confirmed by an Act passed in 1851, the Mayor and Corporation of Great Yarmouth were instituted the local board of health for that town, and the powers, authorities, and duties under the local act, so far as they were not thereby repealed, were vested in the local board of health, and thereupon the powers and duties relating to the mortgages of the rates became vested in the present defendants.

In 1869 the plaintiff gave the defendants notice to pay off the mortgages which he held.

This the defendants refused to do on the grounds that they were not bound by the provisions of the local Act to pay off more than 100*l.* per annum.

The plaintiff then filed his bill by which he prayed for an account of what was due to himself and the other mortgagees of the rates, for an account of the rates levied since 1851, and for a receiver.

Eddis, Q.C. and *Wm. Pearson* were for the plaintiff.

Kay, Q.C. and *Lindley*, Q.C. were for the defendants, the corporation.

Rodwell for the defendant, Mary Leeds.

The following authorities were referred to:

Hopkins v. *The Worcester and Birmingham Canal Proprietors*, L. Rep. 6 Eq. 437;
De Winton v. *The Mayor and Corporation of Brecon*, 33 L. T. Rep. 296; 26 Beav. 533;
Fripp v. *The Chard Railway Company*, 11 Hare, 241, 259;
Postlethwaite v. *The Maryport Harbour Trustees*, 20 L. T. Rep. N. S. 138;
Lord Crewe v. *Edelstone*, 1 De G. & J. 93;
Drewry v. *Barnes*, 3 Rus. 94;
Fletcher v. *Gibbon*, 23 Beav. 212;
Ames v. *The Trustees of Birkenhead Docks*, 20 Beav. 332;
Public Health Act 1848 (11 & 12 Vict. c. 63) ss. 113. 114;
Local Government Act 1858 (21 & 22 Vict. c. 98) ss. 10, 57.

The VICE-CHANCELLOR said: I have now heard this case argued at very great length. If I thought any further consideration would induce me to change the opinion I have already formed, of course I should consider my judgment; but I must say that it appears to me very reasonably clear that the plaintiff's claims in this suit cannot be sustained. That the case is one of entire novelty is not be disputed, unless, indeed, *Drewry* v. *Barnes* (3 Rus. 94) is to be called an exception to that universal novelty. In this country there are numerous municipal corporations and other such like bodies, who are authorised to execute certain public purposes, and have given to them the power of levying rates for the purpose of accomplishing those purposes, and as an incident they have very com-

monly, indeed, almost universally, the power of borrowing money. The question in this suit is as to the repayment of the money, and that question is, in my opinion, to be determined wholly upon the provisions of this Act of Parliament of 1837. The cases upon railways and tolls, and market places, where the beneficial interest in the tolls is vested in the owners of the property, are altogether distinguishable from the present case. The commissioners originally but now the corporation are to derive no kind of benefit from the rates. Their duty is to make a rate and to provide by that rate for the payment of all that is properly payable out of the rate, but not one shilling more. And when Mr. Eddis insists that the instances of granting receivers have been very numerous, there is not one to be found that I know of in which it has ever entered the mind of the court that it could appoint a receiver of parish rates. Nor do I see how it would be practicable, not even if resort were had to that machinery provided by the Railway Acts and by the Local Board Act in this case of applying to the justices to appoint a receiver; because the duty of making a rate as incidental to the discharge of that duty ought to be limited by the payments necessary to be made out of the rates; and if it could be brought to an arithmetical nicety and point they ought not to levy by rates one sixpence more than is enough to pay for paving, lighting, and watching, the salaries of the officers whom they are required to appoint, and all the other expenses incidental to the discharge of the public duties which are intrusted to them. And if a receiver were appointed what would the receiver do, whether justices appointed him or this court? There would be nothing for him to receive, for it is admitted, that whenever in a railway case you appoint a receiver, you must authorise him first to pay all the going expenses of the railway, and he can only pay into court that which is profit belonging to the company. This Act of Parliament, the recital of which is that the streets and so on of Yarmouth are not properly paved and watched, and that they are much incommoded by various annoyances and encroachments, goes on to constitute commissioners for the purpose of performing the repairs and doing other things which are necessary, and it empowers the commissioners to enter into contracts for that purpose, that is to say, to incur expenses, and do a variety of other things which are incidental to the office imposed upon them by the Legislature. In ordered to do this they are empowered to borrow money upon the credit of the rates. They are directed to make rates with the help of assessors, and the manner in which the rates are to be made is pointed out in the Act of Parliament. I need not particularly refer to the clauses, but they are rates for the purpose of completing and executing this Act of Parliament and the purposes mentioned in this Act of Parliament. The 96th section is the first which enables the commissioners to borrow money. In order to enable the commissioners to carry this Act into immediate execution, they may borrow sums not exceeding 20,000*l.*, upon the credit of the rates to be made and levied by virtue of this Act, and then there is a form of assignment by which they are to assign the rates *for the* purpose of securing payment of the money *which is set out in* the 96th section. The form *has been read,* and it is unnecessary to repeat it, for it is in the universal form, assigning the whole of the rates. It directs that they shall be numbered, commencing with No. 1, and so on, and shall entitle the person to whom the same shall be made to the payment thereof, and to all profit and advantage therein according to the true intent and meaning of this Act, words which do not appear in the Bill, and which have been very little attended to in the course of the argument. But that part of the 96th section, which points out that the payment of the rates is to be according to the true intent and meaning of this Act, makes it, as I have said, a question upon the construction of this Act. Then the 97th clause provides for payment of annuities. The 99th is, in the marginal note, called a provision for the repayment of creditors by ballot, and it goes on to provide that "The commissioners shall every year pay off and discharge 100*l.* at the least of the moneys borrowed on the credit of this Act." And with that exception there is not a word in the Act of Parliament about the payment of the moneys advanced. The payment of the interest is most carefully provided for, but the payment of the principal is nowhere suggested, nor was it within the meaning of the Legislature in passing this Act nor within the meaning of the persons who lent their money. It is said that it is very hard they should have to wait 150 years before they are paid. That is a somewhat exaggerated mode of putting it, because if the commissioners choose to make a larger rate, or their bonds were drawn by ballot, they might be paid off earlier. However that may be, it would alter the construction of the Act of Parliament, which, as I read it, is very distinct and clear; and I beg to draw attention to the 101st section of the Act, which provides that all money to be raised and which may be due and acquired thereon, or advanced on notes, and so on, shall be paid and expended for public purposes, and the clause ends with "and for such other uses and purposes as are herein expressed, and for no other use, intent, or purpose whatever." The commissioners no doubt have power and are obliged to pay off the bonds to the extent of 100*l.* a year at least, and they are empowered, if they think fit, and the circumstances of the borough should render it expedient, so that in the discharge of their duty they may recommend it, they may raise more money, and if they do, they may pay off the bonds. But beyond that the moneys raised are to be applied for no other use, intent, or purpose whatever than is expressed in this Act of Parliament. I cannot read in this Act of Parliament any intention on the part of the commissioners, or the Legislature, or the lenders, that there should be any other mode of payment than that which is prescribed by the ballot section, nor can I believe that there was any such intention. It would be monstrous to suppose that those persons who lent 15,000*l.* for the present exigencies of the town of Yarmouth, should be able at the end of six months to insist upon payment from its then existing occupiers of houses of the whole 15,000*l.* which was borrowed. The other is a reasonable and proper construction, to pay off 100*l.* a year—that is not less than 100*l.* a year, and as much more as they can afford which relieves the general burden. In the meanwhile, what hardship can the lenders be under? They can transfer their securities, I do not say they are obliged, but I say that the security in their hands is the most easily con-

le security possible, and it removes entirely hem the suggestion that they lie under any ıip, because they cannot compel present pay- ıt the end of six months if they choose to give requiring payment. Then is this in the est degree like the case of railways? A rail- r beneficial enjoyment of tolls, or a corpora- rhich has houses in the town, and cattle and stalls in a market place, draws a ıe from it, and nothing can be more reason- ıan that a receiver should be appointed for But what can be so unreasonable as that a er should be appointed of these rates, and so useless and absurd? If the whole amount se rates are not more than enough to pay the ses of paving, lighting, and watching, and her things, the salaries of the officers, and ıterest upon the debt, and the 100*l.* which year they are obliged to set apart for repay- what would a receiver do? The commis- ners may think, and perhaps not incorrectly, hey do enough if they levy a rate in Yar- ı to provide for all the expenses I have men- . If they do that, and no more, or if they ɔut a very small sum beyond, that is all ding to every principle in which receivers ɔpointed in railway cases), the bondholders sist upon having paid to their receiver. I do op to dwell upon the great inconvenience of ıting a receiver. I do not know how the er would discharge his duty, nor how, under ces' order, he would levy distress upon the ten- nd so on. Perhaps he might be able to do that; ıis I am persuaded of, no justice of the peace ly advised would appoint a receiver unless w there was something to be received, and it was right that what was to be received l be applied in the way which is here sug- l. The only case which has any application matter at all was that case of *Drury* v. s (3 Rus. 94.) The other cases were all d the question. The case most relied on, ɔpkins v. *The Worcester Canal Company* ep. 6 Eq. 437), is not to be disputed for nent. The persons who had borrowed the r, although they had not fixed a day for ɛnt, nor even promised to pay, had by an ment acknowledged in substance and in hat they were debtors, and they were in njoyment of the receipt of money which, ling to the tenor of the instrument, was not . The commissioners here are in receipt of ɔney. No single shilling comes to their . All is spent, or ought to be spent; and ct of Parliament says it shall be spent for her use or purpose whatever than what is ı the meaning of the Act of Parliament, and ɛnt to the lenders is not one of those pur- Every one of the cases that have been ed to is beyond the possibility of dispute. v. *Barnes*, in my opinion, notwithstanding was said about it, is beyond the possibility estion; because in that case there was a y at common law, which this court cannot , for it might happen that commissioners ised or ill-intentioned (if we can say ıt impropriety that there are any ill inten- in a public body), might make a rate im- ly. They might make a rate which did not le for the interest upon the money, and in ase in the Court of Queen's Bench a *manda- would*, as the Lord Chancellor, then the Master of the Rolls, pointed out, ordinarily lie. Not only the *mandamus* might be obtained there, compelling the commissioners to make a proper and sufficient rate, but the court would then decide whether that rate should comprehend the payment of any of those moneys which had been lent, and direct the application of a rate when levied and received. That is a plain, familiar, and easy remedy. That is, as Lord Lyndhurst pointed out, the remedy that ought to be applied for in *Drury* v. *Barnes*; and to ask this court to prescribe to the commissioners what sort of a rate they shall make, and of what amount, would be asking this court to do what it never has done and never can do. The case of *Fletcher* v. *Gibbon* (23 Beav. 212), just as little applies to this case. In the case of *Gibbon* v. *Fletcher*, the bill was dismissed with costs by Lord St. Leonards, but after the Vice-Chancellor had made a decree which was much more favourable to him, directing certain accounts. *Fletcher* v. *Gibbon* was a totally different case, there being a ballot clause in the Act there, and Mr. Fletcher insisting that he ought to have been paid as well as the other persons who had had the benefit of the ballot; he had been baffled by the objections of Mr. Gibbon and the other people, on which he filed a bill complaining that the commissioners had misapplied the moneys that came into their hands, by which means he did not receive his share, and the Master of the Rolls so decided, and he not only so decided, but he decided there should be an account taken of the moneys which the commissioners had received, which would include all that they ought to have distributed by ballot, and to ascertain whether any of the money remained in their hands, or for which they were accountable, a very plain and distinct relief; but the Master of the Rolls stopped there. He did nothing as to further rights, nothing in the way of appointing a receiver. I cannot help thinking, therefore, that this proceeding has been wholly misconceived, that the effect of the Act of Parliament has not been comprehended; that the relief asked is a relief which this court in this case cannot grant, and that the bill therefore must be dismissed, and dismissed with costs.

Solicitors for the plaintiff, *Sharpe, Parker, Pritchard*, and *Sharpe*.

Solicitors for the defendants, *Andrew Story*, agent for *Charles Driver*, of Great Yarmouth; *F. T. Dubois*.

Feb. 21, 22, *and* 23, 1872.

SAVILE v. KILNER.

Nuisance—Glass works—Smoke and vapour—Delay—Injunction.

The owners of certain glass works which were erected in 1845, *erected in the year* 1847 *and subsequent years down to* 1863 *seven new furnaces, which largely increased the amount of smoke and vapour which was emitted from their works. The plaintiff who was the owner of property adjoining the works which he and his predecessors in title had enjoyed long antecedent to the erection of the works, had at considerable expense prepared a portion of his estate for building purposes, but in consequence of the smoke and vapours from the glass works he had been unable to let the land for that purpose.*

Upon a bill filed in March 1870, *for an injunction to restrain the emission of smoke and vapours from the new works,*

Held, that the plaintiff was not barred by delay, but that he was entitled to an injunction as to the whole of the new works, although one of the chimneys was erected more than twenty years before the filing of the bill.

THIS suit was instituted by Mr. Henry Savile, the owner of an estate called the Thornhill estate, near the town of Dewsbury, to restrain the defendants, the Messrs. Kilner, from causing or permitting dense black smoke and vapours to be emitted from their works, to the damage and injury of the plaintiff and his tenants, and for damages.

The defendants were the proprietors of certain glass works, called the "Providence Glass Works," situate at Thornhill Lees on the south and west sides of the Thornhill estate.

These glass works were first commenced about the year 1845, when one furnace was erected. In the year 1847 another furnace was erected, and these two furnaces were commonly called "the old works." In addition to these, other works, commonly called "the new works," had, since the year 1847, been constructed near the old works. These new works comprised seven furnaces, which were erected at the following periods: one in the year 1847, one in the year 1853, two in the year 1859, one in the year 1861, and the remaining two in the year 1863.

The fires in these furnaces being kept burning day and night, inclusive of Sundays, there was scarcely any cessation of the smoke from these works. The plaintiff alleged that this smoke issued in dense black clouds and spread over his estate, especially over a certain portion of it, which was rising ground, the chief value of which consisted in its being well adapted for the erection of villa residences and dwelling houses of a superior character, but which land, in consequence of the smoke from the defendants' works, he was not able to let for that purpose, and that the vegetation on the estate suffered considerably. In 1862 the plaintiff's agent, Mr. Lipscomb, spoke to the defendants about their works being a nuisance to the plaintiff's property.

In March 1866 the defendants promised to ascertain if there were any means by which the smoke could be prevented, and if there were to adopt them, but nothing was done by them towards lessening the nuisance. In Nov. 1868, Lipscomb wrote to the defendants, stating that two years had elapsed since they promised to abate the nuisance, and that during that time instead of the smoke having diminished it had greatly increased. To this letter Lipscomb received a reply that they had been trying to reduce the amount of smoke, but found it quite impossible, but that they were quite willing to adopt any plan that was feasible.

From inquiries which Lipscomb made he ascertained that there was a process which had been invented by a Mr. Siemens for the consumption of smoke, and in March 1869, he referred the defendants to Mr. Siemens for further information on the subject. Finding, however, that the defendants took no steps to lessen the nuisance, Lipscomb, in September 1869, informed them that he should put the matter into the hands of the plaintiff's solicitor, and on the 2nd March 1870, the present bill was accordingly filed.

The defendants by their answer denied that any nuisance was caused to the plaintiff by the smoke from their works, but that the smoke arose from other works upon and adjacent to the plaintiff's land, and they submitted that the plaintiff was barred by his acquiescence from obtaining the relief which he now sought. The facts appear more fully in the judgment.

Kay, Q.C., *Chapman Barber*, *Dunning*, and *Mellor* (of the Common Law Bar), were for the plaintiff.

Amphlett, Q.C. and *Bagshawe*, were for the defendants.

The following authorities were referred to:

St. Helen's Smelting Company v. *Tipping*, 11 H. of L. Cas. 642; 12 L. T. Rep. N. S. 776;
Tipping v. *St. Helen's Smelting Company*, L. Rep. 1 Ch. 66;
Crump v. *Lambert*, L. Rep. 3 Eq. 409;
Rochdale Canal Company v. *King*, 2 Sim., N. S., 78;
Patching v. *Dubbins*, Kay, 1, 11;
Elliotson v. *Feetham*, 2 Bing. N. C. 134;
Attorney-General v. *The Sheffield Gas Consumers' Company*, 3 De. G. M. & G. 304; 21 L. T. Rep. 49;
Bankart v. *Houghton*, 27 Beav. 425;
Williams v. *Earl of Jersey*, Cr. & Ph. 97;
Attorney-General v. *Colney Hatch Lunatic Asylum*, 19 L. T. Rep. N. S. 708; L. Rep. 4 Ch. 146;
Ware v. *The Regent's Canal Company*, 3 De. G. & J. 212;
Goldsmid v. *The Tunbridge Wells Improvement Commissioners*, 14 L. T. Rep. N. S. 154; L. Rep. 1 Ch. 349;
Sanitary Act 1866 (29 & 30 Vict. c. 90), s. 19, subsect. 3;
Kerr on Injunctions, p. 205.

The VICE-CHANCELLOR said:—In this case a landed proprietor, who has at great expense prepared his land for building purposes, finds that his expectations are frustrated by reason of the existence of what he calls a nuisance in the neighbourhood. He files his bill to be relieved against that nuisance, and he alleges in his bill that the nuisance consists of the emission of smoke and noxious vapours, to an extent which is destructive of, or injurious to, vegetation, and he further says that, the consequence of the existence of the nuisance is, that the enjoyment by him of his land is interfered with, that he is unable to apply his land to the purposes for which he desires to do so, and therefore he asks for relief. That is a case, so far as I have stated it, which, if it is made out in evidence, most perfectly justifies the application to the court, and leaves the court no alternative but to accede to the complaint which is made. A great deal has been said about the allegations in the Bill not being sufficient. In my opinion they are quite sufficient, not only to state the complaint, but to let in every kind of evidence, however particular or minute it may be, which is not in conflict with, or different from, the complaint which is made in the bill. I say so in the beginning before I go into the evidence, because a great many observations which have been addressed to me have been upon the ground that the defendants were taken by surprise in some degree by reason of the sort of evidence that was adduced against them; and, moreover, that the relief asked was more extensive than the statement in the bill justifies. The defendants, in the 12th paragraph of their answer, describe the mode of carrying on their manufacture: "The metal or materials for glass in each furnace are first founded or fused together, and then worked into glass bottles, two processes which are distinct, and carried on by two distinct sets of workmen. The founding occupies from ten to fifteen hours, and is carried on principally

during the night, and while it is being carried on, the furnace in which it is so carried on is fired; that is to say, the fire therein is made up and supplied with fuel at intervals of about fifteen to twenty minutes, and the founding is necessarily continued during Sundays, because, if it were not, the metal would cool;" and so on. "When the founding is complete, and the metal is ready for the glass bottle makers, which does not take place at any particular time of the day, the glass bottle makers are summoned and begin their work which they carry on until the metal is worked up, except that they do not work during Sundays. The working up of each batch of metal, the result of each founding, is termed in the trade a journey, and there are usually five foundings and five journeys at each furnace in each week, and each journey usually occupies about eleven hours, and during each journey the furnace at which the same is being carried on is fired usually at intervals of about every three hours." The 14th paragraph is this: "During the founding, visible smoke usually issues from the chimney of the furnace in which the founding is being carried on, and this becomes somewhat denser when the furnace is fired, and for a short time afterwards, but the smoke is not unusually dense or continuous, and is usually dissipated before it reaches the said rising ground on the plaintiff's estate, though some part of it occasionally in a visible form extends over the lower and nearer portions of the plaintiff's estate, but not so as to occasion any nuisance thereto. During the bottle making there is usually a cessation of visible smoke, except shortly after the furnace is fired." I have read that for the purpose of showing what the nature of the works carried on by the defendants is, and what the plaintiff alleges to be a nuisance. To make that description complete, it is necessary to refer to the evidence of Mr. Cocker, who is employed to inspect nuisances in the district in which this manufacture of glass bottles is carried on. He says that "the issue of dense black smoke from one or more of the chimneys in the said glass works occurs daily, and during a great part of each day, and is so frequent at times as to be almost continuous, whilst some are sending out black smoke others less recently fired emit dense vapours of a blueish colour, which are sulphurous to the taste and smell. From my knowledge of manufactories in general, and having had my attention specially directed to the conditions under which black smoke is produced in them, I say that the nature of the defendants' said works, the size and extent thereof, and the vast quantity of coal which they use, and which I know to be for the most part the smallest refuse coal, are causes which necessitate the issue of black smoke for a great part of each day and night, and in great volume." He says the defendants consume 50 tons of coals a day, and, from observations which he made, he states that during 663 minutes out of the thirteen hours comprised in the periods of observation, there was dense smoke issuing from the said new works. In a further paragraph he says: "The quantity of smoke issued from the said works is so great, and the duration of the issue thereof is such as to bring a large portion of the estate of the plaintiff under the influence of the said smoke, especially that portion of it which lies east, north-east, and south-east from the said works, because the wind is more frequently in a quarter to carry the smoke in one of those *directions than any other*." He further says "I should have laid an information against the defendants before any other person on account of the nuisance caused by the smoke from their said works being far greater than any other case I have had to deal with, but I have not yet been in a position to prove to the magistrates as required by the Sanitary Amendment Act 1866, that the defendants do not as far as practicable consume the smoke from their said works, having regard to the nature of their trade." That refers to the Sanitary Act, under which there is a summary proceeding to be taken before the magistrates, or, if necessary, there may be an indictment. The proceeding before the magistrates is that which he particularly alludes to here, for the magistrates sitting in petty sessions would not have authority to entertain any complaint made to them unless it could be shown that the parties summoning the defendants as they have been called, had neglected to do all that was by them practicable to consume their smoke, having regard to their trade. Now that is the nature of the nuisance complained of, and that is the working described by the defendants themselves in their answer. In my opinion it is a nuisance which is indictable at law; but then, to that is added the evidence of several other witnesses, who say that they have traced, and examined, and watched the smoke coming from the defendants' factory, and they have ascertained, by taste and smell, that it is sulphurous, and unpalatable. Other witnesses prove that for a very considerable distance a volume of this, which is proved to be dense smoke, and in very large quantities, extends itself over, in whatever direction the wind may be, from the defendants' works. That, in my opinion, goes very far to prove the case which the plaintiff has alleged. In addition to that, there is a piece of evidence which is of very considerable weight. It was said by the plaintiff, in the first set of affidavits, that tenants had been injured, and crops had been damaged, and the attention of the defendants is drawn to that when they are preparing their evidence. A man named Rufus Mann, who was the tenant of two farms, part of the Thornhill estate, and very nearly adjoining to the defendants' works, said that his father had suffered for years from this; that he had complained—not that he had complained to the defendants—but that he himself had complained of it; that, his complaint being unattended to, he had got a valuer to ascertain the amount of the damage which had been done to his crops by reason of the smoke issuing from the defendant's factories, that he had demanded payment, that they had refused it, and that he had brought an action for it. The defendants, in their answer, admit that he has brought an action, but they deny that they have done any injury whatever to his crops. But in their affidavit they are also required to state, and are compelled by the truth and exigency of the case to state, that with respect to three other tenants, only a little nearer to them than Rufus Mann, they have been for years in the habit of making compensation for the damage which their smoke has done to the agricultural land, sometimes in the shape of a solid payment of money as compensation for damage, sometimes by buying the damaged crops at the market price. There is a great deal of other evidence to which I need not advert more particularly, by persons resident in the neighbourhood, driving along the

roads, visiting at the plaintiff's house, and particularly the evidence of Mr. Wilmot, who says, that on Sundays, at a time when the other factories were not working, he traced and saw the issuing of the smoke, the direction it went in, the mischief it did, felt the unpleasant consequences of it, and proved in the clearest possible manner, almost to demonstration, that the nuisance complained of did and does exist, and that it is caused solely by the defendants' works and manufactory. He says, moreover—and that leads me to another topic which has been greatly discussed—something as to the injury done to the trees. Now, I have said that the general complaint in the bill shows that enough injury has been done for an action at common law, and I know not why it is not enough for a bill in this court. It is proved, and it is not disputed, that the trees in the plaintiff's grounds had been some of them killed, and others of them injured by the smoke proceeding from the defendants' factories. It is suggested that, inasmuch as there is another plantation in the neighbourhood where the trees, in the opinion of some of the defendants' witnesses, are not so much damaged as to justify the plaintiff's complaint in that respect, that therefore the trees in the plaintiff's grounds cannot have been so much injured as he says. But, consider for a moment. If that was the defendants' case, they would only have to say, "let us look at your trees, give us access to your plantations, let us offer evidence on the same subject." Nothing of the sort is done; and it is not in their mouths now to say that the evidence on the subject is imperfect. They have not cross-examined the plaintiff and his witnesses on the subject of the trees. They are content to leave it on the statement as he makes it, only saying, there is another plantation in which the trees have not been damaged, and we do not believe your trees are so much damaged as you say. The mischief done to the vegetation, including agricultural lands, and the injury which is done to the trees is made out, in my opinion, with perfect distinctness. The personal injury is not much relied upon. It is suggested in the bill, but only in the way of an annoyance. But if the defendants' dense smoke does produce disagreeable tastes in the mouths of the people who are passing that neighbourhood, why are they not to be protected against that nuisance as well as any other? It is only necessary you should prove it is hurtful to life and that it diminishes the ordinary enjoyments of life. No man has a right to interfere with the supply of pure air, which is as much the right of the plaintiff as is the right to the soil of which he is owner; no man has a right to interfere with it, and that it is interfered with the evidence establishes beyond all doubt. It is suggested that there are manufacturers in the neighbourhood who employ sulphur in their works to a very considerable extent, and that the effect of the sulphur so employed by them may have been to destroy the trees. One of those men, Mr. Wormald, has been examined as a witness and he says, "We did and still do use a great quantity of sulphur, but as it was found to be injurious we now dispose of it, by sending it up a certain chimney and in other ways it is effectually carried off." If there was any ground for the suggestion that is made in argument, would it have been possible for the defendants, with such a case as I have now suggested, to refrain from cross-examining Mr. Wormald? If Mr. Wormald's statement upon that had contained an evasion or equivocation, it would have been exploded with the first five minutes of cross-examination. They do not choose to do that, and the evidence comes before the court on a positive statement by a credible witness that that which has once been a nuisance, if nuisance it was, has been effectually cured. In my opinion, that evidence and that view of the case effectually disposes of all that has been said about the possibility of this inconvenience proceeding from Cook and Wormald's factory. Then, as to the injury and the diminution of light to the plaintiff's property, it is proved without contradiction. Several witnesses prove that the land is well adapted for building purposes, that it might be beneficially enjoyed by the plaintiff if it could be so applied, and he is prevented from so applying it simply by the nuisance which the defendants have brought upon the place. Upon every ground, therefore, I think the plaintiff has established a case upon which he is entitled to the relief for which he asks. It was suggested in the course of the argument, that if he cannot build houses there he may build cottages. That is really no answer; because it is for the plaintiff himself to decide what to put upon his land; and, if his right is that the air is his as much as the land, it is not for anybody to prescribe to him how he shall build. He has stated a very satisfactory reason why he wants to apply the land to the particular purpose to which he intends to apply it; and the defendants are bound to leave him in the enjoyment of that which is his own, and to carry on their manufactory in some way which will not inflict upon him the great and grievous nuisance which is complained of by the bill and proved by the evidence. It is now only necessary to observe what has been said about delay and acquiescence. Now, the ground of acquiescence has been mentioned in the cases, all of which are perfectly familiar, of which, perhaps, the case of *Tipping* v. *The St. Helen's Smelting Company* (L. Rep. 1 Ch. 66) is, I do not say the most remarkable, but a case where the matter was discussed with great care, and in which the principles of the law are stated with the greatest clearness and force. The plaintiff is accused of having delayed, for such a time as to deprive him of his right. I am at a loss to understand exactly what that means. In the old practice of this court you came for an interlocutory injunction, the court let it stand over or refused it, and gave you leave to go to law to establish your right, and would not interfere on your behalf until you had established your right. When you had established it, on what ground did the court refuse to interfere? On what ground could it do so, except that which is peculiar to the doctrines of the court of equity, namely, that there has been such acquiescence as deprives the plaintiff of the right to enforce that which otherwise would unquestionably be his right? There is no such thing here. All that was said here was, that the plaintiff knew one chimney had been built, and that from time to time some additions were to be made to the others, and that the man was laying out his money for that purpose. That is no such acquiescence as would entitle the defendant to avail himself of that and say, I have by acquiescence got a right better than a prescriptive right, because you have stood by and seen me build a factory that might become a nuisance, or probably would become a nuisance. There is no such

law that I know of in this country. The delay is not fatal under almost any circumstances. I am obliged to express myself with a qualification here, lest I should be saying something too positive, but in almost any circumstances delay cannot be a reason. I cannot conceive any ground on which it could be a reason. It would not be an answer to an action—it would be no answer to an indictment. I confess I do not think delay has anything to do with the principle upon which this case should be decided; but if it had, I find there has been no delay here *de facto*. I find by evidence uncontradicted, that long before the year 1866 the plaintiffs were in motion. I find that in 1862 the thing was designated as a nui ance at that time. I find by the correspondence that in the year 1866 remonstrances are made about this nuisance, not enlarging any claim, not introducing any new circumstances, still harping on the old string. I find the letters are answered, as of course between neighbours they would be, civilly but evasively; and I find no desire on the part of the plaintiff to press matters to extremity if by any means he could induce the defendants to do that which by law he thinks they are bound to do. And so time goes on; everything, in my opinion, well and honestly accounted for up to the period when he finds that further remonstrance is unavailing, that any other application would be fruitless; and then he is driven to file his bill. When the bill is filed it is preceded by a correspondence, in which he suggests, "You ought to do this because the means of doing it effectually exist. I have a right to ask for it, and you are bound to do it." The manager of works similar to the defendants, at Bristol, is referred to, and Siemen's Patent is mentioned, and the defendants do not avail themselves of that at all—they drop the subject. They do not even say that they cannot do it; but they say that if they knew how to do it they would. That the means of doing it exist I cannot doubt, not from any opinion of my own, but from the evidence before me. It is a fact sufficiently proved in this case, that the means of removing this nuisance exist, and are within the defendants' power. Then it is suggested that by granting the injunction here I should be putting a stop to a valuable and important trade. If I am obliged to do so, I should do so, as I need hardly say, with the greatest reluctance. But I am satisfied it will have no such effect, because the evidence, as far as it goes—I do not say is conclusive—but is enough to satisfy me that the defendants can cure this great and grevious nuisance; and that there is no reason why they cannot do as has been done by other manufacturers whose manufactories were just as much a nuisance, and just as inconvenient to the neighbourhood, as the defendants' is now said to be. I am, therefore, clearly of opinion that upon none of the grounds which have been mentioned can the defendants justify the continuance of the nuisance which has been so plainly proved to exist. The defendants could have cross-examined at any time they liked, but they have chosen to bring the case into court upon the evidence. The evidence is, to my mind, as a matter of fact, conclusive; and if I were sitting exercising the functions of a jury, I should hold that the nuisance was clearly proved. The only thing I can do is to grant an injunction as prayed.

Asphett, Q.C.—The injunction will be, I presume, as to six out of the seven chimneys. One having been erected for more than twenty years before the filing of the bill, we have a prescriptive right to it.

The VICE-CHANCELLOR.—The injunction will go to the whole of the seven chimneys.

Solicitors for the plaintiff, *Markby, Wilde*, and *Burra*.

Solicitors for the defendants, *Pitman* and *Lane*, agents for *Scholes* and *Brearey*, of Dewsbury.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and R. A. EDGELER, Esqrs., Barristers-at-Law.

Nov. 22, 1871, *and Feb.* 10, 1872.

REGISTRATION APPEAL.

MOGER v. ESCOTT.

Parliamentary election — Representation of the People Act 1867 (30 *& 31 Vict. c.* 2, *ss.* 5 *and* 27)—*Occupation of premises in succession—Payment of rates by the landlord—*2 *Will.* 4, *c.* 45, *s.* 28.

The 28*th section of the Representation of the People Act* 1867 *does not deprive the occupier of a house in immediate succession within the year, and which house is of less value than* 10*l. per annum, of the right to the franchise, such person having paid the rates in respect of the premises so occupied by him.*

Held also, that the actual payment of the rates by the landlord is a legal payment by the tenant where the payment is made by the landlord by virtue of an agreement existing between them.

THE following case was stated for the opinion of the Court of Common Pleas by the revising barrister for the city of Bath:—

At a court held by me, one of the barristers duly appointed to revise the lists of voters for the city and borough of Bath, Thomas Moger claimed to have his name inserted in the list of voters for the said city and borough.

Thomas Moger's name appeared upon the list of claimants for the parish of St. James as an occupier of houses in immediate succession from one to the other in the following form:

Christian Name and Surname of the Claimant at full length.	Place of Abode.	Nature of Qualification.	Street, lane, or other place in the parish where the property is situate and number of the house (if any).
Moger, Thomas.	7, Taylor's-court, Bath.	Houses in Succession.	7, Taylor's-Court, from 13, Paradise-street, Lipscombe and Widcombe.

The facts proved before me were, that Thomas Moger, up to Feb. 1871 and for a long time previous, had occupied a house in Paradise-street, in the said city and borough, for which he paid an annual rent of 6*l.*, and was duly rated to all rates made for the relief of the poor during the time of his occupation, and had paid all rates payable by him in respect of the premises so occupied by him. That in the month of Feb. 1871 he removed direct into and occupied a house in Taylor's-court, in the said city and borough, for which he agreed to pay an annual rent of 8*l.*, his landlord agreeing at the same time to pay the rates. That in the month of April in the same year a rate was duly made for the relief

of the poor of the parish in which the said house in Taylor's-court is situate, in which rate the name of Thomas Moger did not appear, nor did Thomas Moger make any claim to have his name placed upon the rate book, nor were any shown which would enable him to avail himself of the benefit of the 19th section of the Poor-rate Assessment and Collection Act 1869; but all rates payable in respect of the premises occupied by him were, previous to the 20th July 1871, paid by his landlord.

It was contended on behalf of Thomas Moger, that since, by the 59th section of the Representation of the People Act 1867, this Act so far as is consistent with the tenor thereof should be construed as one with the enactment for the time being in force relating to the representation of the people, and with the Registration Acts, in all cases of successive occupation as referred to in the 26th section of the same Act, although the annual value of the premises occupied be under 10*l*., the right to be registered depends not upon the occupier having been rated in respect of the premises occupied by him during the time of such occupation as required by the 3rd section of the same Act, but upon the fact that all poor rates which shall have become payable from him have been actually paid, as in the case of the successive occupation of houses of the annual value of 10*l*. under the 28th section of the 2 Will. 4, c. 45.

I was of a different opinion and disallowed the claim of Thomas Moger on the ground that he had not been rated, had not claimed to be rated, and was not within the operation of the 19th section of the Poor Rate Assessment and Collection Act 1869.

If the court shall be of opinion that I was wrong, then the register is to be amended, and Thomas Moger's name is to be inserted in the list of voters for the said city and borough of Bath.

The names of twenty-two other persons, whose names and places of abode and particulars of qualifications as set out in a schedule hereunto attached, claimed to have their names inserted in the lists of voters for the said city and borough, or were duly objected to under similar circumstances, and disallowed the claims and removed the names from the list of voters for the said city and borough.

If the court shall be of opinion that I was wrong in disallowing the claim of Thomas Moger, the register is to be amended by inserting their names also in the same lists.

Due notice of appeal from my decision was given, and I ordered the appeals in all the before-mentioned cases to be consolidated.

T. W. Saunders for the appellant.—The question is whether a party, who claims a vote under the Representation of the People Act 1867, on the ground that he occupies two houses in immediate succession, his landlord paying the rates of the second house, is entitled to a vote. If the claimant had paid all rates in respect of his second house, although he had not been rated owing to his landlord having paid, he is entitled to a vote. By the 28th section of the Representation of the People Act 1832 (2 Will. 4, c. 45), premises, in respect of the occupation of which any person shall be entitled to be registered and to vote in an election, are not required to be the same, but may be different premises occupied in immediate succession *during the* twelve months previous to the last day of July, if he has paid the poor rates and taxes which shall have, previous to the month of April, become payable for the premises so occupied by him in succession. I say he need not be rated for the second house, but only for the first which he occupied: (*Rogers* v. *Lewis*, 7 C. B., N. S. 29; 1 L. T. Rep. N. S. 68.) In that case it was decided that it is not necessary that the party's name should appear on the rate; it is enough that he has paid the rate. [BRETT, J.—To meet this case you have to make out that a payment of rates by the landlord is a payment by the tenant.] It clearly is, for if the landlord pays the rates, the tenant, in consequence, pays more rent. The claimant is entitled to a vote under the Representation of the People Act 1867, for that Act was passed to enlarge the scope of the former Acts, and to confer franchises in addition to, and not in substitution of those already in existence.

Gorst for the respondent.—This case is clearly within the Representation of the People Act 1867, which has nothing to do with the old Reform Acts, except so far as they are incorporated into it. Here there were two different premises occupied in immediate succession; but a party has no right to a vote in respect of such occupation, unless he has been rated to each. The 3rd section of the Representation of the People Act 1867, sub-section 2 provides that every one is entitled to a vote who is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been an inhabitant occupier as owner or tenant of any dwelling house within the borough, and the 20th section of the same Act says that different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last day of July in any year shall, unless and except as therein is otherwise provided, have the same effect in qualifying such person to vote for a county or borough as a continued occupation of the same premises in the manner therein provided. Sects. 56 and 59 are saving clauses so far as each is consistent with the tenor thereof, but nothing is repealed. He must, therefore, have not only paid the rates, but have been rated to such rates, and the claimant here has not fulfilled either obligation—for his landlord has paid the rates for him—nor has he been rated. [WILLES, J.—The question for us comes to this, whether sect. 28 of the Representation of the People Act 1832 is to be read into the later Act.]

Cur. adv. vult.

The judgment of the court was delivered by BRETT, J.:—

Feb. 9.—In this case Thomas Moger claimed to have his name inserted in the list of voters for the city and borough of Bath. His name appeared upon the list of claimants as an occupier of a house 7, Taylor's-court, in immediate succession to his occupation of a house, 13, Paradise-street. It was proved that the claimant had occupied 13, Paradise-street, for a long time previous to, and up to, Feb. 1871, at a rent of 6*l*. per annum, and that he was duly rated to all poor rates made during the time of his occupation. In Feb. 1871 the claimant moved direct into, and occupied 7, Taylor's-court, for which he agreed to pay an annual rent of 8*l*., his landlord agreeing to pay the rates. A poor rate was made in April 1871, in which the claimant's name did not appear; he did not claim to be rated; he was not entitled to

the benefit of sect. 19 of the Poor Rate Assessment and Collection Act 1869; but all rates payable in respect of 7, Taylor's-court, were, previous to the 20th July 1871, paid by his landlord. The revising barrister disallowed the claim. It was contended on behalf of the claimant that this decision was erroneous, that it was not necessary that the claimant should be rated in respect of the second house, if he paid all rates payable in respect of it; that he had by the hands of his landlord paid all rates. It was contended on behalf of the respondent, that, according to sects. 3 and 26 of the Representation of the People Act 1867, it was necessary, in order to entitle the claimant to be registered, that he should not only have paid all rates payable in respect of the second house held in immediate succession, but that he should also have been rated to such rates, and further that the claimant had not paid in this case the rates payable in respect of the second house. As to the first point, inasmuch as both houses occupied by the claimant were below the annual value of 10*l.*, the question is whether sect. 26 of the Act of 1867 deprives the occupier of a house in immediate succession within the year, and which house is of a less value than 10*l.* a year, of the privilege contained in the proviso to sect. 28, 2 Will. 4, c. 45, as interpreted in *Rogers* v. *Lewis* (7 C. B., N. S., 29.) According to that proviso, as interpreted by that case, it is sufficient for such an occupier to have paid all rates due in respect of the second house, that he be not rated in respect of such house, if he has been rated in respect of and has paid all rates due in respect of the first house. Now by sect. 3 of the Act of 1867 the inhabitant occupier of a dwelling-house, in order to entitle himself to be registered, must have occupied it, *i. e.*, the one dwelling-house, for twelve months, &c., and must have been rated in respect of it, and must have paid all rates payable in respect of it. Sect. 26 deals with one only of these conditions, namely, that of the occupation, and enacts that the occupation of different premises in immediate succession shall have the same effect as a continual occupation of the same premises. There are added the words, "in the manner herein provided." These words might at first sight seem to refer to an occupation accompanied by a being rated and a payment of rates. But these conditions are not the manner of occupation; they are other conditions required to be fulfilled when the claimant has satisfied the condition as to occupation. These words seem to refer to the necessity of a separate as distinguished from a joint occupier. Sect. 26, therefore, does not interfere with any obligation or any privilege attaching to the questions of being rated, and of the payment of rates. Those obligations and privileges are regulated by other enactments. By sects. 3 and 26, if there were no other enactments applicable, it would seem that the occupier of two houses in immediate succession, claiming to be registered in virtue of the qualification contained in the Act of 1867, must have been rated and must have paid the rates in respect of both houses. But by sects. 56 and 59 of the Act of 1867 the proviso in sect. 28 of the 2 Will. 4, c. 48 is applicable to the case of houses occupied in immediate succession according to the Act of 1867, unless it be inconsistent with sect. 26 of the new Act. According to the interpretation we have given sect. 26 of the new Act, with reference to sect. 3 of the same, there is no inconsistency between it and the proviso to sect. 28 of the old Act. It follows that the proviso is applicable to the cases of occupation in immediate succession under the new Act; and that in such cases the occupier may be registered if he has been rated and has paid all rates in respect of the first house, and has paid all rates payable in respect of the second house, though he has not been rated in respect of it. The reasons given in *Rogers* v. *Lewis* for the distinction between the first and second houses is as applicable in the case of successive occupation under the new as under the old Act. The second point is whether the claimant can be said to have paid the rates payable in respect of the second house. He has not paid them with his own hand, and he has not been released from payment, nor can he be deemed to have paid by virtue of the Poor Rate Assessment and Collection Act 1869. The question is whether, without recourse to that, or any other statute, he can be said to have legally paid the rates. We are of opinion that it can properly be said that he has legally paid the rates. By virtue of the agreement between him and his landlord the actual payment of the rates by the landlord in this case is a legal payment by the tenant: (*Cook* v. *Luckett* 2 C.B. 168.) We are of opinion in the result that the claimant was entitled to be registered, and that the decision of the revising barrister was wrong and must be reversed. The claimant's name must be inserted in the register.

Judgment for the appellant.

Attorneys for the appellant, *Rogerson* and *Co.*, for *Ricketts*, Bath.

Attorneys for the respondent, *Mant*, *Maule*, and *Robinson*.

Tuesday, Jan. 23, 1872.

HILL *v.* COCK.

Easement—Excessive user by proprietor of dominant tenement—Prevention—Least injurious mode to be used.

The plaintiff, having a prescriptive right to a flow of water, led by means of a gutter laid in a mill-stream at a point where an ancient weir was erected, lengthened the gutter for the purpose of irrigating more land.

The flow of water down the defendant's mill-stream was diminished, and the defendant in consequence pulled down the ancient weir, which prevented the water from flowing down the plaintiff's gutter:

Held, that no suspension of the plaintiff's right to the enjoyment of the flow of water as it had formerly existed was caused by his having become a wrongdoer, and the defendant was not justified in stopping the plaintiff's excessive user by means which altogether prevented his enjoyment of the water, but only in stopping it by the least injurious means in his power.

Semble, that if there had been a confusion of rights, the defendant would have been justified in abating the nuisance.

THIS was an action on the case for wrongfully pulling down an ancient weir whereby the right of the plaintiff to irrigate his meadows was injured.

The first count of the declaration stated that the plaintiff was the occupier of certain meadow land in the parish of North Molton, in the county of Devon, situate near a certain stream or water course, and that before the grievances hereinafter mentioned a great part of the water of the said

stream or watercourse did of right run and flow, and ought of right to have run and flowed, and still of right ought to run and flow therefrom into and along a certain gutter or channel through and over the plaintiff's closes for the irrigating and watering of the same, and for the benefit and improvement of the soil. Yet the defendant, well knowing the premises, wrongfully pulled down and removed a certain weir or dam there lawfully standing and being in and across the stream or watercourse, for the purposes of diverting and turning the part of the water there, into, and along the gutter or channel through and over the closes of the plaintiff, and kept and continued the weir so pulled down and removed for a long space of time from thence hitherto, and wrongfully drew off and diverted a great part of the water of the stream which might and would have run and flowed, and hindered and prevented the same from running and flowing into and along, and by means of the gutter or channel through and over the closes of the plaintiff, whereby the closes have been impoverished and lessened in value, and the plaintiff has been prevented from enjoying the same in so ample and beneficial a manner as he otherwise might and would have done.

The fourth count was a countin trespass for breaking and entering a close of the plaintiff in the parish aforesaid forming part of the bed or channel of a certain stream there, and breaking and destroying therein a weir or dam of the plaintiff lawfully standing and being in and across the stream.

The other counts of the declaration were not material to the points in question.

The defendant pleaded fifteen pleas, of which the following are material:

Fourth plea: That before and at the time of the alleged grievance he was possessed of a certain mill, the occupiers whereof for twenty years before this suit enjoyed, as of right and without interruption, the right of diverting and using the water of the stream or watercourse for the working of the mill, and of removing all obstructions which might hinder the flow of the water for the working of the mill, and of removing the weir or dam when occasion required for the better working of the mill, and the grievance and pulling down of the weir was in use of the said right.

Sixth plea: That the defendant was seised in fee of a mill, and he and all those whose estate he then had therein from time immemorial enjoyed the right of diverting and using the water of the stream for working the mill, and of removing all obstructions which might hinder the flow of the stream and of removing the weir as occasion might require.

Fourteenth Plea: The defendant as to the fourth count of declaration, says, that at the time of the alleged grievances he was possessed of a mill adjoining and contiguous to the stream or watercourse for working the mill, and for the more convenient occupation and enjoyment thereof, and that the plaintiff had at the time aforesaid diverted and forced back and penned up the water of the stream, and prevented the same from flowing, and hindered the flow of the same on to the said mill of the defendant, and thereby interfered with and prevented the lawful working of the mill by the defendant, whereupon the defendant caused and procured the water of the stream so diverted, *forced back*, and penned up, again to flow on to defendant's mill, as it had been used and accustomed to do.

Replication and new assignment that the plaintiff sued not only for the trespasses admitted, but also for other trespasses.

Issue joined.

The plaintiff was the occupier of certain lands in the parish of North Malton, in the county of Devon, past which a natural stream of water ran, which ultimately found its way to and worked the defendant's mill. The plaintiff had a prescriptive right to take water by means of a gutter or channel from the stream at an ancient weir, a point considerably above the plaintiff's mill, for the purpose of irrigating his land. It was proved at the trial that the plaintiff had wrongly extended his gutter from the original place to which he was entitled to the flow of the water; and was thereby enabled to irrigate more of his land than he was formerly able to do, and the refuse water, instead of returning to the original stream, and flowing down to the mill, ran away in another direction; the consequence being, that the defendant lost the benefit of its assistance in turning his mill. This had been effected by the plaintiff lengthening the gutter and carrying it for a greater distance through his land. The result of this act of the plaintiff was, that the defendant was unable to obtain sufficient water to work his mill, and he accordingly went up the stream to the ancient weir and pulled down the stones and brushwood of which it was composed. The level of the stream being reduced below the mouth of the plaintiff's gutter, all water ceased to flow in that direction, and he was unable to irrigate his meadows.

The defendant claimed a prescriptive right to throw down the weir when necessary for the purposes of the mill.

Upon the trial of the case at the late Devonshire Summer Assizes, before Mr. Justice Willes and a special jury, the jury found, in answer to a question from the judge, that the pulling down of the weir was not reasonably and practically necessary to abate the nuisance caused by the lengthening of the plaintiff's gutters; and a verdict was directed to be entered for the plaintiff, leave being reserved to move to set it aside, and a verdict entered for the defendant on the ground that he was justified in doing the act complained of in consequence of the plaintiff having exceeded any right to which he was entitled, and thereby caused a suspension of such right.

Kingdon, Q.C. having obtained a rule accordingly.

Cole, Q.C., *Lopes*, Q.C. (*Pinder* with him) showed cause.—It is contended on behalf of the defendant, if the party who is possessed of the dominant tenement creates an excessive user of his enjoyment, that the owner of the servient tenement may put a stop to the right altogether; but I apprehend the true law is, where an encroachment is separable that it must be so separated: (*Cawkwell* v. *Russell*, 36 L. J. 34, Ex.). It was not necessary for the defendant to pull down the weir. I admit the principle that is laid down in *Lawton* v. *Ward* (1 Ld. Raym. 75), that under a right of way over a close to a particular place, a man cannot justify going beyond that place, and if he goes farther an action would lie. But if there are two ways of abating a nuisance, the least mischievous must be chosen, as laid down by Blackburn J., in his judgment in the Exchequer Chamber in *Roberts*

v. *Rose* (L. Rep. 1 Ex. 82; 13 L. T. Rep. N. S. 471.) In abating a private nuisance a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose:

Gale on Easements, 4th edit., pp. 55 584;
Arlett v. *Ellis and others*, 7 B. & C. 346;
Yard v. *Ford*, 2 Wms. Saund. (edit. 1871). p. 521.

In the case of *Tapling* v. *Jones* (11 H. of L. Cas. 290), the plaintiff enlarged the windows of his house, so that it was impossible to obstruct the light to the new windows without at the same time obstructing the light which had previously passed through the old windows, and the House of Lords held that the defendant was not entitled to obstruct the ancient passage of light. [GROVE, J.—Yes, but the opening of a new window was not an illegal act, and therefore distinguishable from the extension of the gutter.]

Kingdon, Q.C., *Montague Bere*, Q.C., and *Mortimer* in support of the rule.—If the defendant had stopped up the gutter, and caused the water to overflow on the land of a third party, he would have been liable to an action, and he chose the safest plan he could adopt by cutting off the water at the fountain head. The case of *Tapling* v. *Jones* is distinguishable, and has no bearing on this case. That case decided that the erection of a new light was not unlawful in itself, and that no one could prevent the erection, but here it is not disputed that the defendant might by some means prevent the excessive user. Whether the right to the water be prescriptive or riparian, the proprietor is bound to return it to the stream without appreciable diminution: (*Imbray and another* v. *Owen*, 6 Ex. 353). If he takes it for other purposes, such taking is illegal, and the whole right becomes forfeited; so where water is running away you are entitled to go to the fountain head and stop the water by raising and repairing the weir: (*Lawton* v. *Ward*, 1 Ld. Raym. 75.) The whole character of the flow was changed by the excessive user. So if a man abuses his rights, he becomes a trespasser *ab initio;* and if a man have a right of way for carriages from D. to Blackacre over my close, and afterwards he purchase lands adjoining to Blackacre, he cannot use the aforesaid way with carriages to the land adjoining, though he go first to Blackacre and from thence to the land adjoining: (*Skull* v. *Glenister*, 8 L. T. Rep. N. S. 826; 16 C. B., N. S., 81.) In *Luttrell's case* (Coke Rep pt. 4, 86*b*) it is said, supposing a tenant holds land under an obligation to repair the lord's hall, as in 10 Edw. 3, 23, if the hall falls and the lord rebuilds the hall in the same place and of such bigness, the tenant is bound to cover it; but if it is built of greater length or breadth, so as prejudice may come to the tenant; or if it is built in another place, he is not bound to cover it, for the nature of the tenure cannot be altered, nor of the tenant's service. The case of *Greenslade* v. *Halliday* (6 Bing. Rep. 379) is distinguishable, as there there was no excess in the right claimed and used, and it is for the excess that I say the defendant is entitled to the verdict. The defendant would have, if obliged to go on the plaintiff's land and obstruct the gutters, to select the exact spot at which the excess commenced. Why may he not say, I know you have exceeded your rights at the ancient weir, for more water flows down the gutter than formerly, and at that spot I will stop the nuisance. *Cawkwell* v. *Russell* (36 L. J. 34, Ex.) is distinctly in point.

WILLES, J.—The point was reserved by me at the trial, because it might have been the case that defendant was entitled to judgment, there being a confusion of a prescriptive right. The flow of water to defendant's mill was injured by the alteration of the gutter, and the plaintiff had thereby destroyed the measure of his right over the old course, and created a confusion of his ancient right. If the whole of the defendant's enjoyment had been interfered with as it was in the case of *Cawkwell* v. *Russell*, where the person who had a right to send clean water through his gutter sent down foul water, so that the nuisance could not be stopped without interfering with the enjoyment; if that had been the case, then the taking down of the weir would have been a reasonable mode of destroying the plaintiff's enjoyment. However, he is bound to abate the nuisance in the most reasonable manner, and subject to there being no confusion of the rights created, the jury have found that it was not practically necessary for the purpose of abating the nuisance to pull down the weir. If the extent of the excess was so great that it was reasonably impossible to abate the nuisance, then I should say there exists a right on the part of the proprietor of the servient tenement to interfere with the whole. In *Luttrell's* case Lord Coke refers to 7 Edw. 4, 27A, "that if a man have estovers by grant or appendant to an ancient house, he shall not have them to an house which he new builds." And a little further on he says, "For although in case when mills or houses, which have watercourses or estovers or other things appendant or appurtenant to them, be overthrown by the wind, or burned by wildfire, or fall by any other act of God, that if the owner rebuild them in the same place and in the same manner that they stood before, they should have the same ancient things, appendants, and appurtenants to this new mill or house, because the act of God shall not prejudice any; yet, if they be erased by the party himself, or fall through his default, the ancient appendants thereby are lost, for by his own act he cannot extend the prescription or grant, which was in a manner appropriated to the old house to a new house." The defendant has abated the nuisance, but in such a manner as he has no right to do, as he might have stopped the excessive enjoyment by blocking up the gutter at the spot where the old gutter terminated.

BYLES, J.—I am of the same opinion. I do not think there is such a confusion of rights as to make it necessary for us to interfere. The defendant, instead of bringing an action, takes the opportunity of abating the nuisance, and by a wrong method.

BRETT, J.—I am of the same opinion. One cause of action on which the plaintiff relied was, that he had a prescriptive right to the flow of water in the old gutter. The question, therefore, comes to be whether the defendant can justify his act? The jury found there was a damage done to the defendant's mill, and that the plaintiff himself had become a wrongdoer. The learned counsel's argument for the defendant is, that as the plaintiff had already become a wrongdoer by excessive user of an enjoyment to which he was entitled, the defendant is not obliged to go to any expense, or take any trouble to find where the plaintiff's wrongful act began, nor can he complain if it is abated by an encroachment in return. The fallacy in the case is, that such right of total abatement arises

only when the rights cannot be practically separated. In *Cuckwell* v. *Russell* no jury could have found otherwise, for there was no possible way for defendant to abate the nuisance than by doing what he did, but here the defendant ought to have confined himself to stopping up the gutter.

GROVE, J.—I am of the same opinion. The current of authorities show where, in cases of excessive user, an excess can be separated, that method should be chosen; and, if the defendant can stop the excess without interfering with the plaintiff's rights, he is bound to do so. The learned counsel puts it that the flow of water may be altered at the weir by the lengthening of the gutter, and it would be a very sound argument that there was a confusion of the right if the jury had not found that it was not reasonable to remove the weir, but what the plaintiff did was an excess, and cannot be justified so long as there is any other remedy.

Rule discharged.

Attorneys for plaintiff, *Whittakers* and *Woolbert*, for *Riccard* and *Son*, South Molton.

Attorney for defendant, *Thos. Sismey*, for *Pearse* and *Cross*, South Molton.

Saturday, Feb. 24, 1872.

SHARP *v.* POWELL.

Negligence—Illegal act at commencement—Remoteness of damage—Police Regulation Act (2 *&* 3 *Vict. c.* 47), *s.* 54.

The defendant's servant washed his master's van in frosty weather in the public highway, which was admitted to be an illegal act and against the provisions of 2 *&* 3 *Vict. c.* 47, *s.* 54.

The surplus water ran from off the road into the gutter, which was its normal course, and from thence towards the mouth of the common sewer. The mouth of the sewer being choked, the water again ran over the road and there froze. The plaintiff's horse passing at the time, fell down and was injured.

In an action to recover damages for the injury to the horse:

Held, that although the defendant was generally answerable for the natural consequences of his negligence, yet that he was not liable, for the proximate cause of the injury to the plaintiff was not such as might be reasonably expected to result from such negligence; and also that the damage was too remote.

THE declaration stated that the defendant wrongfully caused a certain van of his to be washed in a public highway in the parish of St. Leonard, Shoreditch, and thereby created a public nuisance, and caused large quantities of water to be collected together, whereby the said water became frozen and dangerous to the traffic of the said highway, and the plaintiff's horse, whilst lawfully passing along the highway, slipped upon the ice and fell with such violence that its knee was broken, and it became necessary to kill the horse, and the plaintiff was deprived of the use of the same, and was hindered in his business, &c.

The defendant pleaded not guilty; upon which plea issue was joined.

Upon the trial, which took place before Keating, J. and a common jury, last Hilary Term, the following facts were proved in evidence.

The defendant occupied a stable and coach-house in Felton-street, Hoxton, where he kept his van. Owing to the greater convenience, the defendant's servant was in the habit of washing his van in the public highway outside and opposite to his stables: and on the 22nd Nov. last the servant, according to his usual practice, washed the van in the road. At this time there had been a very severe frost, which had lasted for about a fortnight. The water with which the van was washed ran over the road and part of it froze on the road, and the rest ran down the kennel between the road and the kerbstone of the pavement for a distance of seventy-five feet, where there was the grating of a sewer for the purpose of conveying the water away underground. It was proved that all the water that was used for washing the van ran into the kennel, which was its natural course; but that on its reaching the grating of the sewer, owing to some stoppage, the water again overflowed on to and over the road, where it accumulated in some holes in the road, and rapidly became congealed into ice. The plaintiff's horse passing at this time, stepped upon the ice, fell down, and was so injured in consequence that it had to be destroyed.

At the conclusion of the plaintiff's case, the learned judge stated that he was of opinion that the damage done to the plaintiff's horse was too remote, and he therefore nonsuited the plaintiff, reserving leave to move to enter a verdict for the plaintiff for 25*l.*, the sum agreed between the parties, if the court should be of opinion that the defendant was liable; power being also reserved to the court to draw inferences of fact.

Metcalfe having obtained a rule, in accordance with the leave reserved,

Henry James, Q.C. (*Lanyon* with him) showed cause.—I am willing to admit that the defendant, by his servant, was committing a wrongful act in washing his carriage in the public highway, and an act against the provisions of the Metropolitan Police Act (2 & 3 Vict. c. 47, s. 54, sub-sect. 1), (*a*) yet the water which was used to wash the defendant's van ran into the gutter and would have flowed down the sewer in the ordinary course if it had not been stopped up. The plaintiff is trying to make the defendant liable for the improper construction of the sewer; but the defendant is only liable for a wilful act of negligence and for the natural consequences of such act, and such consequences as an ordinary person could reasonably anticipate would be the result of his negligence. He referred to *Scott* v. *Shepherd* (1 Smith L. C., 6th edit., 417.) The damage must be the proximate cause of the defendant's wrong, and must immediately, and according to the common course of events, follow from the defendant's wrong; the wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible: (*Hoey* v. *Felton*, 11 C. B., N. S., 142; 5 L. T. Rep. N. S. 354.) Thus the water would have flowed into the sewer if it had not been stopped, and although we were

(*a*) And be it enacted, that every person shall be liable to a penalty of not more than forty shillings, who, within the limits of the Metropolitan Police District, shall in any thoroughfare or public place commit any of the following offences (that is to say)—Every person who shall, to the annoyance of the inhabitants or passengers . . . . clean, make, or repair any part of any cart or carriage, except in cases of accident where repair on the spot is necessary.

wrongdoers originally, yet when the water got into its natural course our liability ceased.

Sedgwick on Damages, 82;
Cox v. *Burbidge*, 32 L. J. 89, C. P.; 13 C. B., N. S., 340;
Burrows v. *March Gas Company*, L. Rep. 7 Ex. 96;
Harrison v. *Great Northern Railway Company*, 3 H. & C. 231; 10 L. T. Rep. N. S. 621.

are distinguishable.

Metcalfe, in support of the rule.—It will be conceded that the defendant would be liable to an action if the horse had slipped where the van was being washed; and this act was a nuisance by the common law, as laid down in Hawkins' Pleas of the Crown, Book I. c. 75. The cause of the accident was in consequence of the water being poured down the gutter, and this was a nuisance: (*Brown* v. *Bussell*, L. Rep. 3 Q. B. 251.) The case of *Smith* v. *The London and South-Western Railway Company* (L. Rep. 6 C. P. 14; 23 L. T. Rep. N. S. 678) is in point; there the defendants left some dry grass on the bank of the railway, which becoming ignited by a passing engine, set fire to the plaintiff's cottage, which was situate 200 yards away across a stubble field and a public road. There the court decided that if the defendants were negligent in leaving the dry grass on the embankment, they were responsible for the injury that resulted from their conduct to the plaintiff, although they could not have reasonably anticipated that such injury would be the result of their neglect. So the plaintiff is responsible, being a wrongdoer *ab initio*. We are not to look to see whether the defendant might with reason anticipate an accident as the consequence of his act, but if it were an unlawful act he must be made liable; besides which, the frost had continued a fortnight, and was very severe on the morning of the accident. He referred to

The Lords Bailiffs Jurats of Romney Marsh v. *The Corporation of The Trinity House*, L. Rep. 5 Ex. 204; 22 L. T. Rep. N. S. 446.
Reynolds v. *Clarke*, 2 Ld. Raym. 1399.

BOVILL, C. J.—There is no doubt that a person who does a wrongful act is liable for the consequences, but generally he is not responsible for more than the ordinary consequences, unless it can be shown that there is a likelihood of such a result. There was no likelihood here, nor was the defendant's act the proximate cause of the accident. It seems to me that if there had been no obstruction in the grating of the sewer the water would have passed away. The frost had been in existence about a fortnight, but this would not lead the defendant to suspect any stoppage, and there was no evidence to show that the plaintiff had any knowledge that the gutter was so stopped, and without the stoppage the water would not have run over the road and become ice, and no damage would have occurred. It cannot be said that it was a reasonable thing to expect that the washing of the van would lead to such consequences and become the cause of such a disaster. In this case we have power to draw inferences of fact, and amend the record if necessary; and it is impossible to say the defendant is guilty of negligence to make him liable in this action, when the plaintiff sent out his horses in severe weather, a fortnight after the commencement of the frost, without taking the precaution of having them roughed. That appears to me to be a complete answer to the action; but as there seems some doubt if that point was intended to be left to us, I am content to found my judgment on the other question.

GROVE, J.—I am of the same opinion. The negligence of the defendant was neither the immediate nor the proximate cause of the injury to the plaintiff; nor do I think it within the ordinary scope of the Act of Parliament. The word natural has been used in the course of the argument with reference to the course of the water, but it is equally natural for water to overflow at one place as at another, and the correct word to be used, when referring to the course of a stream of water, should rather be normal than natural. If the water had been allowed to accumulate close to where the carriage was washed, then the overflow would have been brought under the notice of the party washing the carriage, and I should perhaps have been of a different opinion; but here the water has gone back to its normal channel, and the defendant is not bound, having got the water back into its ordinary place, to go below the stream to see whether any accident may be occasioned, which would just as much have occurred under ordinary circumstances, and if the defendant had not washed his carriage in a place improper for the purpose.

KEATING, J.—I am still of the same opinion as I expressed at the trial. The proximate cause of the accident was from the accumulation of water, and from it becoming frozen. Having reserved power to the court to draw inferences of fact, we are at liberty to go into the question of contributory negligence; yet that point not being particularly mentioned and adverted to at the trial, I prefer to base my judgment on other grounds. The defendant was ignorant of the stoppage at the mouth of the sewer, nor was he answerable in any way for it. It may be said that if the defendant's servant had not thrown the water down it could not have accumulated, and the accident never would have happened; but if we were to agree with such an argument, the question would arise, how are we to limit the doctrine of liability? It is not traceable to the unlawful act of the defendant, which appears to me to be too remote, and I think therefore with the rest of the court, that this rule should be discharged.

Rule discharged.

Attorney for plaintiff, *Holmes*.
Attorneys for defendant, *Mills* and *Lockyer*.

EXCHEQUER CHAMBER.

Reported by H. F. POOLEY, Esq., Barrister-at-Law.

Saturday, Feb. 10, 1872.

APPEAL FROM THE COURT OF COMMON PLEAS.

VIGAR v. DUDMAN.

Tithes—Modus—Conversion into "tillage."

Before the Tithe Commutation Act 1836, *an award was made under certain Enclosure Acts, by which the tithes of the land in which the plaintiff was a landowner, and the defendant the rector, were commuted. By this award a yearly modus payable in lieu of hay and adjustment tithe payment, and also larger sums to be paid yearly for the same lands when occupied by non-resident or converted into "tillage," were fixed by the commissioner.*

A house had since been built upon a portion of a field of the plaintiff mentioned in the award,

and a further portion to the extent of twenty-two perches was converted into garden ground, and the remainder of the field made into an orchard.

The defendant put in a distress for the larger sum fixed by the award to be paid for this field, on the ground that part of it had been converted into "tillage."

Held by the Court of Exchequer Chamber (Cockburn, C.J., Blackburn and Mellor, JJ., Channell, Pigott, and Cleasby, BB.), affirming the decision of the Court of Common Pleas, that the garden ground and orchard being accessories to the house, there had been no conversion into "tillage."

THIS was an appeal from a judgment of the Court of Common Pleas on a special case stated in an action of replevin: (See *ante*, p. 149; 24 L. T. Rep. N. S. 734; L. Rep. 6 C. P. 470; 40 L. J. 229, C. P.)

By an award made under the General Enclosure Act (41 Geo. 3, c. 109), and the Pitney Enclosure Act (42 Geo. 3, c. 15) (private) the tithes of Pitney were commuted for a corn rent-charge. It was provided by the said Pitney Enclosure Act that lands exempted from the payment of tithes in kind by valid moduses, or customary payments, should not be affected, but that such moduses or customary payments should continue payable as if the said Act had not been made. And the award stated that in order to ascertain what lands were so exempt from the payment of tithes, a schedule of the same, entitled the "Pitney Modus Schedule," was annexed, wherein were set forth the said lands with the amounts of the moduses or customary payments payable thereout, and also, inasmuch as such exemption extended only to the said lands when occupied by the owners thereof, or by persons residing within the parish of Pitney, and such lands were subject to the payment of tithes when occupied by non-residents, or when converted into "tillage," the tithe money payment to be thereafter payable thereout in the event of such lands being occupied by non-residents, or being converted into "tillage." The part of the schedule relating to the land in question was as follows:

No. on plan, 422; property and premises; Matthews, John, sen., Stawey Foot; computed acres, 1 acre; modus payable yearly, 1*d.*; actual measure of land, 1a. 1r. 3p.; yearly rent to be paid to the rector of Pitney when the modus lands shall be occupied by non-residents, 4*s.* 9*d.*; payment per acre, 3*s.* 8¾*d.*; corn payment at 8*s.* 7¼*d.* per bushel, 4 gall. 3½ pts.; yearly rent to be paid to the rector of Pitney when the modus lands shall be converted into tillage, 12*s.* 8½*d.*; payment per acre, 10*s.*; corn payment at 8*s.* 7¼*d.* per bushel, 1 bush. 3 gall. 6½ pts.

About forty years before the action was brought a house was built upon a portion of the field, and a further portion (to the extent of 22 perches) was converted into garden ground by the then owner, who fenced off the house and garden from the rest of the field, the remaining portion being orchard. No claim had ever been made on the plaintiff for payment of any other sum than the modus payment of one penny, mentioned in the schedule, until Oct. 1869, when the collection of the tithe having been placed in the hands of new agents, they called for payment of 3*l.* 16*s.* 3*d.*, being six years' arrears of the corn rent, on the ground that there had been a conversion into "tillage," and breach of the modus. The plaintiff refused to pay the sum claimed, but subsequently tendered 9*s.*, being six years' arrears in respect of the 22 perches actually converted *into garden*. Afterwards, a distress for the amount having been put in, the plaintiff replevied his goods and commenced the action in the Somersetshire County Court, whence it was removed into the Court of Common Pleas by writ of *certiorari*, and, by consent of the parties, a special case without pleadings was stated for the opinion of the court. Judgment having been given for the plaintiff, this appeal was brought.

E. Jones for the defendant.—I submit that "tillage" must be taken to mean any change of cultivation which would have entitled the parson to tithe in kind. A parson is entitled to tithes in kind for garden produce and orchards which are generally attached to houses. The definition of the word "tillage" in Johnson's Dictionary is "husbandry, the art or practice of ploughing, or culture." In Webster's Dictionary we find: "Tillage—the operation, practice, or art of preparing land for seed, and keeping the ground free from weeds which might impede the growth of crops. Tillage includes manuring, ploughing, harrowing, and rolling land, or whatever is done to bring it to a proper state to receive the seed; and the operations of ploughing, harrowing, and hoeing the land, to destroy weeds and loosen the soil after it is planted; culture; a principal branch of agriculture." [COCKBURN, C.J.—There is no cultivation except the momentary planting of trees.] He cited:

Comyn's Digest, title Dismes, E. 20;
Bedingfield v. *Feak*, Cro. Eliz. 467; 1 Rolle's Abr. 651, l. 35.

A. Charles, for the plaintiff, was not called upon.

COCKBURN, C.J.—I quite agree in the judgment of the Court of Common Pleas. The land was subject to a modus which was liable, according to the award, to be put an end to if the land was converted into "tillage," and I agree with the learned judges in the court below, for the reasons stated in their judgments, that what took place did not amount to a conversion into tillage.

BLACKBURN and MELLOR, JJ., CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Appeal dismissed.

Attorneys for plaintiff, *Vizard, Crowder*, and *Austie*.

Attorneys for defendant, *Nelson* and *Jones*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 27, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE and QUAIN, JJ.)

REG. *v.* REEVE AND ANOTHER.

Evidence—Confession—Inducement—Admissibility.

Two little boys were in custody on suspicion of obstructing a railway train, and the mothers and a policeman were also present. One of the boys' mothers said, "You had better, as good boys, tell the truth." Whereupon, both the boys confessed. Upon the trial, they were convicted upon evidence of that confession.

Held, that the evidence of confession was rightly received.

CASE reserved for the opinion of this Court by Byles, J.

The prisoners were children. One was eight

years of age, and the other a little older. They were convicted at the Worcester Assizes of an attempt to commit a misdemeanour, by obstructing a railway train.

The evidence was that Hancock's mother, Reeves' mother, and a policeman being present after they had been apprehended on suspicion, Mrs. Hancock said, "You had better, as good boys, tell the truth;" whereupon, both the prisoners confessed, and on this confession were both convicted.

The question for the Court of Criminal Appeal is, whether the confession was admissible against both the prisoners or either.

No counsel argued for the prisoners.

Streeten for the prosecution.—The evidence of the confession was properly received. The inducement to the prisoners to tell the truth was in the nature of an admonition and an exhortation, and was not in the nature of improper influence to procure a confession. This case is not so strong as *Reg.* v. *Jarvis* (10 Cox C. C. 574; 37 L. J. 1, M.C.), where one of the prisoner's employers having called him into his private room said, "I think it right that I should tell you that besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise you that to any questions that may be put to you, you answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue;" and having shown a letter to him which he denied having written, added, "Take care, we know more than you think we know," and the prisoner thereupon made a confession which was held admissible. [He was then stopped.]

KELLY, C.B.—We need not trouble you any further. The cases excluding confessions on the ground of unlawful inducement have gone too far for the protection of guilt. The case of *Reg.* v. *Jarvis* was much stronger in its circumstances than the present. In that case a good deal was said by one of the prosecutors that might have operated on the prisoner's mind, and led him to confess. In the present case, the inducement was simply what a mother would say to her son under the circumstances.

The rest of the COURT concurring.

Conviction affirmed.

(Before KELLY C.B., WILLES J., CLEASBY B., GROVE and QUAIN JJ.)

REG. v. WOLLASTON.

Indecent assault—Consent.

A man induced two youths above the age of fourteen years to go out with him in the evening to an out of the way place, where they mutually indulged in indecent practices on each others persons. The youths were willing and assenting parties to what was done:

Held, that under these circumstances a conviction for an indecent assault could not be upheld.

CASE reserved for the opinion of this Court by Cockburn, C. J.

Thelwall Wollaston was tried before me, at the last Assizes for the county of Sussex, on an indictment under the 24 & 25 Vict. c. 100, s. 62, for an indecent assault on one William Rickard with intent to incite the said William Rickard to commit an unnatural crime. There was a similar count for an assault, with the like intent on one Douglas White.

There were also (besides other counts which altogether failed on the evidence) counts for an indecent assault on each of the two parties before named.

The facts did not admit of dispute. It appeared that the defendant had induced two youths, William Rickard and Douglas White, by the expectation of pecuniary reward, to go out with him in the evening to an out of the way place, and had, &c. (The facts showing the indecency practised were then set out.) After having passed some time in the gratification of this unnatural propensity, he, without attempting or suggesting anything further, voluntarily left, not having been interrupted or become conscious of being observed. It was plain that the two youths had accompanied the defendant with a full knowledge of what was about to take place—this not being the first time that the defendant had carried on such practices with one of them—and had been perfectly willing and assenting parties to all that had been done.

There being thus no evidence to establish the intent necessary to support the counts framed on the statute, the counsel for the prosecution very properly gave up that part of the case and relied for a conviction on the counts for the indecent assault. But on the part of the defendant it was contended that, as it was admitted that the parties on whom the alleged assault had been made had been consenting to all that had been done to them, that which would otherwise have been an assault became divested of that character; that this was not a mere submission, which, it was true, might not make a touching of the person less an assault, but an actual consent, knowingly and intentionally given, which was inconsistent with the essential character at law of an assault, and that in this respect there could be no difference in point of principle between an assault committed in furtherance of a natural desire, and one committed in furtherance of a lust however unnatural and detestable.

In support of the general doctrine that where there is consent there cannot be an assault in point of law, the case of *Reg.* v. *Martin* (2 Moo. C. C. R. 123) was referred to. The case appeared to me to be in point, and on the whole I was disposed to think that the contention of the defendant's counsel was well founded. But as the point had never been decided in a case like the present, I directed the jury to find the defendant guilty on the counts for indecent assault, reserving for the consideration of this court whether upon the facts of the case those counts could be upheld. Upon this point I now request the opinion of the court.

I admitted the defendant to bail, to come up for judgment, if required, at the next Sussex Assizes.

Parry, Serjt. (*R. E. Webster* with him) for the prisoner.—The conviction cannot be sustained. The indictment is framed upon the 24 & 25 Vict. c. 100, s. 62, which enacts that whosoever shall be guilty of any indecent assault upon any male person shall be guilty of a misdemeanour. There was no evidence to support the finding of the jury on the fifth and sixth counts of the indictment, the counts for an indecent assault. The charge is one at common law, and in substance for a common assault—the offence of an

indecent assault being statutable. There is no allegation of *ad communie nocumentum* and no charge of indecent exposure. [Willes, J. referred to *Reg.* v. *Watson* (2 Cox C. C. 376), where an indictment which alleged an exposure of the person to one person only was held bad.] There was nothing of the kind here to constitute an exposure. [Kelly, C. B.—The only question is whether this can be called an assault at all? What was done was done not only with the consent of the youths, but they were willing participators. Of what age were the youths?] Above the age of fourteen. [He was then stopped by the court].

Barrow, for the prosecution.—The case of *Reg.* v. *Martin*, relied upon at the trial, was no doubt a decision to the effect that an attempt to commit the misdemeanour of having carnal knowledge of a girl between ten and twelve years old is not an assault if the girl assent. But in such a case it is no offence in law on the part of the girl to give her consent. The old cases establish that where two people meet to commit that which is an offence in the eye of the law, consent is immaterial. In such cases the indictment charges that each committed an assault upon the other, and that seems to show that when an indecent assault is charged to which the patient offers no opposition his consent goes for nothing, and that the law will not regard it. (The case of *Lord Audley* 3 Howell's St. Trial 402) [Willes, J.—In an action for criminal conversation the declaration alleges that the defendant assaulted the wife though she was a consenting party.] An indecent assault is an act to which the law will not permit a party to consent.

Kelly, C.B.—It is clear that, upon the circumstances of the case, there is nothing which constitutes an assault in law. If anything is done by one being upon the person of another to make the act a criminal assault, it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case there was actual participation by both parties in the act done, and complete mutuality. We should be overturning all the principles of law to say that in this case there was any assault in law. The cases referred to in the argument of the counsel for the prosecution are founded on this, that the law does not recognise consent to commit a felony. In this case there is nothing in the nature of an exposure of the person charged which is within the purview of the law. Anything of the kind in question done before two or more persons would have amounted to an indecent exposure, and consent would have been no defence. Consequently, under the circumstances of this case, the conviction must be quashed.

The rest of the Court concurring.

Conviction quashed.

COURT OF APPEAL IN CHANCERY.

Reported by E. Stewart Roche and H. Peas, Esqrs., Barristers-at-Law.

Jan. 26 and 31, and Feb. 12, 1872.

(Before the Lords Justices.)

Beckett v. The Corporation of Leeds.

Highway—Ownership ad medium filum viæ—Presumption.

In opposition to the claim of the owners of houses abutting upon an ancient street in a town that they were entitled to the soil of the street ad medium filum viæ, evidence was adduced, that the lords of the manor used formerly to receive tolls in respect of markets held in the street, which tolls they subsequently sold to the corporation of the town; that in 1694 they had, in consideration of a yearly rent of 3l., granted a licence to certain persons to dig up any streets of the town in order to lay pipes for the purpose of supplying the town with water, which rent of 3l. was paid to them down to 1856, when it was bought up by the corporation for 75l.; and that payments had on several occasions been made to the lords of the manor by owners of houses abutting on the street in question in respect of encroachment made upon the soil of the street:

Held (reversing the decision of the Master of the Rolls), that the evidence of ownership in the lords of the manor was sufficient to rebut the presumption of law, that the owners of the lands abutting upon the street were entitled to the soil of the street ad medium filum viæ, and that consequently the lords of the manor had shown a good title to the soil in question.

This was an appeal from a decision of the Master of the Rolls.

The suit was instituted by the lords of the manor of Leeds to enforce specific performance of an agreement dated 20th Dec. 1867, and made between the plaintiffs of the one part and the corporation of Leeds of the other part, whereby the plaintiffs undertook to convey to the corporation the soil of so much of the ancient street called Briggate, in the town of Leeds, as would be required to enable the corporation to complete certain contracts for sale into which they had entered.

On the 2nd Dec. 1867 the corporation of Leeds, acting under the powers conferred upon them by the Leeds Improvement Act 1866, had offered for sale by public auction two plots of land on the west side of and abutting on Briggate, undertaking to grant to the purchasers of these lots the right of forming cellars under and extending fourteen feet into Briggate, and co-extensive with the frontages of the lots.

The lords of the manor disputed the right of the corporation to make any such grant of the right of forming cellars under Briggate, and claimed to be themselves the owners of the soil under that street.

Under these circumstances the agreement of the 20th Dec. 1867 was entered into, by which it was agreed that it should be referred to an arbitrator to determine the value of the soil agreed to be sold.

The corporation having alleged that the lords of the manor did not show any title to the soil in question, and that they (the corporation) themselves were the owners of it in fee, the lords of the manor instituted the present suit to enforce specific performance of the agreement.

The chief clerk of the Master of the Rolls having certified that the lords of the manor had made out a good title to the soil in question, the corporation took out a summons to vary the chief clerk's certificate, and the Master of the Rolls reversed the decision of his chief clerk.

The lords of the manor now appealed from the decision of the Master of the Rolls.

The land upon which the greater and older portion of the town of Leeds now stands is within the manor of Leeds, and anciently formed part of the demesne lands of the manor, and the street called Briggate is in that part of Leeds which is within the manor. Briggate is the principal and one of the oldest streets of Leeds, and it passes through the centre of the town to a bridge over the river Aire, upon which the town is situated. It is a very wide street, being on the average about 65ft. across, and at the part where the land in question in this suit lies it is 63ft. in width.

The lords of the manor of Leeds from time to time exercised acts of ownership upon the soil of the ancient streets in Leeds. Fairs and markets used formerly to be held in Briggate, and in other old streets of the town, and the stallage and pickage and other tolls in respect of those markets were regularly paid to the lords of the manor down to the year 1854, when they sold the same to the corporation of Leeds.

By a deed dated the 22nd Sept. 1694, the lords of the manor, in consideration of the sum of 3*l.* for ever to be yearly paid as therein mentioned, granted license, leave, power and authority, to Henry Gilbert and George Sorrocold, their heirs, executors, administrators and assigns for ever, to dig up any of the streets and highways within the town of Leeds, to lay pipes and do all other things necessary for the carrying on and managing certain waterworks which were about to be made for supplying the town of Leeds with water.

In the year 1853 these waterworks were transferred to the corporation of Leeds, who regularly paid the annual rent of 3*l.* down to 1858, when an arrangement was made between the lords of the manor and the corporation, by which the corporation paid the lords of the manor 75*l.* for the purchase of the annual rent of 3*l.*

The plaintiffs adduced evidence of several cases in which the owners of houses in Briggate had made payments to the lords of the manor in respect of encroachments made upon the soil of the street.

The defendants also adduced evidence of cases in which such encroachments had been made without any payment having been made to the lords in respect thereof.

The *Solicitor-General* (Jessel, Q. C.), Sir *Richard Baggallay*, Q. C., and *North*, for the appellants, contended that the evidence of acts of ownership on the part of the lords of the manor showed conclusively that they were the owners of the soil in question, and that the evidence was sufficient to rebut the general presumption of law that the defendants, as owners of the houses, were entitled to the soil of the street *ad medium filum viæ*. They referred to

Attorney-General* v. *Chambers, 4 De G. & J. 55;
Berridge* v. *Ward, 10 C. B., N. S., 400;
Lord* v. *The Commissioners of Sidney, 33 L. T. Rep. O. S. 1; 12 Moo. P. C. 473;
Doe* v. *Pearsey, 7 B. & C. 304;
White* v. *Hill, 6 Q. B., N. S., 427;
Squire* v. *Campbell, 1 My. & Cr. 459.

Sir *Roundell Palmer*, Q. C., *Bagshawe*, and *Graham Hastings*, for the respondents, contended that the evidence was not sufficient to rebut the presumption that the corporation were entitled to the soil *ad medium filum viæ*. They cited

The Marquis of Salisbury v. *The Great Northern Railway Company*, 32 L. T. Rep. 175; 5 C. B., N. S., 174;
Simpson v. *Dendy*, 8 C. B., N. S., 433.

Sir *Richard Baggallay* Q. C. in reply.

Lord Justice JAMES:—In this case I am of opinion that the lords have made out a very clear and very satisfactory title to the piece of ground in question. A good deal of the argument has turned upon what is supposed to be the rule of law as to the presumption that closes extend *ad medium filum viæ*, and it is said that that presumption is to be applied to such a house as this in Leeds, with respect to that wide space between the house and the houses on the other side. The rule, as laid down in the case of *Lord* v. *The Commissioners for the City of Sydney* (12 Moo. P. C. Cas. 473), in which the matter was probably more fully considered than in any other case, is, that in all these cases you must have regard to the circumstances under which the words of grant are used. The learned judge who there gave the judgment of the court, the Right Hon. Sir John Coleridge, says this: "If lands were described as bounded by a house, no one could suppose the house was included in the grant; but if lands granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum* in the far greater majority of cases wholly unprofitable." I should, myself, if it were necessary to determine it, be very slow to come to the conclusion that where there is a road going through an estate, and a site is granted by the roadside for the erection of a cottage or house, and a cottage or house is built upon that site, the mere conveyance, or grant, or demise of a piece of land as the site, and for the purpose of the site of a house, is in presumption of law a grant up to the middle of the high road, the frontage of which is probably the origin of the house being built on that space. It appears to me that a great many inconveniences might arise, which one could easily point out, from the notion that a mere grant or demise of such a site would of itself raise a presumption of law which would deprive the owner of the estate of his possessory title, or of his freehold in respect of the half of the highway. But the present case stands in this way. These were really not originally, according to the evidence before us, houses built by the side of a mere highway to which the rule could be at all applied. It appears now quite clear that this street is a very wide open space—I mean very wide having regard to the purpose for which the space was used between the houses—60ft. wide; it is a space which was kept and used for fairs and for markets of all kinds and descriptions, which fairs and markets were the fairs and markets of the lord of the manor, and continued to be the fairs and markets of the lord for several centuries after the time when the place came into existence. It appears to me that in such a case as that, to presume that where the lord of the borough had allowed his dependent burgesses to have a thing called a "toft" fronting towards the market and fair place which was also used as a road, that where the lord granted or permitted to his bur-

gesses to have each such a toft as that, and then by a grant enlarged the tenure of that toft into a fee simple tenure in borough English. To presume that, in such a case, the lord intended to grant, or the tenant intended to take, the half of the vacant space between the one row of tofts and the other row of tofts, is, to my mind, a presumption inconsistent with common sense, and inconsistent with the sense which the common usage of mankind would apply to such a grant. Then we have this —there being nothing but the presumption, or supposed presumption, in favour of the owner of the house—there is, beyond all question, the fact that the lord has received for a great number of years a substantial money payment for the use of part of the soil itself of the road in question. It was a sum of 3 guineas a year, and, no doubt, that is not a very large sum, but it is a substantial sum which the lord has received, and has received latterly from the corporation, before that from a joint stock company, and before that from individuals who were speculatively engaged in establishing works for the benefit of the town, and which must have been received, as it appears to me, with the full knowledge of everybody connected with the town of Leeds at the time. Then, in addition to that, the lord has received a sum in respect of encroachments upon part of this very street itself, one or two upon the street called Briggate, and one or two more upon that which is doubted as being part of Briggate, but which, at all events, is a continuation of the same line of road leading from the bridge upwards towards the country, as against which proofs of ownership, to my mind, there is no evidence of enjoyment of any profit, or of any right, which can be considered as adverse to the title of the lords. Under these circumstances, I am of opinion that a good title was shown; and, having regard to the offer which was made to furnish evidence of the material facts, I am of opinion that a good title was shown before the institution of the suit.

Lord Justice MELLISH. I am of the same opinion. Looking at the nature of the property, namely, a road which passes between two rows of houses, you cannot of course expect to prove the property in it by the ordinary acts of ownership, of its having been let and enjoyed in that way. You can only expect the sort of evidence that can be produced in such a case, and, having regard to the nature of the property, I am of opinion that the lord has really made out an extremely strong case. In the first place, I agree that, looking at what we know about the property in ancient times, there is no presumption that the tofts went to the middle of the highway, or to the middle of the space between them and the tofts on the other side. What we know about it is this: I think it is clearly to be presumed that the road between must have existed from time immemorial, because the fairs and markets must be presumed to have been held from time immemorial. As regards the markets, it is expressly recited in the charter of Charles I. that they had existed from time immemorial, and the fairs must have existed likewise from time immemorial, because there is no trace of any grant. Then this being in fact in the time of King John, you have a small town with a market-place and fair-place in the middle of it, and probably a small portion of it only occupied as a highway at that time, but with spaces between used for the common benefit of the public, and the enfranchisement of the markets and fairs appears to have been permitted by the lords. Then you find that at some time, certainly before the reign of King John, there were granted out tofts simply as burgage tenements in the first instance, and then, as it appears to me, as tenements at will. Is it to be presumed that the lords intended to grant the actual soil of all that space which was granted to the use of the public, and which was to be used for the purpose of markets and fairs? It appears to me to be extremely improbable that it could have been their intention at that time to do so, and that, whatever may have been the presumption at that time, the acts of ownership have been very strong indeed. The lords having granted the right to lay down water pipes in all the streets in Leeds, and having received an annual payment for years, is very strong evidence of ownership. So also is the granting of liberty to make encroachments in the streets and receiving payments, some fixed and some annual, for doing so. They were very strong acts of ownership: and so also was receiving profits in respect of the soil of the streets. Then there was the moot-house in the middle, and also the copyhold house going down. When these copyholds were granted or erected we do not know; but it all goes to show the general intention of the lords to reserve and keep a considerable dominion over the soil of the streets. Then, what is there on the other side? Nothing but the most slight evidence of encroachments in modern times; and really, as to the Acts of Parliament, I cannot see that there is anything inconsistent in them; and we have to decide this case in fact, as jurymen, and say whether, on this evidence, we ought to find in favour of the lords of the manor. I can only say that I am convinced in my own mind that the soil in the ancient streets did belong to the lords, and that up to a very modern period, that was the universal opinion in Leeds, and everyone acted upon it, and it is only in modern times that doubts have been cast upon it. Under these circumstances I am of opinion that a jury would come to the conclusion in favour of the lord; and I am also of opinion that, if the jury found against the lord upon the evidence, a common law court would send down the case for a new trial.

Solicitors for the appellants, *Paterson, Snow,* and *Burney,* for *Dibb* and *Atkinson,* Leeds.

Solicitors for the respondents, *Wright* and *Venn.*

Jan. 30 *and Feb.* 19, 1872.

(Before the LORDS JUSTICES.)

HARDY *v.* THE METROPOLITAN LAND AND FINANCE COMPANY (LIMITED).

Building society—Breach of trust by directors—Unauthorised investment—Suit to recover moneys improperly paid—Jurisdiction in equity.

A benefit building society from time to time deposited moneys with a finance company, whose manager and some of whose directors were also manager and directors of the society. Portions of the moneys were at various times repaid to the society, and ultimately the company gave a cheque to the manager for the repayment of the balance to the society. The manager misappropriated the money, and afterwards died. The trustees of the society thereupon, with the sanction of the directors, who

were not made parties, filed a bill against the company to recover payment of the money:

Held (reversing the decision of the Master of the Rolls) that the cheque was given to the manager as the agent of the company, and that he held it as such agent till he had paid it over to the society, but as he never paid it to the society the money must be treated as still in the hands of the company, and as it had come into their hands by means of a breach of trust, a suit for the recovery of it could be maintained in equity.

Decree accordingly for repayment by the company with interest.

THIS was an appeal from a decision of the Master of the Rolls.

The suit was instituted by the trustees of the London Benefit Building Society, to recover from the defendant company, a sum of 375*l.*, alleged to have been improperly received by them under the following circumstances.

The building society was formed under the provisions of the Act 6 & 7 Will. 4, c. 32, with which was incorporated the Act 10 Geo. 4, c. 56, and its rules were duly certified and enrolled.

By these rules the City Bank were appointed the bankers of the building society.

The defendant company was incorporated for the purpose, among other things, of raising and borrowing money at interest, and receiving deposits.

Joseph Dutton, the then manager of the building society, and also the manager of the defendant company, was permitted by the directors of the building society to deposit part of the society's moneys with the defendant company. These deposits were made from time to time, between Feb. 1866, and March 1869, when a balance of £375 was standing to the credit of the building society in the books of the defendant company.

On the 23rd March 1869, the defendant company drew a cheque for the balance in favour of the building society and handed it to Dutton, to pay it to the society. This cheque was signed by two of the directors of the company and countersigned by Dutton as manager of the company.

Dutton did not pay the money to the society, but appropriated it to his own use, and soon afterwards died.

The present suit was instituted by the trustees of the benefit building society, pursuant to a resolution of the directors. The bill alleged that the deposit of the society's moneys with the defendant company was unauthorised and illegal, as they had no power to lend money otherwise than on real and heritable securities, and that in fact the society and its officers were expressly prohibited by the above mentioned Acts of Parliament, and by their rules, from investing money on deposit with a joint stock company; that the defendant company had notice through their manager of such illegality; that the repayment to Dutton was made without any authority from the directors of the building society, and without taking any proper receipt; and that the defendant company were liable to repay the amount. And it prayed that they might be decreed to repay it accordingly.

The defendant company, by their answer, submitted that they had no notice through their manager or otherwise that the investment was unauthorised. They alleged that they had duly repaid the 375*l.* to the building society, by a cheque given to Dutton, the manager of the society, and that the society must be taken to have adopted Dutton as their agent for the purpose of receiving repayments, inasmuch as from 1866 to 1869 repayments of deposits to the society had always been made by means of cheques given to Dutton; and they submitted that the remedy of the plaintiffs, if any, was at law, this being a mere money demand.

Evidence was adduced on behalf of the plaintiffs that the directors of the society had not given any authority to Dutton to apply for or receive the 375*l.*, and that they did not know that he had received it until May 1869, after his death.

The society made a claim for the 375*l.* against Dutton's estate, after his death.

The Master of the Rolls dismissed the bill with costs, on the ground that it was a mere money demand.

In delivering judgment, his Lordship said: I am of opinion that this suit fails. It is brought nominally by the trustees of the London Benefit Building Society, but really by the directors, to make the defendant company repay the sum of 375*l.* lent to them by the directors of the building society. The suit either rests upon a breach of trust, or it does not. If it rests on the ground of a breach of trust on the part of the directors in lending the money to a finance company, then the directors were as guilty in lending the money as the company was in receiving it. Mr. Davey argued that it being a breach of trust to advance the money, the defendant company, by dealing with the building society, must be taken to have known of the breach of trust, and are therefore liable to repay the money. If that were so, then I am of opinion that it would be impossible for the directors of the building society to proceed against those to whom they themselves advanced the money, and make them liable to repay it to the trustees, who are only formal parties to the suit. The case of *Gray* v. *Lewis* (20 L. T. Rep. N. S. 582; L. Rep. 8 Eq. 526) does not apply at all. If such a suit is instituted alleging a breach of trust, it must be brought by some parties complaining of the directors and of the defendant company, and seeking to make both liable. But the prayer of the bill in the present suit is not framed on the ground of a breach of trust; and, that being so, it is reduced to a mere money demand, and the question then is whether the money has or has not been actually repaid; but that I do not go into. There is no foundation for the proceedings in equity, and the bill must be dismissed with costs, without prejudice to any proceedings at law.

From this decision the plaintiffs appealed.

Southgate, Q.C. and *Davey*, for the appellants.—We contend that this suit can be maintained, the moneys deposited with the company being trust moneys, and the company having at least constructive notice of the trust: (*Bridgman* v. *Gill*, 24 Beav. 302.) The deposit of the money with the company was not a common banking account, the society having by their rules to keep their banking account with a certain bank; but it was an investment of the money and an investment which was not authorised by the rules, and therefore it was a breach of trust on the part of the directors of the society. The company must be taken to have had notice of the rules, for they were enrolled, and we submit that at least the fact of the society and the company having common directors, and a common manager, fixes the company with constructive notice that the deposit

was a breach of trust. [Lord Justice MELLISH.—In *Re The Marseilles Extension Railway Company* (25 L. T. Rep. N. S. 858; L. Rep. 7 Ch. 161), we held that although two companies had common directors, and a common solicitor the lending company was not affected with notice of any illegality in the purpose to which the money borrowed was to be applied.] That was a different case from the present, for the lending company had power to lend, but here the society had no power to deposit its money in this way. *Ernest* v *Croysdill* (2 L. T. Rep N. S. 616; 2 De G. F. & J. 198), is strongly in favour of our claim, for there as here the claim proceeded upon the right to recover moneys affected by a trust which had got into the hands of other persons with notice of the trust. We contend that our claim to relief in equity cannot be resisted on the ground that it is a mere money demand, and that we have only a remedy at law. Dutton was not our agent for the purpose of receiving repayment of the money, therefore the company are not released by having paid it to him, and it must be taken to be still in the hands of the company. We contend that it was not necessary to make the directors of the society parties to the suit, for *McGachan* v. *Dew* (15 Beav. 84) shows that it is not necessary to make all the parties to a breach of trust parties to a suit seeking redress, but the injured persons can proceed against some of the persons guilty of the breach of trust without making them all parties. But even if they ought to have been made parties, that was a defect easily remedied, and not a ground for dismissing the bill. They also cited,

Ernest v. *Nicholls*, 6 H. L. Cas. 401;
Fountaine v. *The Carmarthen Railway Company*, L. Rep. 5 Eq. 316;
Grimes v. *Harrison*, 26 Beav. 435; 6 & 7 Will. 4, c. 32.

Swanston Q.C. and *Montague Cookson*, for the respondents.—We contend that the company was discharged from its liability by paying the money to Dutton, who we contend was the agent of the society. The society admitted this by making a claim against his estate. But we contend that the deposit was not a breach of trust; it was merely a banking transaction, and not an investment. It was therefore a legitimate transaction and, if so, there was no trust; it was a simple banking operation. It is said that the society had bankers of its own; but there was nothing to prevent it from changing its bankers, or if there was, we had no notice of it. No case decides that a person dealing with a building society is bound with notice of everything in its rules. Indeed the provision of the 10 Geo. 4, c. 56, s. 8, that all the members of a building society shall be deemed and taken to have full notice of its rules, shows that persons not members are not affected with notice of them. This case is reduced to a mere money demand, and we contend that the bill was rightly dismissed.

Without calling for a reply,

Lord Justice JAMES said: The argument satisfies me that the court has jurisdiction to do what is clearly the right thing to do, namely, to make the defendants repay this money which they clearly received, and of which they have not discharged themselves. For assuming them to have been indebted in the sum of 375*l.* to someone on behalf of the London Benefit Building Society, the mode *in* which they state that they discharged themselves of that sum is utterly without validity. According to the defendants' own account of the transaction, their directors were in the habit of acting upon the information of the manager as to the deposits to be withdrawn at any time, and then of drawing cheques for the amounts which they left in his hands to pay to the persons in whose favour they were drawn. According to this practice, he represented to them that the building society had by some proper authority or other required payment of this sum of 375*l.* Upon that representation the directors drew a cheque for the amount, and he countersigned it, and it was left in his hands to be paid over to the building society. It appears to me that that was no payment to the London Benefit Building Society, until the cheque passed into the hands of someone authorised to receive it, and give a receipt for it on behalf of the society. And in spite of all that has been said about the usual mode of transacting business between the company and the society, and the resolution of the directors of the society, Dutton clearly had no authority to receive the money on behalf of the society. Till he paid the cheque over to the society he held it in exactly the same capacity as that in which he had countersigned, that is as manager of the defendant company, who were not discharged by handing the cheque to him. That being so, the only question is, whether this is such a clear money demand that this court has no jurisdiction to give relief. At first it appeared to me that there would be great difficulty in the way of granting relief in equity, and the Master of the Rolls was of opinion that the difficulty was insuperable. However, it appears to me beyond all question that these moneys were moneys belonging to the London Benefit Building Society, who had no power by their rules to deposit the moneys in this way with the defendant company. But as the money was lent by the directors in a manner unauthorised by the rules, it was trust money placed by an improper act in the hands of the defendants, and, as, in my view of the case, it has not been repaid, it is trust money still in the hands of the defendants, and having been improperly placed there by trustees, it is competent to the *cestuis que trust* to come here and file a bill requiring repayment of the trust money. If the money had really been paid to persons authorised to receive it, more investigation would have been necessary as to how far the defendants had notice of the breach of trust committed by the directors of the society in depositing the money with them. But in the view which I take of the case it is unnecessary to investigate that question. On the whole I am of opinion that, under the circumstances of the case, this court has jurisdiction to grant relief, and that the order of the Master of the Rolls must be discharged. The order will be that the defendant company do pay the 375*l.* with interest at 4 per cent., together with the costs of the suit up to and including the hearing before the Master of the Rolls.

Lord Justice MELLISH.—I am of the same opinion. The Master of the Rolls decided the case upon the ground that it was a mere money demand. But it appears to me, looking at the Act and the rules of the society, that the directors of the building society were guilty of a breach of trust in depositing the money with the defendants. If it was intended as a permanent investment the directors had no power by their rules to make any

such investment, and if not looked upon as a permanent investment, but only as a temporary deposit, it was equally contrary to the rules by which the City Bank were appointed the bankers of the society. There is no doubt, therefore, that it was a breach of trust on the part of the directors; and, that being so, the question is whether this suit can be maintained. I am of opinion that it can. It appears to me that if the money is still in the hands of the defendants, they are liable to repay it, whether they had notice of the breach of trust or not. I am of opinion that it must be considered to be still in their hands, and therefore the question of notice does not arise. The payment to Dutton cannot be treated as a payment to the building society. Till he handed over the cheque to the society he held it as the defendant's agent, as he did in the ordinary course of business. But it is alleged that the society treated him as having received the money on their behalf by making a formal demand for payment of it upon Dutton's personal representatives. The mere fact of such a demand having been made could not be evidence that the money was really received by Dutton on behalf of the society. Therefore, as this money is trust money which came into the hands of the defendants by a breach of trust, and as it is still in their hands, I am of opinion that a suit to recover it can be maintained.

Solicitors for the appellants, *Willoughby* and *Cox*.

Solicitors for the respondents, *Sharp* and *Turner*.

ROLLS COURT.

Reported by G. WELBY KING, Esq., Barrister-at-Law.

Feb. 19 *and* 28, 1872.

GAUNT *v.* FYNNEY.

Nuisance—Heat—Noise—Vibration—Delay—Damages—21 & 22 *Vict. c.* 27, *s.* 2.

The defendant, in Jan. 1865, *erected a steam engine in a shed adjoining the stable belonging to the plaintiffs, by which the stable was rendered unfit for horses, and some inconvenience occasioned in the plaintiffs' dwelling-house. No complaint was made by the plaintiffs until June* 1870.

Under the circumstances, the court refused to grant an injunction to restrain the defendant from working the engine, but directed an inquiry as to what damages should be awarded to the plaintiffs in respect of the injury to the dwelling-house and stable.

THE plaintiffs were the owners and occupiers of a dwelling-house and outbuildings at Leek, in the county of Stafford, which had been erected by their late father, Richard Gaunt, in or about the year 1811, and also of a two-stalled stable, originally two cottages, which were conveyed to the said Richard Gaunt in 1817, and converted by him into a two-stalled stable and harness room in 1830.

In 1855 the defendant purchased a piece of land lying to the east of the plaintiffs' dwelling-house, upon which a mill was built for the purpose of manufacturing silk, leaving a small strip of land adjoining and lying to the east of the plaintiffs' said stable. This mill was connected with another silk mill belonging to the defendant, which he had acquired in 1849, and which had been used for many years previously in the manufacture of silk. Both these mills were worked entirely by hand power up to the month of Jan. 1865, and no steam power was used upon the defendant's premises before that time. In the latter part of the year 1864, and in Jan. 1865, the defendant and his late partner raised a part of the wall, which inclosed the strip of land on the west, boarding up the lower half of the east wall of the plaintiffs' stable, and converted it into a boiler and engine house and placed a boiler and steam engine in it for the purpose of working the machinery in the mills, such engine house being about 60ft. distant from the plaintiffs' residence. The plaintiffs alleged that from the time when the engine began to work, the noise occasioned by it caused some slight inconvenience to them, but in, and for some short time prior to, the month of June 1870, the noise and vibration occasioned by the engine and the machinery connected with it had increased to such an extent as materially to interfere with the health and comfort of the plaintiffs, and their enjoyment of the dwelling-house and premises, and to be a nuisance and injury to them, and that the stable was rendered unfit for horses, and wholly useless as a stable, in consequence of the heat from the boiler and the noise and vibration of the engine. They also stated, that until the month of Oct. 1870, they believed that the engine was in some part of the defendant's mill, and that they had no idea or suspicion that there was any engine or machinery in the space between their stable and the defendant's mill.

A considerable mass of evidence, of a somewhat contradictory nature, was adduced upon the question of nuisance, but, as will be seen from the judgment, the court was of opinion that the existence of the nuisance was clearly proved.

Sir *R. Baggallay*, Q.C. and *Rowcliffe*, for the plaintiffs, referred to *Crump* v. *Lambert* (L. Rep. 3 Eq. 409).

The *Solicitor-General* (Sir G. Jessel, Q.C.), *Fry*, Q.C. and *A. G. Marten* for the defendants.

LORD ROMILLY.—In this case the plaintiffs complain of the nuisance produced by the erection of a steam engine in the shed or yard adjoining their stable, by which their stable, as they allege, has become useless. They also complain of it as creating a serious inconvenience in the house in which they themselves reside. I think, having regard to the evidence, these two cases must be considered, for the present at least, separately. One thing is very material, particularly with reference to one of these cases, namely, that the engine was erected in Jan. 1865, and that no complaint was made of it till June 1870, five years and a half afterwards. The plaintiffs allege that the reason of this is the constant increase of the nuisance, which has gone on every year augmenting, and which became so considerable as to be unendurable at the beginning of 1870. A great deal of evidence is gone into on both sides, part of which relates to the dwelling-house, and part of which relates to the stable. Now, first of all, I will take the evidence which relates to the stable. The evidence is, as usual in these cases, very contradictory, and shows signs of exaggeration on both sides; but, on considering the effect of the whole, I have arrived at the conclusion that the nuisance is such as to render the stable unfit for the abode of horses; and that until they have become accustomed to the noise, the tremor, and warmth produced by the engine, it is not a fit place for horses, and probably

excitable or nervous horses may be seriously affected and injured in getting enured to the effects of the engine. In addition to this, the defendant has made the window of the stable, which used to admit light and air, useless as to air, and also considerably interfered with as to light. The defendant says in excuse for this, first, that this window is not required for the stable, because the stable has a window on the other side, and also a door, and that there is plenty of air and ventilation in the stable. Now I am of opinion that that is not a matter to be gone into, or a question which I have to determine, and that a person has no right to shut up another person's window and then say it is not required. The next question which has been argued is, that the window was shut up by the sanction and concurrence of the agent of the plaintiffs; but, in my opinion, the evidence fails in proving this. The only person mentioned as the agent is Mr. Brealey, who, unfortunately, died before the suit came to a hearing. That he did act as the agent of the plaintiffs in various matters is unquestionably true. He was originally a clerk of Mr. Crusoe, and has since acted as the plaintiffs' agent in various matters. I do not think that there is any evidence to prove that he did sanction the closing of the window; but of this I am quite clear, that, if he did so sanction it, it was not within the scope of his authority, and that he had no authority from the plaintiffs to perform that office. It is also clear from the defendant's evidence that the boarding up of this window was essential, in his own view of the case, for the exclusion of the noise and heat of the engine from the stable of the plaintiffs. In that state of things, I am of opinion that they are entitled to some relief in respect of the stable. It is true five years and a half have elapsed since the engine was erected, but it is positively sworn by the plaintiffs, and I believe correctly, that they were ignorant of this fact relating to the stable until it was brought to their attention in 1870. Whether this was by reason of the increased nuisance, or by the complaint of the visitor whose horse suffered, or from their accidentally observing it, I do not know, and cannot ascertain from the course of the evidence; but putting it in a way least favourable to the plaintiffs, I am of opinion they are not barred by time, and that they are entitled to relief in respect of that. It is true that the time would prevent them from having an interlocutory injunction, and accordingly that view was taken in the previous stage of the case; but in other respects I am of opinion that they are entitled to apply to the court for relief. Before I proceed to the case of the dwelling house, which I take separately, I have to consider (and I have considered very carefully), what sort of relief the plaintiffs would be entitled to, if the case of the stable stood alone. In this case, so considering it, I am of opinion that I must have regard to these facts. The defendant's capital has been engaged in this business for a great number of years, and was engaged in it for five years and a half without any complaint being made, and an injunction stopping the engine would, I think, upon the evidence, destroy the business of the defendant and put an end to it in that place. I think that if the case stood in the stable alone, a fit case would arise for the application of the provisions contained in the 2nd section of the Act of the 21 & 22 Vict. c. 27, which section I will read. It is very rarely I have had occasion either to consider it or to deal with it. The section is this: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement" (this is not any one of those), "or against the commission or continuance of any wrongful act" (which this is), "or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court if it shall think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct." I think if the stable stood alone, this would be a case for damages; and I am of opinion that the injury occasioned by stopping the business of the defendant is, in the ordinary sense in which this court treats such a thing, irreparable, but that the evil produced by putting an end to the stable is not irreparable, at least as far as I can understand it. Another stable further off still exists, and, assuming that they must have a stable to supply the place of this, I am by no means clear that that might not be enlarged and increased without injury, and that it might easily be ascertained what the damage was. Therefore, I should in that case think fit to say that the amount of damages should be ascertained in this court, and I would not enforce specific and irreparable injury upon the defendant. In considering that, of course I must consider the purpose for which the Act was passed. After the Act passed a person was not entitled, by obtaining an injunction, to inflict an irreparable injury upon a defendant, even though the defendant occasioned the nuisance himself, when in fact the plaintiff could be paid for any damage which he had sustained. Having so considered it, I now consider the question of the house. The house raises a new question, because the question is this with respect to the house, "Is the house made uninhabitable, or is it so seriously inconvenienced as to render it such that an ordinary person would naturally quit the house and reside somewhere else?" because, if so, that I consider is an irreparable injury. If the question were a question between the abandonment of the house and the abandonment of the factory for carrying on the business, I should consider both injuries irreparable, but I should not hesitate between them, because the injury would have been created by the defendant, and, therefore, the injury to the house would be a case for an injunction. I have stated this in order to explain, if the case goes further, the principles which actuate me in the course I am about to take in the matter. Therefore the question is whether the abandonment of the house or the abandonment of the factory, is a necessary consequence which follows from the working of this engine. Upon this part of the case the evidence is very material, because the evidence here, as in the case of the stable, is very contradictory; indeed, more contradictory in the case of the house than in the case of the stable. In addition to that there are some marks of exaggeration, which there always are in these cases, and naturally enough, because persons who go there to give evidence give it, in a great measure, as partisans. But then the question of time becomes of very material importance indeed, because this is certain, that for five years and a half the plaintiffs have not complained. That is a very strong observation to show that if the nuisance has been the same,

they did not conceive it to be very serious for five years and a half, and therefore it could not be of such a nature as to drive them out of the house, if it was so. For that purpose I have looked very carefully at the evidence of what took place during the period of that five years and a half, and the evidence, I think, conclusively shows that the engine has been kept exactly the same for five years and a half. It is a very small engine, but I am of opinion that it is quite large enough to produce the injury I have mentioned in the stable; I am now talking, however, of the house. During that time not only has this engine been worked exactly in the same way, and by the same man, but I have got the bill for coals in which I do not conceive that they have concealed anything from me. I am bound to assume they tell the truth; and from that it appears that the same amount of coals has been used for five years, and that the same man has worked it. This is certain, that according to whether the engine is kept clean or not, it makes a greater or less noise; and that if it is kept carefully oiled, it works more easily and with less tumult. In addition to that, the state of the wind may produce considerable effect, and for aught I know the state of the atmosphere may have a good deal of effect upon it. But I believe, in reality, that the effect on the house is very slight. That there is some noise is quite clear to my mind. One gentleman says, he never perceived any, and that he endeavoured in vain to perceive it; but on the evidence of the others, there must have been some, which an impartial person would have perceived. Unquestionably it is very small under the particular circumstances I have mentioned, that is, when the wind is blowing in a contrary direction, and the engine is kept in a perfect state so as to work as easily as possible. Then I come to the evidence respecting the tremor. One gentleman has taken the course usually adopted, I believe, by astronomers, of making an horizon of quicksilver, and ascertained in that way the amount of the tremor. It is notorious that, with respect to astronomers, the very slightest tremor disturbs their observations. Still, no doubt, there is something susceptible, because, I think, the evidence upon that subject is quite distinct; although I doubt whether that would have been sufficient to have induced this court to have interferred, if it had rested upon that alone. I am disposed to think it would not, and if it stood there alone, I should have allowed the matter to stand for the plaintiffs to bring such action as they might be advised in a court of law, and I should have reserved the costs till I had ascertained whether substantial damages had been given in the action or not. That is what I should have done under the old system. I have quite made up my mind that it is proper to give a direction as to the stable, and therefore, although I do not think it right to grant an injunction upon that, it is quite fit to include the house in that direction, and to direct an inquiry as to what is proper to be allowed for damages for such injury as is inflicted upon the plaintiffs by the steam engine with regard to the stable, and also with regard to the house. I think the injury has been occasioned by the defendant, and he must pay the costs of the suit up to and including the hearing; any further costs I shall reserve, and consider what I shall do with them. I shall direct that inquiry to be taken in chambers, and it will be dealt with in chambers subject to any appeal to me. Of course this does not interfere with the right which the plaintiffs may have, if they think fit, of carrying this case to a superior court for the purpose of obtaining a positive injunction, but I think the injury inflicted on the defendant would be greater than, under the circumstances, the plaintiffs are entitled to inflict, and that it could only be used, as is sometimes done, for the purpose of extorting larger damages than I think they would be entitled to receive; whereas, if I take the other course, I shall, according to my view of the case, subject to correction by a superior court, be able to give such damages as I think adequate compensation for the injury done.

Solicitors for the plaintiffs, *Gregory* and *Co.*, for *R. Stevenson*, Hanley.

Solicitors for the defendant, *Milne, Riddle*, and *Mellor*, for *Hacker* and *Allen*, Leek.

V. C. WICKENS' COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Thursday, March 14, 1872.

METROPOLITAN BOARD OF WORKS *v.* MARQUIS OF SALISBURY.

Thames Embankment Act 1862 (25 *&* 26 *Vict. c.* 93), *s.* 62—*Suit in equity—Award—Compensation—Action at law—Injunction to restrain.*

Where, after an award had been made compensating the plaintiff for injury done to his property by the defendants, the plaintiff, considering that certain rights had not been included in the award, instituted a suit to enforce them, and at the same time commenced an action at law to recover the amount of compensation awarded,

The court, at the instance of the defendants, granted an interim injunction to restrain the action until the hearing of the cause.

THIS was a motion on behalf of the plaintiffs in the above suit for an injunction to restrain the defendant from prosecuting an action at law for the sum of 10,645*l.* 1*s.* 11*d.* The facts were these:

By the 62nd section of the Thames Embankment Act 1862 (25 & 26 Vict. c. 93), "full and free rights of communication and access and egress at all times to and from the land reclaimed and inclosed" under the Act were reserved to the Marquis of Salisbury, "his heirs, sequels in right, or assigns," with respect to Cecil-street and Salisbury-street, and the Board of Works were to "provide and construct such convenient means of communication therewith as might be necessary for giving to the Marquis, his heirs and assigns, and his, and their lessees and tenants, such access accordingly."

Under subsequent Acts the embankment was laid out as a garden, and a claim was made by the marquis, under his reserved rights, to a carriage road to the embankment road from Cecil and Salisbury-streets. Matters in dispute relating to the question of damage and compensation for injury done to the marquis's inheritance, were referred to an arbitrator, who, in May 1871, awarded him the sum of 8875*l.* for the injury to the inheritance, and 1770*l.* 1*s.* 11*d.* for interest thereon, making together the 10,645*l.* 1*s.* 11*d.* in question.

The marquis considered that the award did not include his claim to the carriage-way, and

instituted a suit to enforce his right. The defendants, however, insisted that the 10,645*l.* 1*s.* 11*d.* would not have been awarded, but on the consideration by the arbitrator that it covered the right of way. Pending the suit to enforce the grant of the carriage-way, the marquis brought an action at law to recover the sum awarded.

The plaintiffs now moved as above.

The question on the motion substantially was, whether the arbitrator had present to his mind when he made his award the 62nd section of the Act of 1862.

Greene, Q.C. and *Charles Hall*, contended that the marquis must elect whether he would sue in this court for the carriage way, or at law for the compensation awarded. He could not continue proceedings in both courts. If he succeeded both at law and in equity, he would be compensated for that which he had never lost, and, in fact, would be paid twice over for the same thing. The whole of the question, under the 62nd section of the Act, was before the arbitrator, and there was no doubt that the sum awarded was intended as compensation for the want of carriage access. If a mistake had been made by the arbitrator, the court had jurisdiction to rectify it, especially as such mistake must have arisen through the misrepresentations of the marquis himself. The Board of Works were perfectly willing to allow the whole matter to be referred back to the arbitrator, but at all events they were entitled to ask that all proceedings in the action should be stayed until the result of the suit had been determined. They cited

Penny v. *Penny*, L. Rep. 5 Eq. 227; 18 L. T. Rep. N. S. 13;

Duke of Buccleugh v. *The Metropolitan Board of Works*, L. Rep. 5 Ex., 221;

Re Dare Valley Railway Company, L. R. 6 Eq. 429; 4 Ch. 544.

Eddis, Q.C. and *W. W. Karslake*, for the Marquis of Salisbury, argued that the court had no jurisdiction. It could not alter the award, except on the ground of mistake or misconduct on the part of the arbitrator. There was nothing of that kind here. The award was made with full knowledge by the arbitrator of the provisions of the 62nd section, and without reference to the Marquis's right of access under it. The Marquis, therefore, had two distinct claims against the Board of Works, and was perfectly justified in the course he had pursued to establish them. If the Marquis succeeded in his action, the money was perfectly safe in his hands, and no injury would arise if it should be eventually decided that he was not entitled to it. The plaintiffs had altogether failed to establish a case for an *interim* injunction. They cited

Read v. *Victoria Station and Pimlico Railway Company*, 32 L. J. 167, Ex.;

Mills v. *The Master, Wardens, and Society of Bowyers*, 3 K. & J. 66, 72;

Brandon v. *Brandon*, 1 B. & P. 394.

THE VICE-CHANCELLOR.—I consider that the arbitrator's award includes compensation to the Marquis for the want of access to his property. The Metropolitan Board of Works say that according to the true construction of the 62nd section of the Thames Embankment Act the Marquis has no right to carriage access; the Marquis maintains that he has, and with the view of establishing his right has filed a bill in Chancery. He has also brought an action at law for the full amount awarded by the arbitrator. If he succeeds both in the suit and the action, he will be compensated for what he has not lost. I consider that this court has jurisdiction to prevent the injustice of double compensation being recovered; and although perhaps it cannot set aside the award, still it will find some means of doing justice. I will therefore grant an injunction to restrain the action until the hearing of the cause, or further order, and the Board of Works must pay the money awarded into court.

Solicitors for the plaintiffs, *William Wyke Smith*.

Solicitors for the defendant, *Nicholson* and *Herbert*.

Monday, March 18, 1872.

THE ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BATLEY.

Municipal Corporation Act (5 & 6 *Will.* 4, *c* 76), *s.* 92—*Borough fund—Purchase of chain for mayor out of—Injunction.*

The purchase of a gold chain for the mayor of a borough out of the borough fund is illegal.

THIS was a motion on behalf of the Attorney-General and the relators in the above suit, for an interim injunction to restrain the defendants, their council, treasurer, officers, and agents from purchasing, or otherwise providing out of the borough or district rates, or out of any other rates levied or to be levied for public purposes within the borough of Batley, a chain and badge, or any similar or other decoration for the personal use or adornment of the mayor for the time being of the borough. The facts were these:

In Nov. 1871 the general purposes committee of the borough of Batley passed a resolution suggesting to the town council the necessity of providing a gold chain for the mayor of the borough, and recommending that one should be purchased at a cost not exceeding 200*l.* Designs were afterwards submitted and approved, and at a meeting held on the 23rd Dec. a design for a chain and badge was selected. The chain was to be 48in. in length, to weigh 30oz., and to cost 200*l.* The emblems on the chain were to be—a bale of wool, or shoddy, in the centre; a sheaf of wheat on the right, and a fleece on the left. It was also determined that the names of the past and present mayors, with their years of office, and the future mayors as they served the office, should be engraved on the chain.

As soon as the resolution became publicly known in the borough several of the ratepayers objected to the purchase being made out of the borough rates, and a meeting was held, at which the proposal was condemned. Subsequently the question was formally put in the town council, and the result was that eleven voted in favour of the purchase, and eight against it. Thereupon the dissentients instituted this suit to restrain the purchase as a misapplication of the rates.

They now moved as above.

The arguments principally turned upon the interpretation of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), the 92nd section of which, after providing that all corporate property shall be brought within the borough fund, and applied, first to payment of debts contracted previously to the passing of the Act, then to the payment of the salaries of the borough officials, the costs of prosecutions, the main-

tenance of the borough gaol, and the payment of constables, enacts that "all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act, and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied under the direction of the council, for the public benefit of the inhabitants, and improvement of the borough."

Greene Q.C. and *W. Barber*, in support of the motion, contended that the defendants had no power under the Act to expend the funds of the borough in the manner contemplated by the resolution. The defendants stood in the position of trustees with regard to the fund. They cited

Attorney-General v. *The Corporation of Lichfield*, 11 Beav. 128;
Attorney-General v. *The Mayor of Plymouth*, 1 W. R. 445;
Attorney-General v. *Mayor of Wigan*, Kay 268;
Attorney-General v. *Aspinall*, 2 Myl. & Cr. 613;
Attorney-General v. *The Corporation of Norwich* 1 Keen 700.

Karslake, Q.C. and *Ince*, for the defendants, after contending that the plaintiff's remedy, if any, was by writ of *certiorari* in the Court of Queen's Bench, argued, on the construction of the Act, that the defendants were fully justified in charging the expense of the chain and badge upon the borough rates. They referred to,

Reg. v. *The Mayor of Warwick*, 8 Ad. & E. 926;
Attorney-General v. *The Corporation of Liverpool*, 1 M. & Cr. 171;
Attorney-General v. *The Mayor of Wigan*, 28 L. J. 429, Chan.

THE VICE-CHANCELLOR.—I am of opinion that the borough fund is a trust fund held by the Corporation upon a public trust, which is not a charitable one. The Legislature has provided that in certain cases where there has been abuse in dealing with the fund the remedy shall be by writ of *certiorari*, and it has therefore been contended that the Court of Queen's Bench is the proper tribunal for dealing with the question in dispute. I consider, however, that this court has ample power, and is fully as competent to deal with a case like the present as a court of law, and that being so I shall certainly not send it to be tried over again before another tribunal. Then comes the question whether the proposed expenditure upon the chain and badge is within the terms of the Municipal Corporation Act. Giving the most liberal interpretation to the statute, and construing it so as to allow the Corporation, acting as trustees, every possible charge and every reasonable and justifiable latitude in reference to the due discharge of their duties, and allowing them everything which could be "reasonably" included in their costs, charges and expenses under the Act, I still find it impossible to hold that the expenditure in question is authorised by, or can be brought within the Act. It is said that the sum in dispute is so small as to be beneath the attention of the court; but it would be a matter of considerable regret if that were so. The money will have to be raised by a number of small payments, contributed by a number of persons of various positions in the social scale, and varying also in their pecuniary means; and it becomes the duty of the court to see that money so contributed is not wantonly spent or wasted. Forms and ceremonies, no doubt, have their uses, and some persons may be, and are, perhaps, more impressed by them than others. But to suppose that any reasonable human being would pay more respect to a mayor because he wears a gold chain, a chain bought for him out of the rates, a chain for which he has not paid himself, and which is not even, therefore, a proof of his own personal solvency, is a supposition beyond the possibility of belief. I have, in fact, throughout the argument, found great difficulty in regarding the case as a serious one; but as I have been asked to adjudicate upon it, and as—as I have already said—the amount in dispute, though small, is no objection to the interference of the court, I shall grant an injunction in the terms asked, restraining the corporation from applying the borough funds in the manner proposed.

Solicitors: *Ridsdale, Craddock*, and *Ridsdale*, for *Chadwick* and *Son*, Dewsbury; *Edward Layton* and *Jaques*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Saturday, April 20, 1872.

SECOND COURT.

REG. *v.* ST. IVES UNION.

Order of removal—Status of irremovability—Breach of residence.

The pauper, an old woman of seventy, had lived twenty-eight years in the parish from which she was ordered to be removed; during the last four years she was at intervals in the workhouse, and had no other place of residence. Upon leaving the workhouse in 1870, *she was for six weeks in domestic service in the parish; after which, finding herself too old for such service she left, saying that she wished at any rate first to have a holiday. She stayed six days out of the parish with a son and a friend, both of whom were too poor to continue to entertain her. She then returned to the workhouse of the parish, from which she was afterwards removed to her place of legal settlement.*

Held, that this was not such a breach of residence as to destroy the pauper's status of irremovability in the removing parish, although she had no place of residence in that parish to which she could return, during her absence.

Reg. *v.* Glossop Union (*L. Rep.* 1 *Q. B.* 227) *discussed and qualified.*

THIS was an appeal against an order of removal, which was heard at the quarter sessions, held in and for the county of Middlesex on the 29th April 1871. The court confirmed the order, subject to the following case:—

The only question raised was, whether the pauper, Mary Parnell, was or was not removable from the parish of St. Matthew, Bethnal-green.

The facts were that the pauper was about 70 years old, and was the widow of William Parnell; that she and her husband lived in St. Matthew for about twenty-four years, continuously, until March 1866; that owing to the illness of her husband she then went into the workhouse in that parish, into which also the husband was received a few months afterwards; that both were, from time to time, discharged and received again until the 23rd Dec. 1868, when the husband was removed to York Lunatic Asylum, where he died in Jan. 1869.

Until that time both remained continuously in the parish of St. Matthew, and after the removal of the husband to the asylum, the wife remained in

the workhouse of St. Matthew until the 24th Oct. 1870. She then went as a domestic servant into the service of the chaplain of the workhouse, who lived out of the workhouse, but in the same parish of St. Matthew. Before she went into his service she was supplied with a stock of clothes by the officials of the workhouse; she was hired as a yearly servant in the ordinary way. She continued in his service in the same parish for about six weeks, when being too old for service, she left the chaplain, saying that she wished at any rate first to have a holiday. Upon the day of leaving the chaplain, she took all she possessed, consisting of her clothes only, with her, and went to visit her son, who was living out of the parish, and stayed with him for three days. The son was a married man, had only one room, was very poor, and both he and his mother proved that she only went on a visit, with no intention of staying. Upon leaving the son she went on a visit in the same way to Mary Clarke, who also lived out of the parish, and there she stayed for three days. She then went for one day to a friend living in the parish of St. Matthew, and on the next went into the workhouse of that parish, where she remained until the making of the order. Whilst out of the parish of St. Matthew, Bethnal-green, she endeavoured to get employment, and if she had succeeded in getting employment out of the parish she would not have returned to that parish. When the pauper left Mrs. Clarke she asked Mrs. Clarke to let her, the pauper, know if she should hear of any work to suit her, and said she was going back into the workhouse.

The respondents contended that a break in the residence was established by her absence from the parish during these two periods of three days each, inasmuch as it could not be said that she was constructively resident in St. Matthew, Bethnal-green; she having no house or residence in that parish during such absence to which she could return.

The appellants contended that there was no break, inasmuch as she did not leave with the intention of residing out of the parish, but simply to visit friends temporarily.

The question for the court is: Was there a break in the residence or not? If there was a break, the order to be confirmed. If not, the order of sessions and the original order to be quashed.

Poland, for the respondents, relied upon the case of *The Queen* v. *Glossop* (L. Rep. 1 Q. B. 227), in which Blackburn, J., said, "There must be both a place which he has a right to return to and an intention to return, to constitute a constructive residence; and where a man has gone away and left no residence, though he means to return at a future time, the *animus revertendi* is immaterial." This was in accordance with the previous cases of *Hartfield* v. *Rotherfield* (17 Q. B. 746), and *Reg.* v. *The Stourbridge Union* (34 L. J. 179, M. C.); and contained a clear and definite principle which would be more useful for the guidance of quarter sessions than the various considerations required by the case of *The Guildford Union* v. *St. Olave's Union* (25 L. T. Rep. 803).

Metcalfe appeared for the appellants.

BLACKBURN, J.—We need not trouble Mr. Metcalfe. The question is whether this pauper was constructively residing for a year before she became chargeable in the respondent parish. She was not *bodily present* in the parish during six days out of the year. I think myself that when a person is clearly shown to have been residing in a parish, the onus of proof is upon those who wish to establish that a break of the residence has occurred. *Primâ facie*, no doubt, the fact of departure is evidence of a break of residence; this, however, may be rebutted by proof of an intention to return. When an actual residence is abandoned, as, for instance, when a house, which has been occupied, is given up altogether, the presumption is strong that there is no intention to return. In the same way, when a house is retained, there is strong ground for assuming that the occupier intends to return. But neither of these things is of itself absolute proof of intention. The real test of a break of residence is whether the person going out of the parish entertains an intention to remain away permanently or for some indefinite time. I think in the case of *Reg.* v. *Glossop* the woman's intention was to come back to the place of her residence only in case she should be discharged from her service; and the fair inference was that she intended to stay away indefinitely. If, as in this case, a person leaves a parish with no object but to pay a short visit, I think we may infer that there was no intention to stay away indefinitely. There must always be a difficulty in deciding a matter of more or less, but it would be monstrous to hold that a definite intention of being absent for a few days only should create a break of residence merely because there is no particular house to which the absent person has a right to return. Mr. Poland properly pressed upon us the language which I am reported to have used in *Reg.* v. *Glossop*; but whatever words I actually used in that case, I was conscious at the time, and I am clear now, that those contained in the report are not the law; all that I meant to say was that the fact of having a residence or no residence to return to should be a strong element in determining the intention to return. A complete break of residence would be established if the person departing had begun to reside elsewhere, or even if he had gone away with a clear intention to reside out of the parish in which he had been stationed. A dwelling-house to which he might return must be an important element in determining what was his intention, but is not essential for either conclusion. Here, I think, there was no break of residence, and the order must be quashed.

HANNEN, J.—I am of the same opinion. It appears that the pauper intended to have a few days of holiday before going back to the workhouse of her parish. This is what I understand from the case, and I do not think she meant to continue her absence long enough to constitute a break of residence.

QUAIN, J.—I also am of the same opinion. Each case must depend upon its particular circumstances. Here the old woman had lived continuously in the parish of St. Matthew without relief for twenty-four years; for six years afterwards she remained in the parish, and was at intervals in the workhouse. Being unable to carry out some employment which she had found in the parish, she said that before she returned to the workhouse she would have a holiday at any rate; and if she could find work to suit her, she seems to have meant to take it. But she found no work, and after six days' absence she returned, as she intended, to the workhouse. It would, in my opinion, be a very sad thing if we were bound to

hold that this absence was a break of residence, and to send the old woman into the country away from all the people and places to which she had for so many years been accustomed. According to the authorities, however, I think there was no break of residence.

Order of sessions quashed.

Attorneys for appellants, *Neal* and *Philpot*.
Attorney for respondents, *W. J. Howard*.

Wednesday, Jan. 24, 1872.

GUEST (app.) *v.* THE OVERSEERS OF EAST DEAN (resps.).

Poor rate—Rateability of surface land, &c., connected with iron mines—Surface land valueless apart from mines.

Appellant, grantee under the Crown of gales or rights to work certain iron mines, also rented from the Crown certain surface land over the mines, on which he erected buildings, machinery, railway, and tramways; the surface land being practically valueless apart from their use in connection with and for the purposes of the mines.

Held, that the appellant was rateable in respect of the surface land, and the buildings, &c., erected on it, though occupied in connection with a non-rateable subject, and though practically valueless except in connection with and for the purposes of such non-rateable subject.

THIS was a case stated under 12 & 13 Vict. c. 45, s. 11, on an appeal to the Gloucestershire Quarter Sessions, against a poor-rate for the township of East Dean.

Sir Ivor Bertie Guest, Bart., is the owner and occupier, in the manner and under the circumstances hereinafter mentioned, of certain mines of iron ore called Westbury Brook and Dean's Meend, in the township of East Dean.

By 24 & 35 Vict. c. 40, s. 1, the grant of a gale of coal or iron shall be deemed to have conferred, and shall confer, on the galee and his assigns, a licence to work the mine, and shall be deemed to have conferred on the grantee and his assigns, an interest in the nature of real estate, such licence being conditional on the payment of royalties to the Crown.

By 1 & 2 Vict. c. 43, s. 25, the commissioners may grant to any galee leases for terms not exceeding thirty-one years, of the uninclosed waste land of the Forest of Dean, for the purpose of erecting thereon any house, building, or machinery for the convenient working of any mine, or for any purpose connected with any mine or work, not more than one and a half acres of land to be included in any such lease.

Pits or shafts have been sunk for working the said iron ore, and the same is worked in the usual manner pursued in mining operations, namely, by subterraneous working.

Some of the surface lands are above the said mine of iron ore, and other parts of such surface lands are distinct and separate from the said mines.

The mines extend over an area of about 310 acres, and the surface lands over an area of 2a. and 16p.

The pit included in the rate is an oval or egg shaped shaft, about 222 yards deep, and 16ft. long, and 8ft. wide; it is partly lined with stone or brickwork. In the centre of the shafts are guides or frames to steady the cage on which the carts containing the ore are brought to bank.

At one or both ends of the shaft are three sets of pumps about 14in. in diameter, for pumping the water from the workings near the pit; and on the said demised surface lands, is a large stone building which contains an engine of 170 horse power, used for pumping water by means of the pumps in the shaft.

There is also another building containing an engine of fifty horse power, used for bringing the ore from the mine.

There are boilers set in masonry, and a large chimney to the furnaces for heating the boilers. The boilers belong to the engines. All these are absolutely necessary to bring the iron ore to bank.

The other buildings, plant, and tramway comprised in the rate consist of one office, two workshops, and two storehouses, a weighbridge fixed in the land capable of weighing up to 7 tons, and 745 yards of railway laid in the land in the usual manner, which railway is used for bringing coals to the boiler furnaces, and for conveying the ore away from the pit mouth; all which offices, workshops, storehouses, and weighbridge are constructed on the said surface lands so as aforesaid demised.

The said surface lands and buildings, and the said railway, tramway, plant, and machinery are occupied and used by Sir Ivor Bertie Guest solely for the purposes of the said mines called Westbury Brook and Dean's Meend, and are necessary for such purposes, and without the mines the said surface lands, buildings, railway, tramway, plant, and machinery would be practically valueless.

The overseers of East Dean, by a rate made the 12th May 1870, and by another rate made the 8th Oct. 1870, rated Sir Ivor Bertie Guest, Bart., in the following manner:—

Land containing iron ore within the boundary of the Westbury Brook, gate of iron ore, rateable value, 1419*l.*; surface land with the pit, buildings, machinery, plant, tramways, and other workshops connected therewith, rateable value, 500*l.*

Sir Ivor Bertie Guest appealed to the assessment committee of the Westbury-on-Severn Union against both those rates, which decided that the said properties were rateable, on which he gave notice of appeal to the quarter sessions for the county of Gloucester, on the grounds (*inter alia*) that he is overrated in respect of the yearly value of the land occupied by him in the said township; that in the assessment, although he is nominally rated for land containing iron ore, he is in reality the occupier of an iron mine where he works iron ore, and the land mentioned is in truth and in fact such iron mine for which he is in law not rateable. That the surface land, with the pit and other buildings, machinery, plant, houses, and workshops connected therewith, as mentioned in the second item of assessment, are the pit, buildings, machinery, plant, tramways, and workshops connected with the said iron mine, and used exclusively for the purposes thereof as aforesaid, and that the machinery is used for getting the iron ore out of the pit, and pumping water therefrom, and forms part of the mine itself; that the other matters mentioned in the said assessment are greatly overcharged and overrated.

The building, machinery, plant, houses, and workshops mentioned in the said assessment are on the surface, and occupy land.

The said award of the Dean Forest Mining Commissioners, and the rules and regulations for working same, and the statute 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40, form part of this case.

The questions for the opinion of the Queen's Bench are whether Sir Ivor Bertie Guest is liable to be rated to the poor rate for the properties mentioned in the said assessment, or either of them; and if for the said surface land, on what principle is the same to be assessed?

If the court should be of opinion that the appellant is liable to be rated for the said property, or either of them, or any part thereof, he agrees that judgment in conformity with such decision may be entered by the respondents at the sessions next or next but one after such decision shall have been given (it being agreed that the case should be remitted to the said sessions for the purpose of ascertaining the rateable value) and for such costs as the court shall adjudge. If the court should be of a contrary opinion, then the respondents agree that a judgment in conformity with the decision of such court, and for such costs as the court shall adjudge, may be entered on motion of the appellant at the session next or next but one after such decision shall have been given.

Manisty, Q.C. (with him *Macnamara*), for the appellant.—The question as to the rateability of the iron mine may be considered as disposed of by the decision of the House of Lords in *Morgan and others* v. *Crawshay* (24 L. T. Rep. N. S. 889), and the only question to be discussed is as to the rateability of the surface land. It is submitted that the surface land in question has no value whatever, and is consequently not rateable. The case comes within that of *Rex* v. *Bilston* (5 B. & C. 851), in which case it was held that where the owner and occupier of an ironstone mine erected an engine for the purpose of drawing the water from the mine and used it for no other purpose, he was not rateable to the poor in respect of the engine. "Here," said Bayley, J., "a person working a mine on his own land has erected an engine for the purpose of working that mine, and which is of no other use. The occupier of the mine, as such, is not rateable under the provisions of the 43 Eliz. c. 2. In many such mines there are railroads under ground which greatly enhance the value of the mine, and, therefore, of the land; but they cannot be rated, and in principle they are on the same footing as this engine. This is a mode of drawing the water from the mine; the railroad is to facilitate the conveyance of the ore to the foot of the shaft. Each is of use in carrying on the mining operations, but of no other use." So here the surface land is of no use whatever out of relation to the mine below. To the same effect Holroyd, J., observed, "The engine was not profitable, but burdensome, except as it respected the mine itself. As it regarded the land, independently of the mine, it was clearly burdensome. Now the profits arising from the mine are exempt from taxation under the 43 Eliz. c. 2. The engine is, therefore, in like manner exempt."

James, Q.C. (with him *Anstie*) for the respondents.—The question as to the iron mine will not, after the decision of the House of Lords referred to, be argued. But a portion, at all events, of the buildings erected over the mine, cannot be brought within the decision in *Rex* v. *Bilston* (*ubi sup.*); and as to those portions which do, it is submitted that the decision in *Rex* v. *Bilston* is an unsatisfactory one, disapproved in other cases, and therefore not a binding authority. In *The Talargoch Mining Company* v. *The Guardians of St. Asaph Union* (9 B. & S. 210; 18 L. T. Rep. N. S. 711; L. Rep. 3 Q. B. 478), where the appellants, for the purpose of working the machinery connected with a lead mine, diverted a stream from its natural course, paying the owners for such diversion, and paying certain small sums for the occupation of the land by the watercourse, which was about a mile and a half in length, being partly open, partly tunnelled, and for about 350 yards in pipes, it was held that the appellants were rateable to the poor rate in respect of the occupation of the watercourse at the value of the land enhanced by its capability of conveying water; and that it was not exempt from rateability by reason of its connection with a lead mine, though that is not rateable under the 43 Eliz. c. 2. This decision in principle overrules that in *Rex.* v. *Bilston*. "The value of the land," said Cockburn, C.J., "is increased by the buildings or works erected on it, and by the water brought over it. Suppose, instead of the present state of things, the company had not the occupation, either of the land or the works constructed for the watercourse, and they wanted the water, they would have to pay so much rent to the proprietor of the land for the use of the watercourse and the works accessory to it, and that rent would be the rateable value of the land covered by the water. Assuming the rate is made on that basis it would be right, and there is nothing in the case to negative that." As to the decision in *Rex.* v. *Bilston*, Blackburn, J. in the same case said: "It was decided that, the mine in that case not being rateable, an engine used for the purpose of drawing water from it was not rateable either. There was, however, nothing to show that the engine occupied land; if it did I should hesitate in agreeing to that decision. In the present case the watercourse cannot be said to be part of the mine. Its value is enhanced by its affording facility for conveying water to the mine and the works attached to it, and we have to consider what would be the rent which might reasonably be expected from a tenant from year to year, &c." [COCKBURN, C.J.—The difficulty I feel as to the surface land in the present case is this. Assuming that it is liable to be rated, what is its value? It is practically valueless, apart from the mine]. The rateable value, it is submitted, is the value of which it is to the appellant for the purpose to which he applies it, although that purpose itself is exempt from rateability. Suppose that a branch railway were constructed for the purpose of carrying the ore to the nearest railway station, that branch railway would be useless except for the purposes of the mine, but could it be contended that it was not liable to be rated? In *Reg.* v. *The Metropolitan Board of Works* (L. Rep. 4 Q. B. 15; 19 L. T. Rep. N. S. 348), where the Board, in pursuance of their statutory powers, constructed sewers and other necessary works, namely underground sewers, a wharf and engine house, layby for barges, tramways, coal shed and dwelling house, all which they occupied for the purposes of the main drainage scheme, the Board deriving no pecuniary advantage from the sewers and other drainage works, it was held that the sewers were not rateable to the poor rate, on the ground that they were not the subject of a beneficial occupation, but that the rest of the property had an occupation value, and

that the Board were rateable in respect of them, as there was nothing in the statutes exempting them from rateability. This case is a direct authority for the respondents in the present case. "The wharf," said Lush, J., delivering the considered judgment of the court, "and engine house in Norman-road, and the pumping station, land wharf, lay by for barges, tramways, engine houses and appurtenances in North Pole, have an occupation value. The Board must have rented such premises if they had not become the owners of them, and a tenant might easily be found to take them if the board were willing and able to let them. A distinction was attempted to be drawn in favour of the pumping apparatus, as being a necessary adjunct to the sewers, and it was contended that as the sewers are not rateable, this adjunct must be exempted as being part of a non-rateable subject. But we cannot accede to this view. The machinery stands on land which is valuable for occupation, and which would undoubtedly be rateable in the hands of any other occupier; and its rateable quality cannot be affected by the particular use to which it is applied by the board. The reason why the engine and engine pit in *Rex* v. *Bilston* were held to be exempt was that the pit was dug and the engine erected in, and that they formed parts of an ironstone mine, which was itself not a rateable subject; but that reason does not apply to the present case." [He was here stopped.]

Manisty, Q.C., in reply.—The true principle of the cases is that if a thing has in itself a rateable value, independently of its use in connection with a mine, it does not lose that value by being used for the purposes of the mine. If the surface land in the present case had any independent value, it would not lose it by reason of the land being used for the purposes of the mine below, but it is found as a fact that it is in itself valueless, and, therefore, it is submitted it is not rateable.

COCKBURN, C.J.—I think that upon the only question on which our decision is now asked it ought to be in favour of the respondents. It must be taken to be now settled law, there having been a decision of the House of Lords upon the question, that the iron mines of the appellant, which it was proposed to assess, are not liable to be rated. This case shows that there may be, as we know there may otherwise be in point of law, a separation of the soil from the minerals below it; and I think we must consider this case with a view to what would have been the state of things if there had been such an entire separation here of the ownership of the soil from that of the minerals. Indeed, we have learned that Sir Ivor Guest is the mine owner in one right, and the owner of the surface in another, the ownership of the mine being one thing, the ownership of the surface another. Why should we not in this case maintain and act on the same substantial distinction between the ownership of the mine and the ownership of the surface, which is acted on in other cases? Suppose that by the testamentary or other disposition of the owner, in whom was vested the entire soil as far as it can be reached into the depths of the earth, the minerals had been granted to one person and the surface to another. The grantor of the minerals, if he desired to work them, would have to make a bargain with the owner of the surface in order to obtain from him the right to use the surface for the purpose of the mining occupation. In the present case it seems that Sir Ivor Guest, having in himself, though through different titles, both surface and mines, has got the surface into a condition in which it is no longer available for agricultural purposes; but it is available for the purpose of tramways, and otherwise for the purposes of the mines. If the surface were not in his hands he would be under the necessity of saying to the owner of the surface, "on what terms will you let me the surface for the purpose of working the mines?" and it would be as clear, in such a case, that the surface would have a value in its use by the owner of the minerals below; and the use of the surface would not be allowed, except on a given consideration. It is clear that the owner of the minerals would be compelled to give, and that he would be quite willing to give, a consideration for the use of the surface. The owner of the minerals would, to a certain extent, be placed at the mercy of the owner of the surface, as the mines could not be used without some use of the surface. The surface owner would, however, defeat his own object if he were extortionate in his terms; and the result would be that common sense and a common interest would bring the parties together. In settling between themselves what the terms of the bargain should be, each party would take into account all the circumstances of the case. It seems to me, therefore, that, in point of principle, there is no reason why the surface should not be assessed according to the value which should be set upon it by such a settlement between the parties, if such were here practicable. It certainly never was intended, in point of principle or policy, that the surface should be withdrawn from contribution to local burdens. *Rex* v. *Bilston* (*ubi sup.*) has decided that a different rule is to be adopted where the surface is merely subservient to the purposes of the mines below. I must say that that case seems to me not a satisfactory one, as being at war with the general principle on which all lands are assessable; and I think that the reasonings of the judges in it are not at all convincing. Bayley, J. based his decision on the ground that the engine was to be considered as part and parcel of the mine itself; Holroyd, J. on the ground that as regarded the land independently of the mine, the engine was not profitable but burdensome; the reason for Littledale, J.'s, judgment not being stated. Where we see that the surface is essential to the working of the mine, and would have a value distinguishable from the mine itself, I think we are quite justified in holding that it is assessable to the poor-rate. On this point of the case, therefore, our judgment must be for the respondents.

BLACKBURN J.—I am of the same opinion. Iron mines have been held not to be rateable, on the constructon of the statute of Elizabeth; and it follows that whatever is a portion of an iron mine is not rateable either. Bayley J., in *Rex* v. *Bilston* (*ubi sup.*), seems to me to have thought that the engine in that case was part of the mine itself; and if he were right in point of fact as to that, I should agree with him as to the law applicable to it. But Holroyd J., as pointed out by the Lord Chief Justice, does not seem to have thought so, but appears to have rested his judgment on the ground that the engine was a thing useless and of no value apart from the mine; and this opinion has been repeatedly overruled as to things which are, in themselves of no value. In the present case the great difficulty is to settle what the rateable value of

the surface would be. The Parochial Assessment Act gives a test of easy application in some cases. The rent which would fairly be paid by a tenant from year to year, is made a test which it would be easy to apply wherever the land is actually let. In such a case the rate can easily be ascertained, but a difficulty exists where the land is not actually let, and we have not the test of experience as to its letting value. We have to see what would be the hypothetical rent which would be paid by a hypothetical tenant. To judge of that we have to see what are the benefits which the hypothetical tenant would have, and to set-off against them all that he would have to pay in the way of disbursements, giving himself a fair tenant's profit; the balance would be the rateable value. That has been done in cases of rating railways and things of that sort, where there is no tenant at all. Then comes the case—where what Sir Wm. Erle used to call "the complex problem" arises—where a thing in its entire state would have a value, but it is split into two parts, one of which, regarded by itself, is intrinsically of no value; for instance, a watercourse which in one parish may be a morass or a nuisance; in another parish there is the main pipe, which is by itself wholly valueless; and in a third parish there are supply pipes, which, without the water, would be valueless; but when the three are taken together you get a very large rent. There is always in such cases a difficulty in ascertaining the value of the thing in each parish, though it may be easy to tell the value of the entire thing. I have never been able to see any satisfactory rule for such cases, though in practice rules of thumb have been applied. In the present case there is an iron mine, which is not rateable at all. There is also the surface ground, of which Sir Ivor Guest is the lessee, and on it are engines, buildings, railways, &c., which are very valuable to the occupiers of the mine, and of no value to anyone else. The mine owner, however, cannot do without them. We have, therefore, to consider how much of the entire value is to be considered the value of this surface land. It is a question very difficult to solve. However, we have only to lay down the principle applicable to the case, and I agree with what the Lord Chief Justice has said as to the test to be applied. Suppose there were two owners, or suppose that the same person has the mine as owner in fee simple, and the surface as lessee of it, and is in occupation of both. Suppose he died intestate, leaving a widow and children who are minors, and the Court of Chancery sanctions the letting of the mine and the surface to a good tenant. If a man offered a certain sum per annum for both together, but will not give anything for either separately, it would be referred to a master or chief clerk to determine how much of the rent would go to the next of kin under the leasehold interest and how much to the heir-at-law under the freehold interest. It would be argued before him that the surface owners might act the part of the dog in the manger, and prevent any practical use being made of the mine without his consent; and on the other hand the mine owner would argue that the surface apart from the mine was valueless. The master or chief clerk in Chancery would have to perform the very difficult task of apportioning the rent between the parties; but I have no doubt that he would have the common sense to apportion it fairly. That is exactly what the sessions have to do in the present case. The guess may be a rough one, but it must be made, and on it will depend the amount at which the surface is to be rated.

LUSH, J.—I am of the same opinion. In order to work out the Parochial Assessment Act in a case like this, we must suppose that the surface land, which is undoubtedly a rateable subject, is in the market to be let. It may be that the owner of the mine would have no competitor, but we know that it would be worth his while to make an offer, because the surface is essential to the working of the mine: we know, therefore, that the surface has a value. As to the amount of that value I quite agree with the observations already made, that we must send that matter to the sessions to determine, and to settle what is the fair and reasonable amount which the owner of the mine, and the owner of the surface, would have to pay respectively (a).

Judgment for respondents.

Attorney for appellant, *Thomas Clark*.
Attorney for respondents, *Rogerson* and *Ford*.

Saturday, April 20, 1872.

SECOND COURT.

FOULGER (app.) *v.* STEADMAN (resp.).

Wilfully trespassing—Premises connected with railway station—3 & 4 Vict. c. 97, s. 16.

Respondent, a cabdriver, had been charged before a magistrate under 3 & 4 Vict. c. 97, s. 16, for that he unlawfully and wilfully did trespass upon certain premises connected with the Fenchurch-street Railway Station. The magistrate found in the special case stated under 20 & 21 Vict. c. 43, that the respondent refused to move away his cab from a place, for the use of which, as a cab stand, certain other cab drivers paid the railway company 4s. a week each; that this place presented the appearance of a public street, was opposite certain shops, and although stated to belong to, was not proved to be, the private property of the company; that no bonâ fide claim of right to occupy this place was made by the respondent; and that the respondent was not wilfully trespassing.

Held, upon appeal from the dismissal of this information, that the only ground upon which this proceeding could be found to be not a wilful trespass was that the respondent had a bonâ fide claim of right. The case, therefore, was ordered to be re-stated.

THIS was a case stated by one of the aldermen of the City of London, being one of Her Majesty's Justices of the Peace for the said city and the liberties thereof, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with his determination upon the questions of law which arose as hereinafter

(a) The rule drawn up was as follows: "That the appellant is liable to be rated in respect of the surface land, with the buildings, machinery, plant, tramways, and other workshops connected therewith, and that he is not liable to be rated in respect of the residue of the property; that the principle on which the surface land, with the buildings, machinery, plant, tramways, and other workshops upon it, is to be rated, is to assume the mine and the surface to belong to separate owners, and then say what rent the owner of the mine would give to the owner of the surface for the surface la d, with the building, machinery, plant, tramways, and other workshops upon t."

stated on the 14th March 1870, at the Mansion House Justice Room in the said city; the appellant having duly entered into a recognisance to prosecute the appeal.

Upon the hearing of an information preferred by the appellant, the inspector of the police of the Great Eastern Railway, against the respondent, a cab driver, under the Act for regulating railways, the 3 & 4 Vict. c. 97, s. 16, for that the said respondent "on the 1st March inst., in Railway-place, Fenchurch-street, in the said city, unlawfully and wilfully did trespass upon certain premises there connected with the Fenchurch-street Station of the said railway, and did refuse to quit the same upon a request to him for that purpose, made by an officer of the said railway company." The alderman dismissed the same.

The section of the statute referred to is as follows:

XVI. And be it enacted that if any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending and all others aiding or assisting therein shall and may be seized and detained by any such officer or agent or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justice as aforesaid (who is hereby authorised and required upon complaint to him upon oath to take cognisance thereof, and to act summarily in the premises) shall in the discretion of such justice forfeit to Her Majesty any sum not exceeding 5*l*., and in default of payment thereof, shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty.

It was proved by a constable employed by the railway company, that the respondent, on the 1st March instant, drove a cab into Railway-place, the sides of which next to the kerb of the footways, the railway company allow to be occupied as cab-stands, by cabs, the drivers of which paid to the witness for the company 4*s*. per week for that privilege.

That about forty cab-drivers pay that sum, and that there is room for fifteen cabs thereon at one time.

That the respondent is not one of such cab-drivers; that he refused to move therefrom when requested by the witness; and that by occupying a place in the stand he was depriving another cab-driver, who had paid for the privilege, from the advantage of being upon the stand.

A plan was put in evidence, from which, and from the magistrate's own local knowledge, he found as facts that the place occupied by the respondent's cab was not in or opposite the railway station, but opposite some refreshment and other shops, and between them and certain other houses, some of which houses and shops did formerly, but do not now, belong to the company.

That Railway-place is not a *cul de sac*, but presents the appearance of an ordinary public street, and that the only fact to mark it as being railway property, and not a public street, is that an iron post stands at each corner of one end thereof, where Railway-place runs into Fenchurch-street, on which posts the words "*Blackwall* Railway" are cast, but that these posts otherwise present the appearance of ordinary street posts.

It was also proved that at one time, some years ago (how long, however, was not shown), a chain was occasionally stretched from one post to the other, but that this has not been done for some years.

That foot-passengers pass through Railway-place as if it were a highway on their way to other streets, or to the public-houses and shops in the neighbourhood of the station; and that besides cabs and carriages going to the station, others pass through Railway-place at all hours to take up or set down at the shops or houses in the neighbourhood, or to proceed to other streets.

That the stand is not paved or kerbed differently to the rest of the carriage pavement on Railway-place, and is not a regular cab stand.

That Railway-place is paved, cleansed, and lighted by the railway company; but that there is nothing in the paving or lighting so peculiar in appearance as to distinguish it from the paving and lighting of an ordinary public street.

The freehold of the place was said to belong to the company, but no deeds were put in to prove that it was their private property, nor, as the Alderman said, "should I have received evidence thereof, as I should have declined to try that question, if it had arisen."

Lastly, from these facts that the place presented the appearance of a public street, and there being neither gates nor walls around it, but shops, public-houses, and private houses and offices, with the foot pavement in front thereof abutting on to the place, the Alderman was satisfied that no person who was not familiar with the history of the locality, or the title of the property, and being guided in forming his judgment by the appearance of the place, would have considered it other than a public street.

On the part of the respondent it was contended: (a) that the section of the statute under which the information was laid was intended to enable railway officials to remove from their stations and premises used for railway purposes disorderly and objectionable persons, who were not passengers, and who had no business to detain them there; (b) that Railway-place was a public thoroughfare, and that the respondent was not a wilful trespasser; (c) that it was not a railway station, or works or premises, connected therewith.

On the part of the appellant opposite views were held and contended for. The Alderman was, however, of opinion: (a) that the section of the statute was not intended to apply to the case before him: (b) that the respondent was not wilfully trespassing; and (c) that the locality on which the offence was alleged to have been committed was not within the words of the Act, being neither a railway station, works, or premises connected therewith.

The questions of law arising hereupon are set out in the preceding paragraph, and the opinion of the court is requested thereon, and as to whether the magistrate ought to have convicted the said respondent upon the facts before him.

Giffard, Q. C. (with him *Marriott*) for the appellant.—The magistrate ought, upon these facts, either to have convicted the respondent, or to have refused to adjudicate. He says he should have declined to try the question of the railway company's property in the land if it had arisen; we

may assume, therefore, that the respondent made no *bonâ fide* claim of right to keep his cab standing here, in which case, whatever the appearance of the place, the respondent was a trespasser, and should have been fined. If, however, the magistrate considered the facts he finds to have constituted a *bonâ fide* claim of right, he ought to have held that his jurisdiction was ousted. In either event he was wrong in dismissing the information.

Brown, Q. C. for the respondent.—The magistrate found that the respondent was not wilfully trespassing, and was therefore justified in dismissing the information. In *Jones* v. *Taylor* (1 E. & E. 20), the magistrates had refused to convict under this very enactment; and this court held, on appeal, that they were not bound to convict, inasmuch as it was competent to them, if they thought fit, to decide that the person charged was not a wilful trespasser. *Reg.* v. *Bent* (1 Den. Cr. Cas. 157) is an authority that the omission of the word "wilfully" in an indictment is material when that word is contained in the statute upon which the indictment is framed. There is another question which was here open to the magistrate, viz., whether this place was the station or premises connected therewith: he has practically held that this was not such a place. [QUAIN, J.—The only ground upon which this proceeding could be held to be not a wilful trespass was, that the respondent made a *bonâ fide* claim of right. The magistrate, therefore, ought to have either convicted or refused to adjudicate.]

Giffard in reply.—In *Hudson* v. *M'Rae* (33 L. J. 65, M. C.), it was held upon an information for unlawfully and wilfully fishing, that the *bonâ fide* belief of the defendant that he had a right to fish does not prevent his being convicted, a guilty mind not being a necessary ingredient to constitute the offence.

BLACKBURN, J.—I think that in this case there are some points which we can decide at once, although the whole matter must go back to the magistrate, in order to determine the result. Notwithstanding the case of *Jones* v. *Taylor*, I think that the respondent, by staying at the place in question after being ordered off, or by refusing to move therefrom when requested by the appellant, if the place formed part of the premises connected with the railway station, was wilfully trespassing, even if he acted honestly in the belief that he had a right to be there. If he based his defence upon a *bonâ fide* claim of right to be upon the land, the magistrate's jurisdiction was ousted, and he ought to have stayed his hand, and neither convicted the respondent nor dismissed the charge. It appears from the case that there is no reason for saying that this place is not the property of the railway company; the magistrate's finding is merely that it is not in or opposite the station, but presents the appearance of an ordinary public street. I cannot see that on this account a cabdriver would have a right to keep his cab standing there. Another point taken by Mr. Brown was that this was no part of the premises connected with the station. I should apprehend from the plan that this was part of the station. The fact that the railway company have disposed of the surrounding houses *would not prevent it*, but if this point were intended to be raised, the magistrate should have stated more than he has done. The case must be remitted to the magistrate, in order that he may more clearly state the facts which he finds.

HANNEN and QUAIN, JJ. concurred.

Attorney for appellant, *W. H. Shaw*.

Attorneys for respondent, *Lewis* and *Lewis*.

Wednesday, April 24, 1872.

SECOND COURT.

JENKIN AND ANOTHER (apps.) *v.* KING (resp.).

*Poaching—Proof of having taken game—Evidence sufficient for conviction—*25 *&* 26 *Vict. c.* 114, *s.* 2.

The appellants, a mason and a carpenter, were together upon a highway about nine o'clock of a misty winter evening; one had a net for game, which was wettish, under his arm. Two policemen who met them about 100 *yards from their houses, which adjoined each other, had heard a dog yelping just before, and one of the police said he saw a dog with them, but this they denied. They did not say where they had been, but afterwards they asked the police to say nothing about the matter. Justices convicted the appellants of poaching under* 25 *&* 26 *Vict. c.* 114, *s.* 2.

Held, that proof of having actually taken game was not necessary for a conviction; and that these facts constituted evidence from which the justices might infer that an offence under the Act had been committed.

CASE stated by justices under 20 & 21 Vict. c. 43, and the Poaching Prevention Act 1862 (25 & 26 Vict. c. 114).

At a petty sessions holden at Launceston, for the division of East North, in the county of Cornwall, on the 2nd Jan. 1872, Samuel Jenkin and William Dennis were charged by a certain information and complaint of James King, one of the constables of the county police, for that they the said Samuel Jenkin and William Dennis, on the 16th Dec. 1871, at the parish of Altarnum, in the said county, being on a certain highway or public place there situate, and with good cause suspected of coming from lands where they had severally and respectively unlawfully been in search or pursuit of game, and aiding and abetting each other, had in their possession a certain net used for unlawfully killing and taking game, and prayed that the said Samuel Jenkin and William Dennis might be summoned to answer the said information and complaint; and the said parties respectively being present, the said James King upon his oath said: "I am stationed at Lewannick. I know the defendants Samuel Jenkin and William Dennis; the former is a mason, and the latter a carpenter. I recollect the 16th Dec. last; from information I received I went to Altarnum, on the highway between Altarnum village and the Rising Sun. I was going along the road with P. C. Cole. I heard a dog yelping at some distance; near half a mile. We stopped about to see what we could see. About half an hour after, we met the defendants together on the highway; it was getting dark then; it had been good moonlight; it was about half-past nine; I had a lamp and opened it on them. I saw Dennis had a net (which I produce) under his arm. They were in their working deshabille. I charged them both with being out poaching. They denied it—I did not see any dog with them, I searched them both; the only thing found was the net. They did not say where they had been."

The defendant's attorney declined to ask this witness any question.

The other constable, John Cole, upon his oath said: "I was with King on this occasion at Treween Eve; heard a dog yelping. A little time after I saw defendants come along the road with a dog, a lurcher, half greyhound. The sergeant threw the light on them, and took possession of a net which Dennis had under his arm. I said they had a dog; Jenkins denied it, and said the only dog he had was the little one. Jenkins took us home to his house, about 100 yards off, and showed us a hole, and his little dog was inside. I told him he had a lurcher there some weeks, which he denied. A few minutes after, we saw the dog go into Dennis's house. He drove him out of his house, and he went through the hole into Jenkins's house. We told him we heard the dog yelping. evidently driving a rabbit or hare, just before. Jenkins said, 'Twas not that dog. I've seen him drive a rabbit to-day, and he won't yelp at all.' Jenkins asked the sergeant several times to look the affair over, and say nothing about it. There had been a mist. The net was wettish."

Cross-examined: "I heard the men whistle to the dog just before we came up to the men. The dog was before them. There is a difference between a dog yelping at a rabbit or at a sheep."

On re-examination Coles said, "It was a hare net."

The net was produced; it was a regular gate net for game, loaded at the corners. This was the case for the prosecution.

The defendants' attorney contended that there was no evidence that either of the defendants had been upon any land in search of game, or for any other purpose, or that they had used the net for unlawfully taking game, or at all. Nor were they in possession of game. That it is not unlawful within the Poaching Prevention Act to be seen in possession of a dog. That there was no evidence that a dog of the defendants was the dog which the policeman had previously heard yelping. Nor that either of the defendants knew that any dog had been upon any land for any purpose; nor was it shown upon what land, or whose land, the yelping dog had been. The defendants are tradesmen—heads of families. They were, when detained and searched upon the public highway, within 100yds. of their own homes, and at a reasonable hour of the evening.

The justices, having heard the said charge and defence, adjudged that each defendant should be fined 1*l.* with costs. And the said Samuel Jenkin and Wm. Dennis, respectively alleging that they were dissatisfied with the said determination as being erroneous in point of law, duly applied to the justices to state and sign the preceding case for the opinion thereon of the Court of Queen's Bench.

If the court shall be of opinion that on the above evidence the justices might infer that the appellants had used the net for unlawfully killing or taking game, the convictions are to remain—otherwise they are to be quashed as against one or both appellants, as the court shall see fit.

Pinder argued for the appellants.—25 & 26 Vict. c. 114, s. 2, enacts that "It shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game; and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person; and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons, citing such person to appear before two justices of the peace assembled in petty sessions, as provided in the 18 & 19 Vict. c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding 5*l.*, and shall forfeit such game, guns, parts of guns, nets, and engines; and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing, shall sell any game so seized, shall be liable to any penalty for such sale; and if no conviction takes place, the game or any such article or thing, as aforesaid or the value thereof, shall be restored to the person from whom it had been seized." There have been two cases upon the evidence necessary for conviction under this section; *Brown* v. *Turner* (13 C. B., N. S. 485), and *Evans* v. *Botterill* (33 L. J. 50, M. C.); although in each case the evidence was held to justify conviction, it was far stronger than that in the present case. In *Brown* v. *Turner* the four men charged were found together early one Sunday morning on the high road. One had rabbits which were recently killed in his pocket; the second had a net, and his clothes were marked with blood and rabbits' fur; the third had sold a rabbit that morning; and the fourth was very wet and dirty as to clothes and shoes. The Court of Common Pleas held that it was not necessary to prove that either of the parties had been seen off the high road, and that the evidence was sufficient to convict the first three, but not the fourth, of the men charged. In *Evans* v. *Botterill* the Court of Queen's Bench affirmed that decision with respect to proof of being off the high road, and held that the justices might have convicted; but the men charged were found with a hare and rabbits, besides stakes and nets, upon them. In no case has a conviction under this section been maintained unless the persons charged were found to have game in their possession. Crompton, J., is reported to have said in the Queen's Bench case, "There is plenty of evidence on which the magistrates might have found that these parties, on whom both game and nets were found, were guilty of the offence either of having been unlawfully on land in pursuit of game, or of having used the nets for unlawfully taking game, because it is but reasonable to infer

that the one was the produce of the use of the other. The possession possibly of game without the nets, or of the nets without the game, might not lead to this conclusion, but the two together might very well have justified the magistrates in coming to an adverse conclusion against the defendants; though I am far from saying they were bound to do so."

Stone for the respondent.—The Act does not require proof of the actual taking of game to justify conviction; and it is sufficient if either game or an article used for killing game be found upon a suspected person. Here the facts, taken together, were quite enough to prompt the justices to infer that an offence had been committed under this section.

Pinder in reply.

BLACKBURN, J.—I confess I have some doubt, but I think there is here just some evidence upon which to convict the appellants. I am inclined myself to think, from the facts stated, that the men had used the net for unlawfully killing or taking game. The facts I rest my conclusion upon are the net found upon them, which was probably carried for the purpose of use. This net was wettish, as if it had been used in the mist; there was evidence of their having a lurcher with them, which had been heard yelping, as if driving a hare or rabbit. I wish to say pointedly that I do not consider success a needful element of a case for conviction. It is sufficient if the justices may infer from the facts that the person charged has used any of the articles mentioned for the purpose of unlawfully killing or taking game, although he may not have killed or taken any.

HANNEN and QUAIN, JJ., concurred.

Judgment for respondent.

Attorney for appellants, *Cowdell* and *Grundy*.

Attorney for respondents, *Bell, Steward,* and *Lloyd*.

Wednesday, April 24, 1872.

SECOND COURT.

COOK (app.) *v.* MONTAGU (resp.)

Nuisance—Owner of premises—Receiver of rents— 18 *&* 19 *Vict. c.* 121—29 *&* 30 *Vict. c.* 90.

An order by justices was made against the appellant under the Nuisances Removal Act 1855, *sect.* 12, *as the owner of premises upon which a foul and offensive privy existed so as to be a nuisance. The appellant was receiver of the rent of the house as agent of the ground landlord, from a person called Hancock, who held a lease of the whole house for twenty-one years: this lessee had underlet a part of the house to a Mrs. Kingston as yearly tenant. The privy was within the part of the house let to Mrs. Kingston, and was used exclusively by her, Hancock having no access to it:*

Held, upon a case stated by the convicting justices, that the appellant was not the owner of the premises on which the nuisance arose, within the definition of the word in sect. 2 *of the Act of* 1855.

THIS was a case stated by three of Her Majesty's justices of the peace acting in and for the city and borough of Bath, in the county of Somerset, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose as hereinafter stated.

Upon the hearing of a certain complaint, laid by the respondent as inspector of nuisances, acting for and under the direction of the local board of health for the said city and borough, against the appellant, and instituted under the Nuisances Removal Act for England 1855 (18 & 19 Vict. c. 121), and the Sanitary Act 1866 (29 & 30 Vict. c. 90), charging "that in or upon certain premises, situate at and being No. 13, Union-street, in the city and borough of Bath, in the district of the said local board under the Nuisances Removal Act for England 1855, the following nuisance exists: a foul and offensive privy, for want of a syphon pan and supply of water, and that the said nuisance is caused by the act or default of you the said George Henry Cook;" the said parties being respectively then present, the majority of the justices present made the following order:

"To George Henry Cook, as the owner of the house and premises situate at and being No. 13, in Union-street, in the city and borough of Bath, within the meaning of the Nuisances Removal Act for England 1855, and to the local board of health for the said city and borough of Bath, and to his and their servants and agents respectively, and to all whom it may concern:—

"Whereas on the 27th Feb., 1871, complaint was made before John Hulbert, Esq., mayor of the city and borough of Bath aforesaid, and one of Her Majesty's justices of the peace, acting in and for the said city and borough, by Henry Graham Montagu, inspector of nuisances, acting for and by order of, and on behalf of, the local board of health for the said city and borough of Bath, that in or upon certain premises, situate and being No. 13, in Union-street aforesaid, in the said city and borough, in the district under the Nuisances Removal Act for England 1855 of the local board aforesaid, the following nuisance then existed, that is to say: a foul and offensive privy, for want of a syphon pan and supply of water, and that the said nuisance was caused by the act or default of the said George Henry Cook, the owner of the said premises.

"And whereas the said George Henry Cook, the owner within the meaning of the said Nuisances Removal Act for England 1855, hath this day appeared before us justices, being three of Her Majesty's justices of the peace, in and for the city and borough aforesaid, sitting in petty sessions at our usual place of meeting, to answer the matter of the said complaint.

"Now upon proof here had before us that the nuisance so complained of doth exist on the said premises, and is a nuisance injurious to health, arising from the defective construction of a structural convenience; and that the same is caused by the act or default of the said George Henry Cook, as owner of the said premises, within the meaning of the said Act. We, in pursuance of the several Acts in this behalf, do order the said George Henry Cook, within fourteen days from the service of this order, or a true copy thereof, to abate the said nuisance. And that the said George Henry Cook do within the same period effect and properly execute all such structural and other works as may be necessary to abate the said nuisance; and especially and for the purpose of abating such nuisance, and so prevent the recurrence of such or the like nuisance, we do order that the existing trunk of the said privy, and stop trough, and ashlar drain, be

ved, and that a syphon pan and proper
y of water and stoneware drains to connect
aid syphon pan with the main sewer, be
ded as a substitute for the privy and drains
e said premises now complained of. And we
rther order that the said works be performed,
ted, and carried out by the said George
y Cook, under the direction and with the
nt or approval of the local board of health for
ity and borough of Bath, so that the said
shall no longer be a nuisance or injurious to
h as aforesaid. And if the above order for
ment be not complied with, then we do
rise and require the said local board of
h, from time to time, to enter upon the said
ıage and premises No. 13, in Union-street,
ıe said city and borough of Bath, and
ve or abate the said nuisance, and to do all
works, matters, and things, as may be
sary for carrying this order into full execu-
ccording to the Act aforesaid.
iven under the hands and seals of us, three of
Majesty's justices of the peace, in and for the
and borough of Bath aforesaid, this 13th
1871. "John Hulbert, L.S.
"Wm. Hunt, L.S.
"Wm. Thompson, L.S."

d the appellant being dissatisfied with the
order and determination, as being erroneous
int of law, pursuant to sect. 2 of the said
e (20 & 21 Vict. c. 43) duly applied in writing,
te and sign a case setting forth the facts and
ıds of such determination as aforesaid for the
ɔn of this court, and also duly entered into a
nisance, as required by the said statute in
ehalf.
ıerefore the said justices, in compliance with
ıid application and the provisions of the said
e, stated and signed the following case.
on the hearing of the complaint it was
ted by both parties, and it is the fact, that the
r, aldermen, and burgesses of the city of
acting by the council of the borough, are the
board of health for the city and borough of
and as such are the nuisance authority within
mits of the city and borough of Bath.
d the justices found as facts
ıt there was on the 7th Feb. 1871, and there
ıued to be and was on the 27th of the same
ı of February, being the day on which the
nation in the matter of this complaint was
on the premises No. 13, Union-street, Bath,
ı the district of the local board of health for
ıid city and borough of Bath, a foul and offen-
ırivy, so constructed and in such a state as to
ıuisance, and injurious to health.
ıt by reason of the defective construction of
ırivy, and of the trunk, stop trough, and
drain, respectively leading therefrom, and
ant of a proper and sufficient supply of water
e said privy, the said nuisance was likely
cur so long as the defective construction
ned unaltered.
ıt the removal of the trunk of the present
and of the stop trough and ashlar drain,
ıe substitution therefore of a syphon pan and
rovision of a proper and sufficient volume of
falling from a sufficient height effectually to
the said syphon pan when fixed, and the
works ordered in lieu of the trunk, stop
h, and ashlar drain, were works needful to
the nuisance, and prevent its recurrence.

That by an indenture, dated 8th June 1853, and made between the Rev. John Allen of the one part and Richard Hancock of the other part, the said house and premises, No. 13, Union-street, Bath, had been demised by the said John Allen (since deceased) to the said Richard Hancock, his executors, administrators, and assigns, for a term of twenty-one years from Midsummer 1853, at a rack rent.

That on the said 7th and 27th Feb. 1871, the said Richard Hancock continued to be and was the lessee of the whole premises under the said lease, having for upwards of three years then last past paid, and continuing to pay, the rent reserved by the said lease to the appellant, who received it as agent for the representatives of the said John Allen, deceased.

That on the 7th and 27th Feb. 1871, and during upwards of four years then last past, the said Richard Hancock had occupied the entrance or shop floor only of the said house and premises.

That by a verbal agreement the said Richard Hancock had during that time underlet the residue of the said house and premises (including the privy complained of) to one Mrs. Emily Kingston, as yearly tenant thereof to him at a rack rent, which she paid to him; and that on the several days aforesaid she continued to occupy the premises so underlet to her. That the privy complained of provided the only closet accommodation for the said Emily Kingston, her family and inmates, and that the said Richard Hancock had no access to and did not use it.

That in pursuance of directions given to him by the local board of health for the city and borough of Bath, acting upon reports made to them by the respondent after inspecting the condition of the said privy, the respondent on the 7th Feb. 1871, caused due notice to be served on the appellant to abate this nuisance within seven days.

And lastly, up to the day of the said complaint being heard before the justices, no steps had been taken subsequently to the service of the said notice to abate the nuisance or prevent its recurrence.

It was contended on the part of the appellant that the alleged nuisance did not arise from either the want or defective construction of any structural convenience, nor were structural works required so as to render it necessary that notice should be served on Mr. Cook, the appellant, who (it was contended) was a mere ground landlord. That the works ordered to be performed and effected were not structural works. That Mrs. Kingston the occupier and yearly tenant at rack rent under Hancock, was the person by whose act, default, permission, or sufferance the alleged nuisance arose and continued, and that as it was caused by her proximate act and default she was the proper party to be summoned; if not, then, that Hancock, as the lessee for twenty-one years, and the receiver of the rent from his tenant was the "owner" within the meaning of the said Acts of Parliament; and that he, Hancock, as such, was the proper person to be summoned. And that he had, by his lease, duly executed and accepted by him, covenanted well and substantially to repair, uphold, amend, maintain, cleanse, and keep in repair, during the said term, the said privy, sinks, drains, &c., when and as often as need or occasion should require.

It was contended, on the part of the respondent,

that the works to the want of which the said nuisance was attributed were "structural works;" that the nuisance did arise from the want or defective construction of a structural convenience, and that that being so, the justices were right in making an order against the appellant as the "owner" within the meaning of the Acts of Parliament.

The justices were of opinion that the appellant came within the terms of that part of the interpretation clause of the Act 18 & 19 Vict. c. 121, s. 2, which enacts that "the word 'owner' includes any person receiving the rents of the property in respect of which that word is used from the occupier of such property on his own account, or as trustee or agent for any other person, or as receiver or sequestrator appointed by the Court of Chancery, or under any order thereof, or who should receive the same if such property were let to a tenant," and that therefore under the provisions of the statute he was, for the purpose of the proceedings before them, an "owner" of the premises.

The justices considered that the works which they found to be needful to abate the nuisance and to prevent its recurrence, and to the want of which they found the nuisance to be due, were structural works within the meaning of the Acts, and that the nuisance complained of arose from the want or defective construction of a structural convenience.

They considered that as the Sanitary Act 1866 (29 & 30 Vict. c. 90, s. 21, 1st proviso) enacts that where a nuisance arises from the want or defective construction of any structural convenience, notice under the section shall be served on the owner of the premises, the Legislature must be taken to have intended that some actual result should be obtained from the owner, and not that a mere formal and barren ceremony should be performed; and that it consequently must be taken that a statutory duty was cast by the notice under the stated circumstances upon the owner, and that a default in compliance with the duty so cast upon him was substantially such a default or sufferance on the part of the owner as was contemplated by the Nuisances Removal Act (18 & 19 Vict. c. 121, s. 12).

They were further of opinion that under the stated circumstances they were, by the enactments of the second Act, compelled to hold that the local board of health could only look to the owner and not to the occupier, and that they could not regard either the contents or conditions of the lease; and that the fact that the lessee Hancock did not actually occupy the part of the house to which the privy was attached, was immaterial.

And that as it was proved to them that the appellant was the receiver from Hancock of the rents of the premises, he was properly before them as owner within the meaning of the statute, and it was therefore competent for them to deal with him as such, and that even if it might be possible also to include Hancock, the lessee, within the meaning of the word "owner" in the interpretation clause, yet that they had no power to discharge one person from a liability which they considered to be cast upon him by statute, by reason only that a second person might be equally, or in *some other* way, liable to him.

They were, therefore, of opinion that the de*fendant in the* case, the now appellant, was in default, and amenable to the provisions of the 12th and following sections of the Act 18 & 19 Vict. c. 121; and they made the order upon the appellant hereinbefore set forth.

The questions of law arising out of the above statement for the opinion of the court therefore are:

First. Whether the works ordered to be effected are structural works?

Secondly. Whether the appellant was the statutory "owner" of the premises on which the nuisance arose; and, if so, whether, under the stated circumstances, he was, as such, liable to an order to effect structural works for the abatement thereof?

Thirdly. Whether they were correct in point of law in their determination, and had power to make the said order of the 13th April 1871?

Bailey for the appellant.—The justices have proceeded against the wrong person. By the Nuisances Removal Act 1855 (18 & 19 Vict. c. 121, s. 12, "In any case where a nuisance is so ascertained by the local authority to exist, or where the nuisance in their opinion did exist at the time when the notice was given, and although the same may have been since removed or discontinued, is in their opinion likely to recur or to be repeated on the same premises, or any part thereof, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission or sufferance, the nuisance arises or continues; or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices in petty sessions, assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time the notice was given, or if removed or discontinued since the notice was given, that it is likely to recur or be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier, for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned, and shall also make an order for the payment of all costs incurred up to the time of hearing or making the order for abatement or discontinuance or prohibition of the nuisance." By the Sanitary Act 1866 (29 & 30 Vict. c. 90), which by sect. 14 is to be construed as one with the Act of 1855, it is provided in sect. 21 that "the nuisance authority or chief officer of police shall, previous to taking proceedings before a justice under the 12th section of the Nuisance Removal Act 1855, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, on the owner or occupier of the premises on which the nuisance arises, to abate the same, and for that purpose to execute such works, and to do all such things as may be necessary within a time specified in the notice: Provided, first, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner; secondly, that where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise and continue by the Act,

default, or sufferance of the owner or occupier of the premises, then the nuisance authority may itself abate the same, without further order; and the cost of so doing shall be part of the costs of executing the Nuisances Removal Acts, and borne accordingly." By the interpretation clause, sect. 2 of the Act of 1855, "the word 'owner' includes any person receiving the rents of the property in respect of which that word is used from the occupier of such property on his own account, or as trustee or agent for any other person, or as receiver or sequestrator appointed by the Court of Chancery, or under any order thereof, or who would receive the same if such property were let to a tenant." The case of *Brown* v. *Bussell* (L. Rep. 3 Q. B. 251), was decided upon the question who was the person by whose act, default, or sufferance the nuisance arose or continued. According to sect. 12 of the Act of 1855, the court held it was the person under whose control, or by whose act the nuisance was continued or caused, and according to that decision the proper person to summons would here have been Mrs. Kingston. She, too, was the occupier of the premises, and the appellant was not the receiver of her rent, and therefore could not be the owner within the meaning of this definition:

Evelyn v. *Whichcord*, E. B. & E. 126;
Lady Holland v. *Kensington Vestry*, 35 L. J. 105, M. C.;
Mourilyan v. *Labalmondiere*, 1 E. & E. 533;
Tinkler v. *Wandsworth District Board of Works*, 2 De G. & J. 261.

Further, the justices have no power to order the substitution of a water closet for a privy. (The court called upon the respondent to answer the first point, as to the appellant's liability.)

H. James, Q. C., (with him *Murch*,) for respondent.—Hancock was the occupier of the house, and the appellant received his rent as agent for the landlord. Mrs. Kingston was only a weekly tenant of part of the premises. and the whole house was one structure with a privy appurtenant to the whole.

Bailey was not heard in reply.

BLACKBURN, J.—I think the justices have here mistaken the person against whom proceedings ought to have been taken. We need not say anything as to other points which the appellant might raise. The Acts give power to a justice to summon the owner of the premises on which the nuisance arises. The definition says "owner" includes any person receiving the rents of the property, in respect of which that word is used, from the occupier of such property as agent for any other person. I take it that the object of the Legislature was to enable the nuisance authority to come upon the receiver of rents, who would probably be a substantial person, in the case of an occupier not being worth the powder and shot. Here the appellant did not receive the rents from the person who occupied the part of the premises on which the nuisance arose, and therefore cannot be included under the word "owner" so as to be liable to conviction upon these facts under this section.

HANNEN and QUAIN, JJ., concurred.

Judgment for appellant.

Attorneys for appellant, *White* and *Sons*, for *G. H. Cook*, Bath.

Attorneys for respondent, *Dobinson* and *Geare*, for *F. H. Moger*, Bath.

Saturday, April 27, 1872.

SECOND COURT.

REG. *v.* MUSSETT.

Certiorari—Conviction for malicious injury—Reasonable claim of right—24 & 25 Vict. c. 97, s. 52.

A conviction by justices, under the Malicious Injuries to Property Act 1861, *cannot be brought up upon a writ of certiorari on the ground that their jurisdiction was ousted by a mere bonâ fide claim of right.*

The proviso in sect. 52, *that "nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of" impliedly restricts the exemption of bonâ fide claims of right from summary jurisdiction to cases where the justices are satisfied of the fairness and reasonableness of the claims.*

A RULE *nisi* had on the 25th Jan. last been obtained on behalf of the defendant calling upon the prosecutor, Alexander Bean, to show cause why a certain conviction, under the hands and seals of John Watson Lay and George Edward Thompson, Esquires, two of Her Majesty's justices of the peace in and for the county of Essex, bearing date the 3rd day of June 1871, whereby the defendant was convicted for that he on the 10th May, 1871, at the parish of West Mersea, in the said county, did unlawfully and maliciously commit damage, spoil, and injury to certain growing grass then and there growing on certain lands, the property of the said Alexander Bean, by then and there trampling down the same, thereby doing injury to the said Alexander Bean to the amount of 1s., contrary to the statute in such case made and provided, should not be quashed for the insufficiency thereof.

Upon the hearing before the magistrates at Petty Sessions, it was proved that the present defendant, together with Samuel Pullen, who was charged with him, were on the day alleged playing cricket on a marsh belonging to the complainant, and that they did damage to the grass by so doing. It was proved that a cricket club had paid rent about thirty years ago for the right to play on this marsh, and that at various times leave to play had been given by the occupier for the time being. It was also proved that for nearly half a century up to the present time rent, rates, and taxes, were paid by the occupier of the said land and his predecessor; also that the defendant Pullen was convicted and fined upon the same charge, under similar circumstances, about a year before, and although at his request a case was granted and drawn for the opinion of a superior court concerning the legality of that conviction, he declined to go on with and abandoned the same, and paid the costs thereof. A great number of witnesses were called for the defence, who had played cricket at this place for years without having obtained leave or paid rent to the occupier or landlord.

The affidavit of one of the magistrates who convicted the defendants upon the present occasion concluded thus: "Under all these circumstances, upon a careful consideration of all the evidence adduced, we came to the conclusion as a matter of fact that the said defendants did not, nor did either of them act or consider they acted under a fair and reasonable belief that they had a right to do the act complained of; and by adjournment on the 3rd June last, we unanimously con-

victed the said defendants of the said charge so brought against them."

Denman, Q.C. (with him *R. E. Turner*) appeared to show cause against the rule on behalf of the prosecutor; but the court called upon the other side to explain how a writ of *certiorari* could apply to the case.

Brown, Q.C. (with him *Purcell*) argued for the defendant.—The justices had no jurisdiction to determine this case. There was a substantial and *bonâ fide* claim of right by the defendant, and there was nothing to show that what he did was a wilful and malicious act. In the case of *Reg.* v. *Nunneley* (E. B. & E. 852), the court upon *certiorari* quashed a conviction for non-payment of church rates upon affidavits, showing that the justices had no reasonable ground for disbelieving the *bona fides* of the defendant's contention that the rate was invalid.

BLACKBURN, J.—I should entertain no doubt upon this matter even if it were new, but last term this court determined that the effect of the proviso in sect. 52 of 24 & 25 Vict. c. 97 was to restrict the application of the general exemption of *bonâ fide* claims of right from the jurisdiction of magistrates; the words are "Provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game." In *White* v. *Feast* (argued on the 17th Jan. last, 20 W. R. 382), we held that these words excluded any further implied exception to the justices' power of dealing summarily with trespassers to land where claim to title is involved. It is the business of the justices who investigate a charge under this Act, not only to consider whether the party acted upon a real and *bonâ fide* claim of right, but also whether the supposition of his right was fair and reasonable; and unless they are satisfied that the defendant's claim is fair and reasonable as well as *bonâ fide*, their jurisdiction is not ousted. *White* v. *Feast* was a special case stated by the justices for the purpose of raising this point, and the effect of it must be to prevent a conviction under this statute from being brought up upon this ground under a writ of *certiorari*. The justices may, of course, raise the question of the propriety of their decision upon a special case.

MELLOR J.—I am of the same opinion. Under this statute the justices must inquire whether a *bonâ fide* claim of right is fair and reasonable, and if they doubt, they must state a case; but their jurisdiction cannot be otherwise questioned.

Rule discharged.

Attorneys for prosecution, *Kingsford* and *Dorman*.

Attorney for defence, *J. Keiley*.

April 24 *and May* 1, 1872.

SECOND COURT.

SKINNER (app.) *v.* USHER (resp.)

Hackney carriage—Plying for hire—Standing appointed—Public place—1 *& 2 Will.* 4, *c.* 22, *s.* 4—6 *& 7 Vict. c.* 86, *ss.* 2, 3, 29, 30, 33.

The appellant, a licensed driver of a hackney carriage, had been convicted under 6 *& 7 Vict.* c. 86, s. 33, *of plying for hire elsewhere than at some standing or place appointed for that purpose. He was the servant of a cab proprietor, who was also the occupier of a public house immediately opposite the Putney railway station. In front of the public house, and between it and the road, is an open piece of ground, part of the land attached to the public-house, and private property. Here the appellant stood with his master's cab, and when hailed from the station drove across the street and picked up a fare. This place was not appointed by the Commissioners of Police as a standing for hackney carriages under sect.* 29:

Held, upon a case stated by the convicting magistrate, that these facts did not constitute an offence under this Act, and 1 *&* 2 *Will.* 4, *c.* 22, *which is to be read with it.*

AT the Police Court for the Wandsworth Metropolitan Police District on the 27th Nov. 1871, Robert Skinner, a licensed driver of a hackney carriage, hereinafter called the appellant, appeared before one of the metropolitan police magistrates to answer to a summons which charged that the appellant did on the 17th Nov. inst. at the parish of Putney in the county of Surrey, and within the metropolitan police district, unlawfully ply for hire with the said hackney carriage elsewhere than at some standing or place appointed for that purpose. The magistrate convicted the appellant in the penalty of 1*s.* and 2*s.* costs; whereupon the appellant, being dissatisfied with that decision as being erroneous in point of law, duly required the magistrate to state for the opinion of this honourable court the following case.

The facts proved or admitted were as follow: The appellant is the servant of James Yeoman Clipson, who is a cab proprietor, and the occupier of a public house situate in High-street, Putney, immediately opposite to the railway station of the London and South-Western Railway there.

In front of the principal entrance of the said public house, and between the same and the main street, is a vacant piece of uninclosed ground, which is and has usually been for many years occupied with the said public house, and is open to the street and frequented by the public, but is private property, and not subject to any right of passage by them.

The said James Yeoman Clipson has for many years been used to cause his cabs to stand upon the said piece of uninclosed ground ready for the conveyance of passengers.

On the said 17th Nov. the appellant, by the orders of the said James Yeoman Clipson, was in charge of a licensed hackney carriage, ready for the conveyance of passengers, standing upon the said piece of uninclosed ground. He was hailed by a person at or near the said railway station, upon which he drove the said carriage across the street, and took up the person so hailing him, drove away, and after an interval of about twenty minutes returned and remained with the said carriage upon the said piece of uninclosed ground, ready for the conveyance of passengers as before.

No part of the said piece of uninclosed ground has ever been appointed by a lawful authority as a standing whereon hackney carriages may ply for hire; but there is a place so lawfully appointed at a short distance therefrom, and in the said High-street.

On behalf of the complainant it was contended that the facts above set forth were evidence of a

breach of the provisions of the statute 6 & 7 Vict. c. 86, s. 33.

On the part of the appellant it was contended that there was no evidence of any plying for hire in a public street or place, and that, in order to create a breach of the provisions of 6 & 7 Vict. c. 86, s. 33, there must be a plying for hire in a public street or place.

The following were the grounds of the magistrate's decision :—

1. That the appellant having his carriage ready for the conveyance of passengers in a place frequented by the public was a plying for hire, although the place was private property.

2. That it was not necessary, in order to constitute a breach of the provisions of 6 & 7 Vict. c. 86, s. 33, that there should be a plying for hire in a public street or place.

3. That, if it was so necessary, the facts above set forth disclose evidence on which it might be lawfully found that there was a plying for hire in a public street or place.

If the court should be of opinion that there was any evidence on which the magistrate could lawfully convict the appellant of a breach of the provisions of 6 & 7 Vict. c. 86, s. 33, then the conviction was to be confirmed, otherwise it was to be quashed.

Edward Clarke argued for the appellant.—The section under which the appellant was convicted is 6 & 7 Vict. c. 86, s. 33, which enacts "that every driver of a hackney carriage who shall ply for hire elsewhere than at some standing or place appointed for that purpose, or who, by loitering or by any wilful misbehaviour, shall cause any obstruction in or upon any public street, road or place; and also every driver or conductor of any metropolitan stage carriage who by loitering or any wilful misbehaviour shall cause any obstruction in or upon any public street, road, or place, or shall improperly delay such carriage on any journey, or wilfully deceive any person in respect to the route or destination thereof, or who shall refuse to admit and carry at the lawful fare any passenger for whom there is room, and to whose admission no reasonable objection is made, or who shall demand more than the legal fare for any passenger, or who, for the purpose of taking up or setting down a passenger, or except in case of accident or other unavoidable necessity, shall stop such carriage opposite to the end of any street, or upon any place where foot passengers usually cross the carriage-way, or who shall ply for hire or passengers by blowing a horn or by using any other noisy instrument, within the limits of the metropolis as defined by the said Act of 2 Will. 4; and every conductor of a metropolitan stage carriage who shall allow any person besides himself, not being the hirer or a person employed by such hirer, to ride on the driving box; and every driver or conductor of any metropolitan stage carriage who shall smoke whilst acting in such capacity, after an objection taken by any person riding in or upon such carriage; shall for every such offence forfeit the sum of 20s." By sect. 2, the words "hackney carriage" shall include every carriage (except a stage carriage) which shall stand on hire or ply for a passenger for hire at any place within the limits of the city of London, and the liberties thereof, and metropolitan police district." By sect. 3, certain provisions of 1 & 2 Will. 4, c. 22, are extended and applied to hackney carriages within the meaning of this Act. By sect. 29, the commissioners of police of the metropolis may from time to time appoint standings for hackney carriages, and at their discretion alter and make regulations for the same. By sect. 30, "No standing shall be appointed for hackney carriages, either within the metropolitan police district or within the City of London, by virtue of this Act, or of any other Act, except in the centre part of the street, unless in the case of a street with houses only on one side of such street." Amongst the provisions of 1 & 2 Will. 4, c. 22, incorporated by sect. 3 of the Act of 1843, are sect. 4, "that every carriage with two or more wheels, which shall be used for the purpose of standing or plying for hire, in any public street or road, at any place within the distance of five miles from the General Post Office, in the City of London, whatever may be the form of construction of such carriage, or the number of persons which the same shall be calculated to convey, or the number of horses by which the same shall be drawn, shall be deemed and taken to be a hackney carriage within the meaning of this Act;" and sect. 35, "That every hackney carriage which shall be found standing in any street or place, and having thereon any of the numbered plates required by this Act to be fixed on hackney carriages, shall, unless actually hired, be deemed to be plying for hire, although such hackney carriage shall not be on any standing or place usually appropriated for the purpose of hackney carriages standing or plying for hire." By the latter part of that section, a driver shall forfeit 40*s.* for refusing a fare, upon his failure at the hearing of a complaint to prove that he was hired by someone else. In *Case* v. *Storey* (20 L. T. Rep. N. S. 618; L. R. 4 Ex. 319), the respondent was the driver of a hackney carriage, standing on the private ground of a railway station, and he refused to drive the appellant who required him, the appellant not having come by train to the station. The court held that he was not liable under sect. 35; for the words "in any street or place" in that section must mean "in any public street or road" as used in sect. 4. Reading these two Acts together, as provided by sect. 3 of 6 & 7 Vict. c. 86, sects. 2 and 33 can only apply to a driver who shall ply for hire in some public street or place elsewhere than a standing or place appointed for that purpose. Two recent cases, *Clarke* v. *Stanford* (24 L. T. Rep. N. S. 389; L. Rep. 6 Q. B. 357), and *Allen* v. *Tunbridge* (24 L. T. Rep. 796; L. Rep. 6 C. P. 481), have been decided upon 32 & 33 Vict, c. 115, s. 4, but they are not in point here. [The *Attorney-General*. — We say they are precisely in point.] They are both, like *Case* v. *Storey*, charges of plying for hire on the private grounds of railway stations, but by 32 & 33 Vict. c, 115, s. 4 "'hackney carriage' shall mean any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is not a stage carriage." Both courts observe upon the omission of the words "public place" from the definition of the previous Acts, and Cockburn, C.J., said (p. 359), "this appears to have been done intentionally and advisedly." The Court of Common Pleas in *Allen* v. *Tunbridge* merely followed the authority of the Queen's Bench.

The *Attorney-General* (Sir J. D. Coleridge Q.C.) (with him *Archibald* and *Beasley*), argued for the respondent. The definition of hackney carriages in

the Act 32 & 33 Vict. c. 115, is substantially the same as that in 6 & 7 Vict. c. 86. [BLACKBURN, J.—The words are not the same, and the only question is whether "place" in the earlier Act means "public place."] The words are simple, and there can be no ground for adding to the definition the words "in some public street or place," which must be done to maintain the appellant's contention. In *The Blackpool Local Board of Health* v. *Bennett*, (4 H. & N. 127), the Court of Exchequer interpreted the same words in a bye-law according to the respondent's view. By allowing the appellant to ply for hire, Mr. Clipson would obtain an undue advantage over other cab proprietors.

Clarke in reply.

Cur. adv. vult.

May 1st.—BLACKBURN, J. delivered the judgment of the court. (Blackburn, Hannen, and Quain JJ.) [After stating the facts.] The magistrate expressed his opinion, which however he has submitted to our consideration, that this was a plying for hire in a public street or place. It is obvious that, if the appellant were liable to a penalty on that account, we should have to affirm the conviction; but what we think is that the Legislature did not intend, in the year 1843, to prohibit what the appellant did in this case, and did not consider such a proceeding a plying for hire in a public place. There are three Acts of Parliament on the subject; the first is 1 & 2 Will. 4, c. 32, but we need not consider the effect of the words used there; the Court of Exchequer has decided in *Case* v. *Storey* that the words "any street or place," in sect. 35, must refer only to a public street or road, as used in sect 4. That decision is binding on us unless strong grounds can be shown for coming to a different conclusion; we, however agree with that decision, and we think that the Act refers only to plying for hire in a public street or road. Then came the Act 6 & 7 Vict. c. 86, under which this conviction took place. It incorporates some of the provisions of the former Act, but it varies the definition of a hackney carriage; by the former, every carriage which shall be used for the purpose of standing or plying for hire in any public street or road, at any place within the distance of five miles from the General Post-office, shall be deemed and taken to be a hackney carriage; by the latter Act "hackney carriage," shall include every carriage which shall stand on hire or ply for a passenger for hire at any place within the limits of the City of London, and the liberties thereof, and metropolitan police district. We think that this second Act was not intended to alter the definition of "place" at all, but merely extended the limits of the application of the Act from five miles round the post-office to the whole of the metropolitan police district. If that be once clear, the meaning of the Act seems to follow; by the 33rd section, every driver of a hackney carriage who shall ply for hire elsewhere than at some standing or place appointed for that purpose shall forfeit the sum of 20*s*. Taking "place" in the definition of hackney carriage to mean public place, this section must make a driver liable only if he plies for hire on some public ground other than a cab stand, and the place on which the appellant's cab was standing would not be such as the Act contemplated. Drivers who stand and ply at railway stations, or upon ground belonging to private persons, are *not liable under the* 33rd section. This is *confirmed by the enactment* in sect. 30, that no standing shall be appointed except in the centre part of a street, unless in the case of a street with houses only on one side. We cannot read this section, unless with our interpretation of place, to mean anything but a positive prevention of any plying for hire at a railway station. We cannot believe that the Legislature ever intended by a side wind and incidentally, to put an end to the custom for cabs to wait for passengers at railway stations. An argument has been used to the effect that, by this construction of the statute, the owner of the appellant's cab gets an unfair advantage over other owners and drivers who have not private grounds so conveniently situated; but that may well be a matter which the Legislature has left to public competition, and I do not think we are bound to provide otherwise. It has also been said that our decision in *Clarke* v. *Stanford* is inconsistent with our opinion in this case; but we still consider that case was rightly decided. The question raised was upon another and a later Act, and the words used to define a hackney carriage in that Act—the 32 & 33 Vict. c. 115, s. 4—are different from those in this Act. They are, "Hackney carriage shall mean"—not include, as here—"any carriage for the conveyance of passengers which plies for hire within the limits of this Act;" there is nothing about standing places, either public or private, in the definition of offences, and the conviction was obviously right. The result is, that our judgment is for the appellant.

Conviction quashed.

Attorney for appellant, *W. A. Willoughby*, for *H. R. Jones*, Wandsworth.

Attorney for respondent, the *Solicitor to the Crown.*

Thursday, May 9, 1872.

CAMPBELL v. EAST LONDON WATERWORKS.

Statutory duty to supply water—Exemption from liability—10 *Vict. c.* 17, *s.* 38; 16 & 17 *Vict. c. clxvi., ss.* 62 *and* 79.

Sect. 79 *of the East London Waterworks Act* 1853, *provides that the company shall, at the request of an owner or occupier of any premises situate in or adjoining any street in which any main or service-pipe of the company is or shall be laid, and who requires a supply of water, afford a supply of water. The plaintiff declared upon this section, and stated that he was such an owner and occupier, and that he requested and required a supply of water; but notwithstanding the fulfilment of all conditions the defendant wrongfully, improperly, and negligently made default in affording to the plaintiff the said supply, by reason whereof he was unable to extinguish a fire which destroyed his premises. The defendants pleaded that the said main or service pipe had a certain fire-plug properly fixed in it, and that the said fire-plug was opened for the purpose of supplying water for extinguishing another fire, which was the cause of default. They also pleaded that they were prevented from affording the said supply of water from unavoidable cause or accident.*

Held, upon demurrer that the former of these two pleas was good, but that the latter was bad.

In this case the plaintiff demurred to two of the defendant's pleas.

The first count of the declaration stated that

after the passing and coming into operation of the East London Waterworks Act 1853, the plaintiff, being an owner and occupier of premises adjoining a certain street in which a main or service pipe of the defendants was laid, required a supply of water by measure for purposes other than the purposes in respect of which rates in the said statute are provided or limited, and requested the defendants, in accordance with the provisions of the said statute, to afford him a supply of water. And the plaintiff said that although all conditions were fulfilled necessary to entitle, and nothing happened to disentitle, and there was nothing to disentitle the plaintiff to have the defendants afford to him the supply of water, and keep him supplied with the same; yet the defendants wrongfully, improperly, and negligently, and in violation of the provisions of the statutes in that behalf made and provided, made default in affording to the plaintiff the said supply of water, and in keeping him supplied with the same, and left him unsupplied with the same, and by reason thereof the plaintiff was unable to obtain water to extinguish, and was unable to extinguish, a fire which extended to and was burning on the plaintiff's said premises; and by reason of the same the premises, sheds, buildings, property, and goods of the plaintiff which were then upon the said premises were damaged, burnt, and destroyed. And the plaintiff was otherwise greatly damnified and injured.

The defendants pleaded to this first count, fourthly, that the said main or service pipe had a certain fire plug properly fixed in it, and that the said fire plug was opened for the purpose of supplying water for extinguishing a fire which had broken out in certain premises adjoining the street in which the said main or service pipe was, which was the cause of the default in affording to the plaintiff the said supply of water in the said first count complained of.

The defendants pleaded to this same first count, fifthly, that they were prevented from affording the said supply of water, from unavoidable cause or accident.

The plaintiff demurred to the fourth plea, on the ground that it was no answer to the charge of negligence and improper conduct; and that it did not show any valid excuse for the breach of the statutory obligation disclosed in the first count.

The plaintiff demurred to the fifth plea on the grounds that it did not deny negligence, but on the contrary, admitted it; and that unavoidable cause or accident was no excuse for not performing the statutory obligation disclosed in the first count.

The defendants' points were: First, That the fourth plea was good because the Water Works Clauses Act 1847, which is incorporated with the East London Waterworks Act 1853, exempts the defendants from all liability for a non-supply of water, arising out of the circumstances mentioned in the plea; secondly, that the fifth plea was good, inasmuch as the exemptions mentioned in the plea apply to a supply of water under section 79; and thirdly, that the declaration disclosed no grounds of action against the defendants.

Sir *G. Honyman*, Q.C. (with him *Cohen*) argued for the plaintiff:—By sect. 79 of the East London Waterworks Act 1853 (16 & 17 Vict. c. clxvi.) it is enacted "that the company may, at their own instance, and shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the company is or shall be laid, and who requires a supply of water, by measure, for purposes other than the purposes in respect of which rates are by this Act provided or limited, and by means of communication pipes, and other necessary and proper apparatus to be provided, laid, and maintained at the cost of the person requiring such supply, afford a supply of water by meter, or other fit and sufficient instrument or mode for measuring and ascertaining the quantity of water so supplied, and may charge for such supply not exceeding" certain rates therein contained. The fourth plea is no answer to the negligence imputed by the declaration; for although the fire-plug might be properly fixed and properly opened for the purpose alleged, it might have been consistently with the plea improperly and negligently left open after the alleged purpose was accomplished. [BLACKBURN, J.—The plea alleges that the opening of the plug was the cause of default; if it turns out otherwise, the issue upon the plea will be in the plaintiff's favour.] At all events the imputed negligence is not answered by the fifth plea. [Stopped by the court.]

Pollock, Q.C. (with him *Lanyon*) for the defendants.—The fourth plea is founded upon the Waterworks Clauses Act 1847 (10 Vict. c. 17), s. 38, which enacts that the "undertakers, at the request of the town commissioners, shall fix proper fire plugs in the main and other pipes belonging to them, at such convenient distances, not being more than the prescribed distance, or if no distance be prescribed, not more than 100 yards from each other, and at such places as may be most proper and convenient for the supply of water for extinguishing any fire which may break out within the limits of the special Act, and also upon sect. 42, "the undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same." These sections impose upon the defendents and all undertakers a public duty which overrides all private contracts. Section 62 of the private Act 1863, supports the fifth plea; "provided always that the company shall not be liable to any penalty for not laying down any such main pipe or communication pipe, if they be prevented so doing by any unavoidable cause or accident, or for not supplying water if the want of such supply arise from frost, unusual drought, or other unavoidable cause or accident." [BLACKBURN, J.—This plea would be proved by establishing any unavoidable cause or accident whatever, but the section exempts the company only from a cause or accident *ejusdem generis* with frost and drought.]

BLACKBURN, J.—I think the fourth plea is a good answer to the first count of the declaration, but the fifth plea is too general, and cannot be supported.

MELLOR and LUSH, J. concurred.

Judgment for defendants on the fourth plea, and for plaintiff on the fifth plea.

Attorneys for the plaintiff, *Coombe* and *Wainwright*.

Attorneys for the defendants, *Bircham, Dalrymple* and *Drake*.

V. C. MALINS' COURT.

Reported by G. I. F. COOKE and T. H. CARSON, Esqrs., Barristers-at-Law.

Friday, March 8, 1872.

ATTORNEY-GENERAL *v.* STEWART.

Charity—Scheme cy près—Application to restore money to original purpose.

When a scheme for the regulation of a charity has been settled by a decree of the court, and acted upon for a number of years, no alteration will be made in the scheme, except upon the clearest evidence that great benefit will result from the change.

Money was subscribed in 1809 *to provide a Gaelic service in London for Highlanders "who could not speak English." An information was filed in* 1827, *and in* 1830 *a decree was made confirming a scheme by which the money was applied in payment of a clergyman who conducted a Gaelic service in London until* 1844, *when he resigned. On a reference being made to the master, he found in* 1846 *that a fit and proper person could not be found to undertake the duty: that Gaelic preaching was not required or desired in London: and he approved a scheme for the application of the money in educating Scotch children at the Caledonian Asylum. The master's report was confirmed by decree, and the money was applied accordingly until* 1871. *A petition was then presented (in the suit, and also under* 52 *Geo.* 3, *c.* 101.) *by three Highlanders residing in London, alleging that a fit and proper person could now be found to conduct a Gaelic service, and praying that the money should be so applied.*

Held, that the money must be considered as raised for the benefit of those "who could not speak English sufficiently to attend an English service with profit:" And no evidence having been given of there being any such persons in London, and the Attorney-General opposing the application, the court refused to make any alteration in the scheme.

THIS was a petition presented in the above suit, and also under Sir S. Romilly's Act (52 Geo. 3, c. 101), with reference to the application of the income of a fund which was raised under the following circumstances.

In 1809 a subscription was opened "for the purpose of providing a place of public worship in London, for persons coming from the Highlands of Scotland who could not speak English, where divine service should be performed in the Gaelic language." A large sum was subscribed, and from 1812 to 1822 the income was applied in support of a Gaelic service in London. The arrangements then broke down, and the money, which at that time amounted to £2790 was invested in exchequer bills by David Stewart and Archibald Campbell.

In 1827 an information was filed by the Attorney-General with reference to this fund, and by the decree the money was ordered to be paid into court, and a reference was made to the master to approve of a scheme for the application of the fund to the purpose for which the same was subscribed, or as near thereto as circumstances would admit.

The master, by his report dated the 15th *June* 1829, found that the Reverend John Lees, a clergyman of the church of Scotland, the schoolmaster of the Caledonian Asylum, who was well acquainted with the Gaelic language, and a man of high character, had entered into an arrangement with the persons composing the committee of management of the Scotch church in Chadwell-street, Spa Fields, whereby the said committee had agreed to grant to the said John Lees the use of the said church every Sunday afternoon at three o'clock, for the purpose of performing divine service in the Gaelic language, in consideration of the said John Lees paying to them the sum of £20 per annum, towards the expenses of the said church: and he also found that the then relators and also the defendant Alexander Fraser, who was one of the original subscribers to the said fund, conceived that as the said fund was not sufficient for the purpose of a chapel and payment of a salary of a clergyman for the special purpose of having divine service in the Gaelic language performed therein, that performance of such service in the Gaelic language on every Sunday afternoon was the nearest approach that could be made towards effecting the object of the said original subscription, and would accomplish it so far as the limited means then applicable to the purpose would allow it to be done. It was further found that the then relators proposed the following scheme for the application of the funds subscribed, that is to say, that the said exchequer bills should be sold, and that the produce of such sale and the sum of 265*l.* 10*s.* 11*d.* cash then in the bank in the name of the said Accountant-General in trust of the said cause, after the payment of the costs, charges, and expenses of the said suit should be laid out in the purchase of 3*l.* per cent. Reduced Annuities in the name of the said Accountant-General in trust in the said cause, and that the dividends to arise therefrom should be from time to time paid by the said Accountant-General to the said John Lees so long as he should perform divine service in the Gaelic language in the said church in Chadwell-street, and that the master had considered of the said proposed scheme, and did approve thereof.

By two orders made in this suit, and dated the 11th June 1830 and the 21st of June 1830, the report of the master was confirmed, and the dividends on the fund were ordered to be paid to the Rev. John Lees until further order.

The Rev. John Lees accordingly received the income of the fund, and Gaelic service was regularly conducted in London by him until 1844 when he resigned the office.

No other person having been found to succeed him, a petition was presented in 1845 by the relators in the suit, and by an order made on their petition it was referred to the master to approve of a fit and proper person to perform divine service in the Gaelic language in the room of the Rev. John Lees, and to approve of a new scheme.

The master, by his report dated the 17th June 1846, made in pursuance of the last mentioned order, found that he had caused advertisements for a preacher to be inserted in papers both English and Scotch, but no applications had been received in consequence of such advertisements; and various inquiries having been made of those supposed to be able to give information as to persons qualified for the situation without success, it was the opinion of the relator James Alexander Simpson that no clergyman could be found who would undertake the proposed appointment. And

the master found that it did not appear, from past experience, that Gaelic preaching was required or desired in London, for during the time that Gaelic was preached in the chapel in Cross-street, then some years ago, not more that half a dozen persons on an average attended, and that before the removal took place to the National Scotch Church, in Regent-square, the Gaelic language ceased to be preached, and the said master found that after the removal to the latter place there were still very few who attended to hear the Gaelic service, sometimes not more than three, and that there were very few persons in England who then spoke or understood Gaelic so as to induce them to attend to hear divine service in that language, and he found that the Caledonian Asyum, which was incorporated in 1815, for supporting and educating the children of soldiers, sailors, and marines, natives of Scotland, who had died or been disabled in the service of their country, and of indigent Scotch parents resident in London not entitled to parochial relief, formerly received only boys, but the charity had since been extended and there were then 34 girls, and plenty of room and accommodation for more, and it would be very desirable that the dividends on the fund in court in the said cause, should be applied in aid of the Caledonian Asylum and the extension of its charity, the children being all those of natives of Scotland who were strictly educated in the religion of the Scotch church. And the master found that there was then standing in the name of the said Accountant-General in trust in the cause, to the account of the *Attorney-General* v. *Stewart* (Gaelic Chapel) in Reduced Annuities 3310*l.* 17*s.* 10*d.*, and in cash 150 15. 9*d.*, and it had therefore been proposed before him on the part of the said relators, that in approving of a new scheme for the future application of the trust fund, he should approve of the dividends payable in respect thereof being applied for and towards the charitable purposes of the Caledonian Asylum for supporting and educating the children of soldiers, sailors, and marines, natives of Scotland, who had died or been disabled in the service of their country, and of indigent Scotch parents resident in London not entitled to parochial relief: and having considered the said proposal, he was of opinion, and found that a fit and proper person to perform divine service in the Gaelic language, in the room of the said John Lees, could not be found; and he therefore approved of the following new scheme, corresponding as nearly as possible under all the circumstances to the purpose for which said subscriptions were originally raised, for the future application of the said trust fund, that was to say, that the dividends in respect of the said 3310*l.* 17*s.* 10*d.* Reduced Annuities should in future, until further order of this honourable court, be applied for and towards the better providing religious and general education, and instruction, under the direction of the Corporation of the Caledonian Asylum, of the children supported by that Institution.

By an order made in the suit, on the 26th June 1846, on the petition of the relator, James Alexander Simpson, it was ordered that the master's report, dated the 17th June 1846, be confirmed. And it was ordered that the scheme by the said report approved of, be adopted and carried into effect, and after providing for the payment of the costs as therein mentioned, it was ordered that the dividends to accrue due on the said sum of 3310*l.* 17*s.* 10*d.* Reduced Annuities should from time to time, as and when the same should accrue due, be paid to the treasurers of the Caledonian Asylum, for the time being, to be applied by them or him towards the charitable purpose of the said Caledonian Asylum, for and towards the better providing religious education and instruction, under the direction of the Corporation of the Caledonian Asylum for the children supported by that institution.

In pursuance of the last-mentioned order the income of the fund was paid to the treasurer of the Caledonian Asylum until Oct. 1871. This petition was then presented by three persons, named McCallun, McGregor, and Macphee, one of whom has been a member of the congregation of the Rev. John Lees. The petitioners stated that they were persons coming from the Highlands of Scotland, who lived in London and spoke the Gaelic language, and that they were desirous of having opportunities of attending divine service in London performed in that language. They alleged that there were a considerable number of Highlanders living in London speaking the Gaelic language, to whom divine service performed in that language would be a great benefit. They further stated that the Rev. David Reid, who was a clergyman of the Church of Scotland, could now be obtained to conduct a Gaelic service in London; that the use of a church could also be obtained for the purpose, and that the cost of the service would not exceed the amount of the income of the fund; and they submitted, that inasmuch as the income could now be applied for the purposes for which the money was originally subscribed, it ought no longer to be paid to the Caledonian Asylum. The petition therefore prayed (1) that the dividends on the fund in court might be paid to the Rev. David Reid until further order, or so long as he should perform divine service in London in the Gaelic language; (2) that if necessary a scheme might be settled for the application of the dividends for the future to providing for the performance by a clergyman of the Church of Scotland, divine service in London in the Gaelic language, for the benefit of the Highlanders in London speaking that language, and that if necessary, trustees of the said fund and charity might be appointed.

The petition was supported by the evidence of a number of persons coming from the Highlands of Scotland who resided in London, and held various positions, as clergymen, officers in the customs, and domestic servants. They all expressed their wish for a Gaelic service; but there was no evidence that any one resided in London who was unable to understand English.

Cotton, Q.C. and *Kekewich*, for the petitioners, contended that this was money devoted to a charitable purpose, for which there was a trust. This charitable purpose had been sanctioned by the scheme adopted in 1830. The court in 1846 had changed the old scheme and applied the money *cy près*, on the ground that it was impossible to carry into effect the original purpose, for no clergyman could be found to conduct a Gaelic service in London. That impossibility no longer existed; the money should therefore be restored to its original purpose.

Glasse, Q.C. and *Freeling*, for the Caledonian Asylum.—The petition is presented under Sir S. Romilly's Act, and also in the suit. Under Sir S.

Romilly's Act the petitioners must have a direct interest in the charity (*Re Bedford Charities*, 2 Swanst. 518), which these petitioners have not. This money was originally subscribed for those who could not speak English; but there are no such persons now resident in London. The only person who can move in this matter is the Attorney-General, and he is opposed to this application. But, even if the application were properly made, the court will not take money from its present useful purpose and apply it for such a speculative and sentimental scheme as that proposed by the petition.

Hemming, for the Attorney-General, submitted that such an application as the present, to vary a scheme which had been already settled by the court, should be made by the Attorney-General, and not by any private individual. Differences of opinion must exist in the case of every charity; and if the court would change a scheme upon a mere statement of opinion, every charity would be exposed to continual petitions presented by those who wished for a different application of the funds, and every petitioner would expect his costs out of the funds of the charity. It was open to every one to apply to the Attorney-General for the purpose of having steps taken by him to procure a change. He referred to

Attorney-General v. *Bishop of Worcester*, 9 Hare, 328.

Cotton, in reply.

The VICE-CHANCELLOR stated the facts and reviewed the evidence which had been filed in support of the petition. He said that all the persons who had given evidence stated that they wished for a service in Gaelic; but it appeared that they were all acquainted with the English language. He was of opinion that every possible advantage which they could derive from a service in Gaelic they could also derive from a service in English; and he must regard the application as having been made for a speculative and sentimental purpose. But, supposing the Gaelic service to be established, the income of the fund, which only amounted to 90*l.* a year, would not be sufficient to support it. It was said that subscriptions would increase; but it was only too probable that this zeal for a Gaelic service would languish and die away, as it had languished and died away before. Treating it, therefore, as a practical question, there would be no advantage gained by acceding to the prayer of the petition. The only result would be the establishment of a scheme which would end in failure. So much for the merits of the question; he had further to consider the technicalities. This scheme had been settled for twenty-six years, and ought he now to interfere with it? He was of opinion that nothing could be more beneficial than the present application of the money, and was it wise to divert it from that application? On this subject he should refer to the *Attorney-General* v. *The Bishop of Worcester*. The facts of that case were not relevant, but the case was important on account of the general principles which it laid down. Turner, V.C. there said in his judgment (9 Hare, 361):—"But although it is thus in my opinion competent to the Attorney-General to apply to the court for alterations in schemes which have been settled under its directions, it is obvious, I think, that the court must proceed upon such applications with the utmost possible caution; *that what has been* done by the court must not be *disturbed, except* upon the most substantial grounds and upon the clearest evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so, consistently with the object of the foundation. Incalculable mischief will ensue to all the charities in the kingdom if this rule be not strictly observed, and if the court ventures in such cases to interfere upon speculative views as to the result of alterations, or in matters of discretion or regulation—matters on which the opinion of each succeeding Attorney-General and of each succeeding judge may well be permitted to differ." Those observations were completely applicable to the present case; and on the principles there laid down he would not be justified in changing a scheme, unless he were satisfied by the clearest evidence that great benefit and advantage would result from the change. He was not so satisfied; on the contrary, he was satisfied that the proposed change would result in failure. The money had been subscribed for the benefit of "those who could not speak English," and much had been said as to the meaning of those words. There was no one now to be found in London who could not speak English. He was of opinion, however, that those words were not to be taken strictly, but that their fair meaning was "for those who could not speak English to such an extent as to enable them, profitably, to attend a service in London conducted in English." But whether the words were construed strictly, or whether a liberal interpretation were placed upon them, there were no persons who came within that description for whose benefit he could apply the money. But further, in a case like the present, where a scheme had been settled by the court and acted upon for a number of years, an application to change the scheme should be made with the consent of the Attorney General. On this point he would again quote the observations of Turner, V.C. (9 Hare, 360), where he said: "I am not prepared to hold that it is not competent to the Attorney General, in a charity case, to call upon the court to review a scheme which has been settled under its decree, if he is satisfied that the scheme does not operate beneficially for the charity, and thinks that he can satisfy the court that the interests of the charity can be better promoted by an altered scheme, consistent with the foundation, the usage, and the law. In such a case, I think it is not only competent to the Attorney General, but it is his duty, to apply to the court for an alteration in the scheme. . . . The Attorney General, it must be remembered, acts in these cases on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity. The court, in these cases, cannot look to any right or interest of the relator, but can regard the suit only as instituted by the Attorney-General, and all the objects of the charity are thus, in effect, plaintiffs through him." Now the Attorney-General was most strongly opposed to the present application; and on the whole he considered that he should be failing in his duty if he were to interfere with a useful charity, and devote this money to the purposes of a speculative and sentimental scheme. The petition would therefore be dismissed, and the petitioners must pay their own costs. The costs of the Attorney-General and the Caledonian Asylum, as between solicitor and client, would be paid out of the funds of the charity.

Solicitors, *Day; J. T. Simpson; Raven* and Bradley.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barrister-at-Law.

Wednesday, March 6, 1872.

HUNTER *v.* BULLOCK.

Will—Charitable bequest—Direction for repair of gravestones.

Testator, after certain directions as to the graves of himself and his niece, desired his executors to pay to the trustees of the Tailors' Institution, Haverstock-hill, 1000*l.* *"for the following use, that is, to pay the required amount for painting and keeping in repair the gravestone or gravestones in Kensal-green Cemetery or elsewhere, for the* 15*th June yearly, if required, and to divide the balance that may remain into two equal parts," to be applied as therein mentioned for the benefit of the pensioners in the institution:*

Held, that there was a good gift of the whole sum of 1000*l. to the charity, discharged from any obligation to repair the gravestones.*

THIS was a question which arose upon further consideration in a suit instituted to administer the estate of the testator, John Hunter.

By his will, dated 8th Oct. 1869, the testator gave his residuary property to his niece, Elizabeth Hunter, for life, with remainder over; and the following clauses occurred in a subsequent part of the will:

I further desire that my executors Mr. John Bullock and the Rev. William Thomas Bullock shall not be held responsible for any lawful loss occasioned to the property, and that they will have my own and my niece Elizabeth Hunter's inscription of death placed on the stone of the grave at Kensal-green Cemetery, provided we have been buried there; if elsewhere to have a stone inscribed placed on the grave, the charge to form part of the funeral expenses . . . .

I further will and desire that my executors do pay to the trustees of the Tailors' Institution, Haverstock-hill, a further sum of 1000*l.* Three Per Cent. Stock, duty free, for the following use, that is, to pay the required amount for painting and keeping in repair the gravestone or gravestones in Kensal-green Cemetery or elsewhere, for the 15th June yearly, if required, and to divide the balance that may remain into two equal parts, to be divided half yearly between the pensioners equally, all married men to receive two shares, single men one share, viz., on the 22nd Jan. in memory of my dear father and wife, and on the 15th June to commemorate my own birthday.

Doubts having arisen as to the validity of the above bequest, the question was reserved for the opinion of the court.

Karslake, Q. C. and *Everitt* for Elizabeth Hunter, the tenant for life.

Amphlett, Q. C. and *Bailey* for the parties entitled in remainder.

D. Chauncey Beale for the Benevolent Institution for the relief of Aged and Infirm Journeyman Tailors at Haverstock-hill.

Bristowe, Q. C. and *C. T. Mitchell* for the executors.

The following authorities were referred to:

Chapman v. *Brown*, 6 Ves. 404;
Mitford v. *Reynolds*, 1 Phil. 185;
The Magistrates of Dundee v. *Morris*, 3 Macq. 134;
Fowler v. *Fowler*, 33 Beav. 616; 10 L. T. Rep. N. S. 682;
Hoare v. *Osborne*, L. Rep. 1 Eq. 585; 14 L. T. Rep. N. S. 9;
Fisk v. *The Attorney-General*, L. Rep. 4 Eq. 521; 17 L. T. Rep. N. S. 27.

The VICE-CHANCELLOR held that the case of *Fisk* v. *The Attorney-General* was an authority in point. —If the direction to repair the gravestones created a trust, the trust was void; and the Journeyman Tailors' Institution was entitled to the whole of the 1000*l.* legacy.

Solicitors: *Fielder*, and *Sumner*; *Pike* and *Son*; *Bailey, Shaw, Smith*, and *Bailey*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Wednesday, Jan. 24, 1872.

REG. (on the Prosecution of the Trustees of Wolverhampton (resps.) *v.* CASWELL (app.)

Rating—Market tolls—Tolls for cattle coming into market place.

Tolls payable (by virtue of an Act of Parliament) in respect of cattle brought into a market place for sale, as soon as the cattle are brought in, and before they are put into a pen or tied up, are not in the nature of stallage or tolls payable in respect of the use of the soil, but are mere market tolls, and are not to be taken into account in assessing the lessee of the market and tolls to the poor-rate, as enhancing the value of his occupation.

THIS was an appeal against a rate for the relief of the poor for the parish of Wolverhampton, as to which the quarter sessions gave judgment for the respondent, subject to a special case.

The corporation of Wolverhampton, as the local board of health, are possessed of an inclosed market place, situate at Cleveland-road and Bilston-street, Wolverhampton. By the Wolverhampton Local Act the local board had power to maintain markets, and levy tolls, as in the schedule to that Act annexed, and also power to grant leases of the markets, market places, tolls, &c., for any period not exceeding seven years.

In 1868 they leased the cattle and pig market, being the inclosed market place above mentioned, to the appellant, and the tolls as then existing or thereafter altered, for the term of five years.

The lease included the "cattle market tolls," and one of the three classes of such tolls, was a toll for animals brought into the said market-place for the purpose of sale, another class for animals placed under covered spaces, or in pens or sheds in the market-place, and a third class for animals remaining at night in the market-place.

The Wolverhampton Improvement Act 1853 was repealed by the Wolverhampton Improvement Act 1869 (32 & 33 Vict. c. cxxxi.). By sect. 410 of this latter Act, all leases, &c., under the former Act are to continue valid. By sect. 193 the corporation have power to continue and establish markets and fairs, and, *inter alia* "the cattle market and fat pig market" before mentioned, and may "demand and receive tolls, stallages, and rents," as specified in the 7th schedule to the Act. By sect. 194 it is declared that the limits of the markets and fairs of the corporation shall be the same as the limits of the borough.

By sect. 200, sales of cattle, except in the cattle market, are prohibited under a penalty. By sects. 202 and 203 the tolls in the markets and fairs in respect of the occupation of stalls, &c., or of articles sold, are payable not only by the original taker or seller, but also by any subsequent taker or seller during the same day.

By sect. 204, "the tolls in respect of cattle

brought to the market for sale, shall become due as soon as the cattle in respect whereof they are demandable are brought into the market place, and before the cattle are put into any pen or tied up in such market place; and if the cattle be not removed within one hour after the close of the market, another toll shall become due in respect of the cattle so omitted to be removed."

By Table F., sched. 7, the payments for bringing cattle into the market are termed "cattle market tolls," and the other payments are termed respectively "shed and pen rents" and "lodging rents." The cattle market tolls are—for every horse or mule under 13 hands high, 4*d.*, above 13 hands, 6*d.*; for every foal, ass, or calf, 2*d.*; for every bull, cow, steer, or heifer, 4*d.*; for every sheep, lamb, or goat, 1*d.*; for every pig not exceeding 20lb., ½*d.*: exceeding 20lb. and not exceeding 200lb., 1*d.*; exceeding 200lb., 2*d.*

By the rate the appellant was rated as the "occupier of the cattle and pig market."

The estimated area was stated to be 3a. 2r. 25p., the gross estimated rental as 1100*l.*, and the rateable value as 880*l.*

The sole question on appeal was whether the first class of "cattle market tolls," received by the appellant for cattle brought into the said market-place for the purpose of sale, may be taken into account in estimating, for the purpose of the rate, the yearly value of the appellant's occupation of the said market-place.

On the part of the appellant it was contended that the toll in question was an incorporeal hereditament, and did not arise by virtue of any occupation of the soil. On the part of the respondents it was contended that although the toll *per se* might not be rateable, yet as the appellant was rated for the market-place, and the toll taken within the market-place enhanced the value of the occupation to the appellant, it should be taken into account in estimating the rateable value of the market-place.

If the court should be of opinion that such tolls may be taken into account in estimating such rateable value as aforesaid, then the judgment aforesaid should stand confirmed, but if the court should be of a contrary opinion then the said judgment was to be reversed, and the rate was to be amended and reduced to 275*l.* 15*s.*, as the gross estimated rental, and to 220*l.* 15*s.* as the rateable value.

J. O. Griffits (with him *Gane*) for the respondents, contended that though the tolls were not *per se* rateable, yet the appellant should be rated at the enhanced value of the occupation of the market by reason of the power given him of taking these tolls. The occupation of the market was clearly enhanced in value by the power of taking these tolls, and a higher rent was obtainable in consequence of it. In *Reg.* v. *The North and South Shields Ferry Company* (1 E. & B. 140), it was held that though the ferry tolls could not be rated either directly as being connected with real property occupied in the township or indirectly by taking them into account as profit of the land, yet the land should be rated on an estimate of the rent which might be obtainable for it in consideration of its being available for the purpose of earning the tolls. In the *Earl of Durham* v. *Bishopwearmouth* (2 E. & E. 230) it was held that the anchorage and *beaconage tolls in that case were not tolls in gross, but tolls connected* with the occupation and use of the soil of the port, and were therefore rateable to the poor rate in the parish and the townships on the port into which the ships paying them came. In *Reg.* v. *The Rhymney Railway Company* (4 L. Rep. Q. B. 276), where the owners of docks and wharves let the wharves to a railway company, who became the sole occupiers of them, this being reserved to the landlords in the agreement of letting certain wharfage dues payable on all goods shipped or unshipped at the wharves, which wharfage dues were paid direct to them by the owners or consignees of the goods, it was held that the railway company as sole occupiers of the wharves were liable to be assessed to the poor rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of benefit which they themselves derived from the occupation. *New Shoreham* v. *Lancing* (L. Rep. 5 Q. B. 489) was also referred to. *Roberts* v. *Aylesbury* (1 E. & B. 423), which will be relied on for the appellants, is distinguishable. In that case the appellants were rated to the relief of the poor in the market house, with the grounds belonging thereto, used and occupied for the tolls of the markets and fairs. It was admitted that under that description they were rated not only for the market house, but also for the tolls on merchandise sold in the market, and for payments made to the lord and his lessees for goods not sold, but exposed for sale, on the stalls and otherwise, which payments from time immemorial were charged according to the situation of the stalls and other circumstances, according to the discretion of the lord and his lessees, and also for payments to use temporary theatres and shows. None of the stalls, &c. were in any way affixed to the soil; the lord was the owner of the soil of the market; the tolls were from time immemorial received in the market house; and the appellants were lessees for a term of years under the lord. The court held that the tolls on goods sold were not the subject of a rate, and the fact that such tolls were paid in the market house made no difference, but that the other payments were in the nature of compensation for the use of the soil, and that they and the market house were properly rated. Lord Campbell, C.J., said, "the person using a stall has for the time being the use and occupation of that part of the soil on which it stands. The compensation which is paid to the owner of the soil, or his lessee, for the use of the soil in this way, is quite different in its nature from the toll payable to the lord of the market for goods sold; that toll is quite irrespective of the ownership or occupation of the soil. Then, on general principles, whatever profit is made by the occupation of the soil is properly rated. I do not see on what principle the payments made in respect of the use of the stalls are to be distinguished from the tolls payable for way-leases in the coal districts of the north which are always rated." The tolls which were held not to be rateable in this case were for goods in reality exposed for sale in the public streets, though within the ambit of the market; whilst in the present case the tolls are for cattle entering the market place, the soil of which is vested in the appellant as occupier. In the unreported case of *The Mayor of London* v. *St. Sepulchre*, which will be relied on for the appellant, the tolls were not for anything which could be said to occupy the soil, but merely for provisions carried into the

. In the present case the cattle as much the soil as if they were stalled, in which ıere could be no doubt as to the rate-

ıd (with him *Bosanquet*) for the appellant. whole case depends upon the answer to the n, whether these are market tolls or not? reported case of *The Mayor of London* v. *ulchre* (*a*), lately decided by this court, is nguishable from the present case, the lan- of sect. 36 of the London Act (23 & 24 . cxciii) being precisely similar to that of 4 of the Wolverhampton Act. The tolls ıayable in respect of all meat, poultry, ıer provisions brought into the market, and ı become payable immediately on the meat, tering or being brought into the market. ırn, C.J., said, "I think it is perfectly clear these tolls are taken in respect of articles into the market, and are not paid in of stallage or other corporeal property d within the market, this case falls within nciple established in *Rex* v. *Bell* (5 M. & S. I cannot distinguish these tolls from the entioned in that case; the only difference that in the present case they are taken by of an Act of Parliament instead of being by virtue of an ancient franchise." And urn, J., observed: "The practical result ıhed in many of the cases cited, and which disputes, is that stallage tolls paid to the a market are considered as attached to his se, and are not rateable. That may be a tion that may seem to an ordinary mind, ıg nothing of the law, to be one not easily tood, why the lord is not rateable in respect ne and rateable for the other. The only n is whether, under this Act of Parliament, s which the corporation have power to take ıchise tolls or stallage tolls payable for the tion of the soil. I can see nothing to distin- hem from market tolls attached to a fran- If the Legislature did mean to make the ıtion rateable in a different way from an y lord of a market (which they might well ne) they should have expressed their mean- arly." [BLACKBURN, J.—The present case the same as that in all respects except that ls were there payable in respect of dead] In *Rex* v. *Bell* (5 M. & S. 221), it was ıat the lessee of market tolls in gross, not it to the soil, is not rateable to the poor in ; of the occupancy thereof. The tolls were case collected at the commencement of the ; out of every sack brought and exposed for Lord Ellenborough, C.J., said: "Would not appellant) be equally entitled to the toll, al- ı the sacks were not set down in the market re upheld on the shoulders of those who ex- the corn to sale? There is nothing to give this toll a corporeal quality;" and Bayley, J., added, "Bell is assessed in the rate for corn tolls, which it is plain, from the statement of the case, were mere market tolls and not incident to the soil. In *Haddey* v. *Welhouse* (Moor. 474) the distinction is well taken; for, it is said, if the King grant a fair or market with toll certain to one and his heirs, to be holden in land, which is borough English, and the grantee die, the heir at the common law shall have the market and the toll; but the younger son shall have the stallage and pickage, with the soil, by the custom." The *Mayor of Northampton* v. *Ward* (1 Wils. 107) is an authority to the same effect. The fact that the tolls in *The Mayor of London* v. *St. Sepulchre* were for dead beasts, whilst in the present case they were for live ones, does not make any difference, for both tolls are payable merely for admission into the market and not for the use of the soil. In *The Mayor of Yarmouth* v. *Groom* (1 H. & C. 111), Martin, B., said that if a person carried goods in a basket into a market for sale, and happened to place the basket on the ground, such a use of the ground would not be stallage. "It would be nothing more than using the market for hawking, and it might as well be said that cattle in a market, which it is impossible to keep stationary, have an exclusive occupation of one spot of ground, and therefore stallage is payable in respect of them." [He was stopped by the court.]

COCKBURN, C.J.—I think we need not trouble you further, Mr. Poland. We think this toll, payable in respect of the admission of cattle into the market, is not properly the subject of a rate. A distinction has been taken which, I think, is much to be regretted, between market tolls and stallage. The man who occupies the soil of the market ought, I think, on principle, to be liable to be assessed to the rates, and to contribute to the local burthens. But this distinction has been taken, probably, upon some principle of ancient law, and we are bound by it. The distinction is that tolls payable simply as market tolls are not liable to be rated, whereas those paid for the use of some stall or similar erection which occupies the soil of the market are liable to be rated. Now, in the present case, the toll was payable, not for the use of a stall or other thing erected in the market, but simply for admission to the market place, independently of any use of the soil, whether in the shape of shed, stall, &c. It is simply a toll in respect of the admission of cattle, and, as such, is a market toll. It therefore comes within the distinction to which I have referred, and is not rateable.

BLACKBURN, J.—I am of the same opinion. I see in the manuscript note of what I said in the case of *The Mayor of London* v. *St. Sepulchre*, that I there pointed out that the distinction between tolls payable in respect of the use of the market and those payable in respect of the use of a stall which occupies the soil, was one not particularly intelligible to an ordinary mind, and one which the Legislature might well reconsider. But the distinction stands, and we must give effect to it. In *The Mayor of London* v. *St. Sepulchre* the question was whether, upon the construction of the London Act, it was the intention of the Legislature to make the tolls for commodities brought into the market a mere franchise, and not tolls in respect of the use of the land, so as to be rateable. The sections of that Act, which enabled the appellants to levy the tolls, were essentially identical in terms with sect. 204 of the present Act. The present

a this case the court of Queen's Bench (Cock- J., Blackburn and Lush, JJ.) held that the Cor- a of London were not liable to be rated in respect which, by virtue of 23 & 24 Vict. c. cxciii, s. 32, are empowered to levy in respect of all meat, , and other provisions, brought into the market r the Corporation, nor in respect of tolls which shall become due and payable immediately on at or poultry or other provisions, in respect of such tolls are to be taken, entering or being into the said market, from any person bringing e, or causing the same to be brought into the "

case is identical in all respects with that, except that there the tolls were leviable in respect of provisions to be sold, whilst here they are leviable in respect of cattle—things which would, in general, be privileged. But I confess I cannot see the distinction between the principle of that case and the present. I agree with the opinion of Martin, B. (*Mayor of Yarmouth* v. *Groom*, 1 H. & C. 111), that live animals driven into the market cannot be said to occupy the soil any more than a living person. It seems to me that this was also what the Legislature intended, for a toll of a halfpenny is imposed on every pig not exceeding 20lb. weight, which would apply to sucking pigs that could not be driven into the market, but must be carried. The Legislature meant the tolls to be similar to those in the *St. Sepulchre* case. They cannot, therefore, be taken into account in rating the market place.

LUSH, J.—I am of the same opinion. The question is whether the payment is made for the use of the market or for the use of the soil on which the market is held. For the reasons already given, I think that the former is the case, and therefore that the payments made are market tolls.

Judgment for the appellant.

Attorneys: *Pearce* and *Son*, for *Wilkinson* and *Gillespie*; *Robson, Tidy* and *Herbert*, for *Brewitt*.

Wednesday, May 1, 1872.

SECOND COURT.

ELLIOT AND OTHERS (apps.) *v.* MAJENDIE (resp.).

Gunpowder—Store magazine without lightning conductor—Forfeiture and fine—23 & 24 Vict. c. 139, *ss.* 2 *and* 4.

The appellants, makers of gunpowder, neglected to provide thunder rods or lightning conductors in connection with a store magazine where gunpowder was kept by them, in breach of the Gunpowder Act 1860, *s.* 2, *regulation* 9. *Upon an information, justices ordered the powder therein to be forfeited, and fined the appellants* 1*s. for every pound so forfeited; such forfeiture and penalty being imposed by sect.* 4 *upon persons making gunpowder contrary to the Act, or keeping in any mill or place gunpowder contrary to the provisions thereinbefore contained:*

Held, upon a case stated, that for this offence the appellants could not be liable to this forfeiture and penalty.

THIS was a case stated by four of Her Majesty's justices of the peace in and for the county of Cornwall, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on the questions of law which arose before them as hereinafter mentioned.

At a petty sessions holden at Liskeard, in and for the division of the hundred of West, in the said county of Cornwall, on the 15th March last, an information and complaint which had been preferred by Borlase Childs, of Liskeard, gentleman, as the attorney for Vivian Deering Majendie, hereinafter described and called the respondent, against Samuel Eliott and others, trading under the name, style, and firm of The East Cornwall Powder Company (hereinafter called the appellants), was heard by the justices, and the following is a copy of the information:

"Be it remembered that on the 9th March 1872 *at Liskeard*, in the county of Cornwall, Borlase Childs, of Liskeard, in the said county, gentleman, the attorney for Captain Vivian Deering Majendie, R.A., of 23, Victoria-road, Old Charlton, in the county of Kent (a person duly appointed by Her Majesty's principal Secretary of State for the Home Department under and in pursuance of the Gunpowder Act 1860, to inspect gunpowder manufactories), personally cometh before us, the undersigned, two of Her Majesty's justices of the peace, in and for the said county of Cornwall, and being duly authorised by the said Captain Majendie, in that behalf, informeth us that Samuel Eliott, of Trafalgar House, Plymouth, in the county of Devon, merchant, and others trading under the name, style, and firm of The East Cornwall Powder Company within the space of six calendar months last past, to wit, on the 7th Feb., at a certain gunpowder manufactory in their occupation at the parish of St. Pinnock, in the county of Cornwall, being makers of gunpowder, did have a store magazine for the keeping of gunpowder, and in which a certain gunpowder was then kept by them, the said Samuel Eliott and others, they not having caused to be erected or provided good and sufficient thunder rods or lightning conductors in connection with such store magazine for the protection of such magazine from the effects of lightning; and did thereby make and keep, and cause to be made and kept, gunpowder contrary to the said Act; wherefore the said Borlase Childs prayeth the consideration of us the said justices in the premises, and that the said Samuel Eliott and others may be summoned to appear before us and answer the premises, and make their defence thereto.

"Exhibited before us the day and year and at the place first above written.

"JAMES GLENCROSS,
"W. R. C. MARSHALL."

At the hearing both the applicants and the respondent were represented by their respective attorneys.

The Gunpowder Act 1860, under which the foregoing information was laid, sect. 2, paragraph 9. runs as follows:

Every maker of gunpowder shall cause to be erected or provided good and sufficient thunder rods or lightning conductors in connection with every store magazine where gunpowder is kept by him, for the protection of such magazine fom the effects of lightning.

It was admitted by the appellants, as the justices found the fact to be, that they were makers of gunpowder trading under the name, style or firm of "The East Cornwall Powder Company," and that on the 7th Feb. last, at a certain gunpowder manufactory, then in their occupation, at the parish of St. Pinnock, in the county of Cornwall, they being then such makers of gunpowder, did have a store magazine for the keeping of gunpowder, and in which a certain gunpowder was then kept by them, and that they the appellants had not caused to be erected or provided good and sufficient thunder rods, or lightning conductors, in connection with such store magazine for the protection of such magazine from the effects of lightning. They also found as a fact, and it was admitted by the appellants, that on the said 7th Feb. last, when the inspection took place which led to the information being laid, there were ten barrels each containing 100lb. of gunpowder in the said store magazine.

Under these circumstances the respondent's

attorney contended that the appellants had kept gunpowder contrary to the provisions of the Act, and had rendered themselves liable to the penalties by the 4th section of the Act, namely, a forfeiture of the whole of the 1000lb. of gunpowder proved to have been in such store magazine at the time of the inspection, as well as a fine of 100*l.*, being at the rate of 2*s.* for every pound of gunpowder so forfeited.

The appellants' attorney, on the other hand, contended that, notwithstanding the appellants were proved to have kept gunpowder in a store magazine, which was not provided with any thunder-rod or lightning-conductor, yet that they did not keep gunpowder contrary to the provisions of the Act in such manner as to bring it within the scope and meaning of the 4th section of the Act, which imposed the penalty for so doing. He contended that the 4th section did not apply at all to such a case, and that, in point of fact, the Act imposed no penalty whatever in respect of not providing lightning-conductors to store magazines; that the 4th section applied only to places used for or in the manufacture of gunpowder, and in which gunpowder is kept in excess of the quantity allowed by the Act, and not to store magazines, in which any quantity of gunpowder may be kept after being manufactured, the Act not fixing any limit in respect of such quantity. He also contended that the words "or other place," occurring in the 4th section, must be construed to mean other place *ejusdem generis* with mill, press house, corning house, drying house, and dusting house, immediately preceding those words; all such houses or places being used for or in the manufacture of gunpowder only, and not for the purpose of storing gunpowder. He also contended that, inasmuch as the 4th section imposed specific penalties for other offences under the Act, such as not having any store magazine 140yds. distant from any mill or other place used in the manufacture of gunpowder, or not removing with due diligence the finished gunpowder from such mill or other place to such store magazine, but did not impose any specific penalty for not providing lightning-conductors to store magazines, either the Legislature intended that no such penalty should be imposed, or it was a *casus omissus*; and he therefore claimed the benefit of such omission on behalf of the appellants.

The said justices, however, were of opinion that the 4th section of the Act did apply to the 9th paragraph of sect. 2 of the said Act, and that the appellants were proved to have kept gunpowder contrary to the provisions of the Act, and within the scope and meaning of the 4th section, by reason of their having a store magazine in which gunpowder was kept, and which was not provided with any thunder rod or lightning conductor; and they accordingly convicted the appellants, and declared the whole of the 1000lb. of gunpowder found in such store magazine to be forfeited, and adjudged the appellants to pay the sum of 50*l.*, being at the rate of 1*s.* for every pound of gunpowder so forfeited. Whereupon the appellants' attorney, being dissatisfied with this determination as being erroneous in point of law, applied to the justices to state and sign a case for the opinion of this court, pursuant to sect. 2 of the said statute (21 & 21 Vict. c. 43), and they stated and signed this case accordingly.

The question of law arising on the above statement is, whether the appellants by having a store magazine for the keeping of gunpowder, and in which gunpowder was kept by them, they not having caused to be erected or provided good and sufficient thunder rods or lightning conductors in connection with such store magazine, for the protection of such store magazine from the effects of lightning, did thereby keep or cause to be kept gunpowder contrary to the provisions of the Gunpowder Act 1860; and thus render themselves liable to the penalties imposed by sect. 4 of the said Act.

If the court should be of opinion that the appellants did render themselves so liable, then the said conviction is to stand good; but if the court should be of a contrary opinion, then the said conviction is to be quashed.

Sect. 4 of the Gunpowder Act 1860, is as follows:

All gunpowder made in any place where, under this Act it is not lawful to make gunpowder, and all gunpowder in any mill, press-house, corning-house, drying-house, dusting-house, or other place, exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person making, or causing to be made, any gunpowder contrary to this Act, or keeping or causing to be kept in any such mill or place, any gunpowder contrary to the provisions hereinbefore contained, shall, for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 2*s.* for every pound of gunpowder so forfeited.

Every person making gunpowder without having such store magazine, or magazines, 140 yards distant from any mill, and every other place used by him, for or in the manufacture of gunpowder, shall forfeit any sum not exceeding 25*l.* for every month during which such person makes gunpowder without having such magazine or magazines.

And every person making gunpowder, who wilfully neglects or delays removing with due diligence the finished gunpowder made at his mill or mills, and the other places used by him for or in the manufacture of gunpowder, from thence or from the magazines or storehouses used therewith to the store magazine or magazines distant as aforesaid, shall forfeit for every day during which such offence continues, any sum not exceeding 5*l.*

Lopes, Q.C. (with him *Bradford*), for the appellants.—The 4th section applies only to places used for the manufactory, not for the storage, of gunpowder. A store magazine is not a place of the same kind as a mill, a press-house, a corning-house, a drying-house, or a dusting house, and therefore cannot be included in the words "or other place," as used in that section. No doubt this being a breach of the last clause of sect. 2, may be a misdemeanor punishable by indictment, but it is not one of the offences for which special remedies are provided by the first paragraph of sect. 4. The justices have here confiscated the appellants' powder as well as fining them, which is a penalty provided only for making powder in an improper place, or keeping an excessive quantity of powder, neither of which offences are the appellants charged with. There is no forfeiture imposed for keeping powder in a store magazine, a place intended for an unlimited quantity. This penalty depends upon the amount of powder forfeited; the forfeiture therefore, being illegal, the penalty must be so also.

The respondent did not appear.

BLACKBURN, J.—We have come to the conclusion that the words of the Act of Parliament do not support this conviction. The justices expressly found the offence for which they convicted the appellants to be within the scope and meaning

of the first part of the 4th section: now that section deals with gunpowder made contrary to the Act, or kept in any such mill or place "contrary to the provissions hereinbefore contained." The previous provisions are by sect. 1, the repeal of earlier Acts; by sect. 2, certain regulations to be observed with regard to the manufacture and keeping of gunpowder, which are, shortly,—that powder is to be made only in licensed places; that powder is only to be made in certain quantities, and mills are to be provided with a charge house for the store of mill charges at a suitable distance; that certain quantities only are at one time to be subjected to certain pressure, to be corned or granulated, or to be dried; that every person making powder is to have a good and sufficient magazine or magazines, at least 140 yards distant from the mill and other house or place used for making the powder, and substantially built, and licensed as a store magazine or magazines; that every maker of powder shall cause all finished gunpowder to be removed from such mill or place used for the manufacture of powder, to the said store magazine or magazines; and lastly the regulation of which the appellants have committed a breach. Sect. 3 exempts certain buildings then in existence, upon application to the Secretary of State. Mr. Lopes has truly pointed out that there is no restriction as to the quantity of powder to be kept in a store magazine, and it is not suggested that the appellants had stored an excessive quantity. The words of the first paragraph of the 4th section, which alone imposes forfeiture and a fine in proportion to the powder forfeited, does not deal with the neglect of lightning conductors in connection with a store magazine, and it is impossible to justify the order of the justices under that part of the section. Whether the appellants might have been liable to a penalty of 25*l.* a month, under the second paragraph of the section, for making gunpowder without having such a store magazine as the Act provides, or whether they are liable to any other penalty, we need not consider. The only question we are asked is whether they are liable to forfeiture under the first part of the section; and as they are not so liable the conviction must be quashed.

MELLOR, J.—I have come to the same conclusion. We need not now decide whether there might have been a conviction under any other provision of the Act.

LUSH, J.—I am of the same opinion. I think this first part of sect. 4 does not apply to the circumstances of this case.

Judgment for appellants.

Attorneys for appellants, *Wedlake* and *Letts*.

Tuesday, May 7, 1872.

REG. *v.* THE VICE-CHANCELLOR AND THE HEBDOMADAL COUNCIL OF THE UNIVERSITY OF OXFORD.

Member of congregation—Resident—Nominal occupation of college rooms—17 *&* 18 *Vict. c.* 81, *ss.* 16 *and* 48.

By 17 *&* 18 *Vict. c.* 81, *s.* 16, *the congregation of the University of Oxford shall be composed of certain persons being members of Convocation; amongst them, all residents. By sect.* 48, "*residents*" *are defined to be all members of Convocation who have resided twenty weeks within one mile and a half of Carfax during the year preceding.*

A fellow of a college held a living nine miles from Oxford, where he occupied the parsonage house, and where his servants lived. He also rented rooms in his college, which he occupied whenever he passed the night at Oxford; no one else used these rooms, and he repeatedly slept there during the preceding year:

Held, that the Act required an actual residence; and that this was not a sufficient qualification.

ON the 20th Nov. 1871 *Adams*, Q.C. obtained, on behalf of the Rev. J. H. Eld, a rule *nisi* calling upon the Vice-Chancellor and the Hebdomadal Council of the University of Oxford, to show cause why a writ of *mandamus* should not issue directed to them, commanding them to place the name of the said J. H. Eld, B.D. on the register of members of the congregation of the said university for the year ending 24th Sept. 1872.

This rule was obtained upon the following affidavit of the said J. H. Eld:

I am a graduate member of the University of Oxford, and a fellow of St. John's College. I took my degree of Bachelor in Divinity in the said university in 1854. My name has been on the register of the congregation of the university since 1857 to the present time, with the exception of the year 1865, when my name was struck off without notice or opportunity of appeal, but it was restored the following year upon my making my claim in the same manner as on the present occasion, although my residence in that case was precisely similar to that in respect of which I have now claimed, as hereafter more particularly mentioned.

That such congregation is composed, under the Act of 17 & 18 Vict. c. 81, entitled "An Act to make further Provision for the good Government and Extension of the University of Oxford and of the Colleges therein, and of the College of St. Mary, Winchester," of, among other persons, all residents, being members of Convocation.

That in the interpretation clause of the above-mentioned Act, it is enacted that the word "residents" shall mean and include all members of Convocation who shall have resided for twenty weeks within one mile and a half of Carfax, during the year that shall expire on 1st Sept. next preceding the making and promulgation of the register, as directed by the 14th section of this Act.

That section 14 of the said Act provides that the vice-chancellor shall, before the 25th Sept. in each year, make and promulgate a register of persons qualified to be members of the congregation of the University of Oxford according to that Act.

That I have, for twenty weeks and upwards next preceding the making and promulgation of the said register, resided within one mile and a half of Carfax; that is to say, I have during that period occupied, as a resident Fellow of St. John's College aforesaid, a set of rooms, consisting of a bedroom and a sitting room, within that college, and within one mile and a half of Carfax aforesaid. That I am the sole occupier and tenant of such rooms; that I pay rent for the same to the corporation of the President and Scholars of St. John's College; that the rooms aforesaid are occupied and furnished by me, this deponent, and are occupied by no one else; and that whenever I sleep in Oxford, I sleep in the bedroom aforesaid, and that during the year preceding the 1st Sept. last past, I have repeatedly slept, and do from time to time sleep, in the said bedroom.

On or about the 28th Oct. last I was informed, by a letter from the Registrar of the University, that doubts had been raised in the Council of the University, on the revision of the Register of Convocation, as to my qualification by residence, and I was requested to substantiate my claim by filling up a printed form inclosed in such letter.

That on receipt of this communication I forwarded to the registrar my claim to have my name inserted on the Register of the Congregation, in the following words:

"University of Oxford.

"I, James Henry Eld, B.D., of St. John's College,

hereby declare that I have resided within one mile and a half of Carfax for twenty weeks during the year which ended on the 1st Sept. last past, and I claim to have my name placed on the list of members of the Congregation of the University of Oxford, for the year ending 24th Sept. 1872. As witness my hand this 27th Oct. 1871."

The aforesaid claim was made by me in the words of the Act of Parliament above stated.

That on or about the 30th Oct. last I was informed, by letter, by the Registrar of the University, that the Hebdomadal Council, in revising the Register of Congregation, had removed my name from the list of persons qualified by residence.

That on the 30th Oct. last the said Vice Chancellor promulgated in the usual manner the list of persons qualified to be members of Congregation at the said University, but that my name does not appear in the said list.

The following affidavit of F. P. Morrell, attorney, was filed on behalf of the defendants:

I am a graduate member of the University of Oxford, and a member of the firm of Morrell and Son, Oxford, solicitors for the University in this matter.

I know and am well acquainted with the Rev. James Henry Eld, B.D., and have read the affidavit sworn by him the 7th Nov. 1871.

Since the year 1863, the said J. H. Eld has been and now is vicar of the parish of Tyfield, in the county of Berks, having been presented to that living by the President and Scholars of St. John's College, Oxford, who are the patrons thereof.

There is a moderate sized and comfortable parsonage house, with stables, garden, and usual offices, and appurtenances, as well as glebe attached to the said living The said living is not of a value which makes it untenable by a fellow of the said College, and it is consequently held by the said J. H. Eld, who is unmarried and a fellow of the said College, together with his fellowship.

I am informed and believe that the said J. H. Eld has permanently inhabited and resided in the said parsonage house since his presentation to the said living as aforesaid; that his servants live there, that all his books and furniture kept in his college rooms are there, that he has daily services in the Parish Church of Tyfield aforesaid, and that he has not and does not keep any curate.

The said J. H. Eld does not hold the office of tutor or dean of the said college, nor is he in any way connected with the teaching thereof.

The said J. H. Eld does, as stated in his said affidavit, occupy a set of rooms in the said college; and I am informed and believe that he does from time to time visit Oxford from Tyfield, which is about nine miles distant from Oxford for college meetings, and other purposes, but that he generally on such occasions returns home to Tyfield in the afternoon or evening of the same day, without sleeping in Oxford; and that he did not for the definite period of twenty weeks during the year which expired on the 1st. Sept. last, actually sleep or reside in the said rooms or elsewhere within one mile and a half of Carfax; and that his only residence during that year was at the parsonage house aforesaid.

Manisty, Q.C. and *Kemplay*, Q.C., showed cause on behalf of the Vice-Chancellor and University of Oxford.—The affidavits show no ground for the interference of the court. Mr. Eld has not resided, within the meaning of the Act of Parliament, long enough during the year to qualify himself for the register. [Stopped by the Court.]

Adams, Q.C. supported the rule.—This is the first time a judicial interpretation of a qualification by residence under this statute has been asked for, and it is contended that the facts of Mr. Eld's case give him a right to claim to be on the register. The meaning of the word "reside" has been discussed with regard to the Parliamentary franchise in

Whithorn v. *Thomas*, 7 M. & G. 1;
Taylor v. *Kensington*, L. Rep. 6 C. P. 309;
Bond v. *St. George, Hanover-square*, L. Rep. 6 C. P. 312.

According to the last two of these cases, Mr. Eld resided the requisite time in his college-rooms.

COCKBURN, C.J.—It was clearly intended by this Act of Parliament to draw a distinction between residents and non-residents within the university; and the Act requires that there should be an actual and not a merely constructive residence to qualify a member of the convocation to be a member of the congregation. Other qualifications bear no analogy to this matter.

MELLOR, J.—I am of the same opinion. An absence of a day or two in the course of a residence extending over twenty weeks should not, I think, interfere with a qualification; but there must be a residence for that time in the sense of dwelling solely at that particular place.

LUSH, J.—I am of the same opinion.

QUAIN, J.—I am of the same opinion.

Rule discharged.

Attorneys for prosecutor, *Wood, Street*, and *Hayter*.

Attorneys for defendants, *J. Philpot*, for *Morrell* and *Son*, Oxford.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

Monday, April 29, 1872.

STEEL (app.) *v.* BRANNEN (resp.)

Obscene book—Report of trial—Privilege—Appeal— 20 *&* 21 *Vict. c.* 83, *ss.* 1 *and* 4—20 *&* 21 *Vict. c.* 43, *s.* 2.

M. was indicted for publishing an obscene book. The appellant thereupon published a report of the trial of M., in which the whole of the obscene book was set out. An information against the appellant was then laid before a magistrate under 20 *&* 21 *Vict. c.* 83, *s.* 1, *and the magistrate decided that the appellant's publication was an obscene book of such a character and description that the publication of it would be a misdemeanor and proper to be prosecuted as such; and also that the report of the trial of M. as sold and published was not privileged. He accordingly ordered the copies seized to be destroyed. At the request of the appellant, he stated a case for the opinion of this court, in which he set forth the facts and such his determination, and left to the court the question whether on the facts he was justified in point of law in ordering the copies of the book to be destroyed:*

Held, that although sect. 4 *of* 20 *&* 21 *Vict. c.* 83, *gives an appeal to the quarter sessions against the determination of a magistrate under sect.* 1 *of the Act, the appellant was justified in making this appeal under* 20 *&* 21 *Vict. c.* 43, *s.* 2:

Held also, as a matter of fact, that the book was an obscene book; and, that being so, that the publication of it was none the less a misdemeanor, and proper to be prosecuted as such, because the appellant had published it without any corrupt motive, and solely for the purpose of carrying on a public controversy on matters of general interest and importance.

Held also, that although the publication in question was a correct report of proceedings in a court of justice, it was not privileged as such.

ON appeal from the determination of a magistrate on an information laid under Lord Campbell's Act (20 & 21 Vict. c. 83), sect. 1, the following case was stated (under 20 & 21 Vict. c. 43, s. 2) for the opinion of this court.

1. The appellant is the occupier and manager of a shop being 14, Tavistock-street, Covent-garden, within the metropolitan police district, for a body called or known as "The Protestant Electoral Union," whose objects, as set forth in their prospectus, are, *inter alia*, "to protest against the teachings of the Romish and Puseyite system which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible, and the liberty of England, and to promote the return to Parliament of men who will assist them in these objects, and particularly will expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes."

2. On the 26th Jan. 1871, the respondent, who was an inspector of the metropolitan police, under authority given to him by special warrant, duly issued under 20 & 21 Vict. c. 83, seized at the shop 14, Tavistock-street, aforesaid, about 181 copies of "a report of the trial of George Mackey, at the Winchester Quarter Sessions, Oct. 18 and 19, 1870, from shorthand notes of Dr. Soutter, lecturer on shorthand in King's College, London, containing the full text of the Morality of Romish Devotion, or the Confessional Unmasked, showing the Depravity of the Romish Priesthood, and the Iniquity of the Confessional, for the use of heads of families and persons of mature years."

The above was the title on the cover and on the first page.

3. Some of these reports were sold in covers, on the outside of which no reference was made to the trial, but contained the following title and description of the book:—"The Morality of Romish Devotion; or the Confessional Unmasked, showing the Depravity of the Romish Priesthood, and the Iniquity of the Confessional.

"The extracts, contained in this pamphlet are simply specimens of the moral theology of Rome, taught in the Royal College of Maynooth, at a cost of 30,000*l.* per annum to this heavily taxed Protestant nation. Through the unfaithfulness of both Christians and politicians, lawlessness has become legalised among us, and the most atrocious and obscene maxims and practices have been imposed upon the people as moral theology and the requirements of religion. On behalf of morality and religion we adjudge the confessional as here 'unmasked' to be a foul blasphemy, and worthy to be execrated of mankind, and we appeal to the word of God and the common sense of the people for a confirmation of our verdict.—ED."

"The time may come when it will become our bounden though painful duty to rouse the indignation of Englishmen at the expense of their modesty by translating and circulating some of the contents of that charnel-house, 'the confessional.' Dr. McNeile. Protestant Evangelical Mission and Electorial Union, 14, Tavistock-street, Covent-garden, London. Price 1*s.* To be had through all booksellers."

4. On the 2nd Feb. last, the appellant duly appeared at the Bow-street Police Court, before Sir Thomas Henry, the chief magistrate of the police courts of the Metropolis, in answer to a summons duly issued under the said statute to show cause why the said books so seized should not be destroyed.

5. The Protestant Electoral Union had been in *the habit of selling* and distributing copies of the *Confessional Unmasked* previous to April, 1868, *when the decision* was given in the case of Reg. v. *Hicklin and another* (L. Rep. 3, Q. B. 360; see 37 L. J. 89, M. C.)

6. In consequence of that decision the first edition of the work was withdrawn, and a new one published as stated in the following extract from the Introduction, p. iii., to the new edition: "Consequently the society withdraws the condemned edition, and does not intend publishing it. But the publication of a new edition in an altered form, that is, with certain alterations, certain omissions, and certain additions, would not come under the condemnation passed upon the former edition; such an edition, then, is here presented to the public. In this edition are omitted some of the most filthy and abominable passages occurring in the former edition. Also in this edition some passages are added for the sake of illustrating the pernicious influence exercised by the priest in the confessional over the mind and consciences of the laity, even apart from the demoralising and polluting influence exercised by them when employing the obscene language authorised and enforced by the Church. See also page 3 of 'Our Apology.'"

For selling this new edition one George Mackey was tried at the Winchester Quarter Sessions, the 19th Oct. 1870, when the jury, being unable to agree, were discharged without giving any verdict.

8. The appellant kept for sale and distribution and sold and distributed from time to time at the said shop copies of various books and pamphlets, and amongst them the first edition of "The Confessional Unmasked," and after the decision of the Court of Queen's Bench, the new edition of that book, and after the committal for trial of the said George Mackey, the "Report of the Trial of Mr. George Mackey" was published and sold.

The Confessional Unmasked consists of extracts from Roman Catholic theologians and divines. On one side of the page are printed passages in the original Latin, extracted from the works of authors therein named, and on the other side a free translation of the same, other portions of the pamphlet consist of introductory matter, and of observations by the editor.

9. The report of the trial of Mr. George Mackey, &c., was a substantially correct report of the trial of that person; but The Confessional Unmasked was not read aloud in open court, but was taken as read, as appears from page 105 of the report: and this explains the following paragraph at the bottom of page 2 of the report, "The sale of the Confessional Unmasked having been proved, reads as follows." Then follows the full text of the new edition of the Confessional Unmasked.

10. The retail price of the report of the trial, &c., was 1*s.* It was exposed for sale in the shop window, and was sold to any person who applied for it, sometimes in one of the covers before-mentioned and sometimes in the other.

11. A copy of the report of the trial, &c., which was seized and ordered to be destroyed, and which is annexed hereto, is to form part of the case.

12. It was contended before me on behalf of the appellant, that upon the facts stated, the book seized, viz., the report of the trial, was a fair report of a trial in a court of competent jurisdiction, and as such privileged.

13. I was of opinion that the Report of the Trial of Mr. George Mackey, &c., as sold and published, was not privileged.

14. I was further of opinion that the Report of

the Trial, &c., a copy of which is annexed, is an obscene book, and of such a character and description that the publication of it would be a misdemeanor, and proper to be prosecuted as such, and that the copies seized were kept in the said shop for the purpose of sale.

15. I therefore ordered all the copies of such book so seized as aforesaid to be destroyed at the expiration of the time mentioned in the statute.

16. The appellant being dissatisfied with my determination as being erroneous in point of law, duly gave me notice in writing to state and sign a case for the opinion of this honourable court, under 20 & 21 Vict. c. 43.

17. The question for the opinion of this court is whether upon the facts above stated, I was wrong in point of law, in ordering the books to be destroyed.

18. If I was wrong in point of law in ordering the books so seized to be destroyed under the statute 20 & 21 Vict. c. 83, the order made by me is to be quashed, and the books to be restored to the appellant, if otherwise such order is to be confirmed, and the books destroyed in pursuance thereof.

The following were the appellant's points:—First, that the magistrates' decision was wrong in point of law; secondly, that The Report of the Trial of George Mackey was not an obscene book. as shown by its contents, within the meaning of the 20 & 21 Vict. c. 83; thirdly, that the said report was not of such a character and description that the publication thereof would be a misdemeanor and proper to be prosecuted as such, and that the copies kept for sale by the appellant were not liable to be seized and ordered to be destroyed under the provisions of the said statute; fourthly, that the report of the trial of George Mackey was a fair report of a trial in a court of competent jurisdiction, and as such report as aforesaid privileged.

The following were the respondent's points:—First, that the magistrate's decision was correct and ought to be confirmed; secondly, that The Report of the Trial of George Mackey was, within the meaning of the 20 & 21 Vict. c 83, an obscene book, and that it was not privileged or protected on any ground from the operation of that Act; thirdly, that it was of such a character and description that the publication of it would be a misdemeanor and proper to be prosecuted as such, and that the copies seized having been kept for sale were liable to be seized and ordered to be destroyed, under the provisions of the said Act; fourthly, that the finding of the magistrate as to the character of the said report is a finding of fact not open to be reviewed; fifthly, that the magistrate having been satisfied as to the character and description of the report, his finding upon that point cannot be questioned.

Kydd for the appellant. [The *Attorney-General* (Sir J. D. Coleridge) for the respondent.—This is not a case for an appeal under 20 & 21 Vict. c. 43. All the facts are found, and no appeal lies to this court from a finding on a question of fact. The appellant, if dissatisfied with the decision of the magistrate, should have appealed under sect. 4 of 20 & 21 Vict. c. 83, to the Court of Quarter Sessions.] The question whether this book is obscene is a mixed question of law and fact, and the court has jurisdiction to entertain it. Another question arises, whether the appellant, having published this book with innocent motives, the publication can be a misdemeanor; also, whether this book, being a fair report of a trial in a court of competent jurisdiction, is not as such privileged. [BOVILL, C.J.—On the point of obscenity, you must go the whole length of showing that there was no evidence on which the magistrate could have found the book to be obscene. If there was any evidence, we cannot review his decision.] The book which the appellant was prosecuted for publishing, contained a report of a trial, and in the course of the report, the book was set out which the man was tried for publishing. The question arises, whether that book so set out was obscene in point of law. The *bonâ fide* object of the publisher was not to corrupt, but to carry on a legitimate controversy on a subject of great public importance. He could not carry on this controversy without giving the extracts which the magistrate held to be obscene. The object of the publisher was to expose the revolting practices of Roman Catholic priests in the conduct of the confessional. This could not be done without giving the extracts. Next, in determining whether or not a man has been guilty of a misdemeanor, the question of intention must always be a most material element, and here the intention was innocent. Besides, it is always of importance to notice how matter of an offensive nature is brought forward. "It is not sufficient that mere passages of such an offensive character should exist in a work in order to render the publication of it an act of criminality. It must appear that no condemnation of such passages appears in the context" (per Lord Denman, C.J., in *Rex* v. *Moxon*, 2 Mod. State Trials, 356). No one can read this book without seeing that its object is to expose and hold up to reprobation the doctrines contained in the extracts. (He then referred to several standard works, in which numerous passages of an obscene character appeared.) Next, the publication was privileged, as being a fair and correct report of a trial in a court of competent jurisdiction. At the trial, the book was taken as read; that is equivalent to its being actually read. In the report of the trial of *Rex* v. *Eaton* (31 State Trials 929), for publishing Paine's Age of Reason, most of the most offensive passages of that book are set out. In *Rex* v. *Carlisle* (3 B. & Ald. 167) the real ground of the decision was that the report was a mock report, and, under pretence of being a report of a trial, was, in reality, intended to bring the whole procedure of the court into disrepute and ridicule. In delivering the judgment of the Court of Exchequer in *Popham* v. *Pickburn* (31 L. J. 133, Ex.), Wilde, B. says, "Undoubtedly, the report of a trial in a court of justice, in which this document had been read would not make the publisher thereof liable to an action for libel." *Hoare* v. *Silverlock* (9 C. B. 20) is to the same effect; so is *Turner* v. *Sullivan* (6 L. T. Rep. N. S. 130). [BOVILL, C, J.—Have you any case where the right to publish a report of a trial remains, when it appears that such publication is prejudicial to morality?] No.

The *Attorney-General* (Sir J. D. Coleridge) (*Archibald* and *Poland* with him) for the respondent.—The appellant has misconceived his remedy, and this court is concluded by the finding of the magistrate. By sects. 1 and 4 of 20 & 21 Vict. c. 83, the appellant ought clearly

to have gone to the court of quarter sessions, instead of coming here. Next, the book is almost identical with that dealt with in *Reg.* v. *Hicklin* (L. Rep. 3 Q. B. 360; 37 L. J. 89, M. C.), which the Court of Queen's Bench unanimously pronounced to be obscene; no one can read this book and say it is not revoltingly obscene. It is not privileged as being a report of a trial. It was not the *bonâ fide* object to give a report of the trial; but the trial is only made the occasion to reproduce obscenity.

BOVILL, C.J.—This case has been stated under the provisions of 20 & 21 Vict. c. 43, s. 2, by which a magistrate had power to state a case for our opinion on questions of law only. The case being before us on that footing, the question for our decision arises under 20 & 21 Vict. c. 83, which was an Act for preventing the sale of obscene pictures, books, &c. In the present case the magistrate decided that the book which the appellant was convicted of publishing was an obscene book, the publication of which was a misdemeanor; and he further decided that the publication was not privileged as being a fair report of the proceedings in a court of justice. He accordingly ordered all the copies of the book which had been seized to be destroyed, and he now submits to us, as a matter of law, whether, on the facts, he was right in so deciding. On looking over the book in question, I find no inconsiderable portion of it so filthy and disgusting that the book could not be read in public, or in decent society, without shocking the feelings of all who heard it. Passages in the book are so entirely opposed to all delicacy and common decency that counsel could only call attention to the pages where they occurred, and I do not hesitate to express my opinion, that these parts of the book are of such a character as to make the book an obscene book within the meaning of the Act. So far, then, from thinking the magistrate's decision on this point wrong, I think it was perfectly right. If this is a true description of the character of the book, it almost necessarily follows that the publication of it is an offence against morals and a misdemeanor. The book is certainly one which no person of any decency would think of leaving on his table, especially if it was likely to fall into the hands of young people. It has been strongly contended by Mr. Kydd that the whole book has properly been made the subject of controversial discussion, and that the motive of its publication was praiseworthy. No doubt the matters dealt with in the book are matters of interest, and ought to be fully and fairly discussed; but while we preserve the liberty of discussion, we must not allow publishers to run into indecency, so as to corrupt the morals of the public. The tendency of this publication being to corrupt, the appellant must be taken to have had that object in view, even though his object may have been otherwise. This point was fully discussed in *Reg.* v. *Hicklin*, where the authorities on the subject were fully considered. There the court of quarter sessions had reversed the decision of the magistrate, on the ground that the immediate intention of the publisher was not to corrupt, but only to expose errors; and it was then assumed by the Court of Queen's Bench that the publisher had a really honest and *bonâ fide* motive. That court reversed the decision of the recorder on the ground that a man must always be taken to intend the natural consequences of his acts. It is very difficult for Mr. Kydd to contend that the details of this book are not obscene, when the very object of the book is to show that the practices of the Roman Catholic church are of that character. The outer cover of the book refers to the depravity and iniquity of those practices, and professes to unmask them. In the apology, which is a sort of preface to the book, the object of the book is said to be to expose some of the immoral objectionable practices of the clergy, and stigmatises some parts of the book as loathsome. I quote that to show the character of the passages I have referred to. I assume that this edition varies somewhat from that dealt with in *Reg.* v. *Hicklin*; but even this book (as stated n the apology) omits only "most of the disgusting offensiveness of Romish morality." I think nevertheless that there is such an abundance of disgusting offensiveness here as to make the book undistinguishable from that dealt with in *Reg.* v. *Hicklin*. The test of obscenity is there said by the Lord Chief Justice to be "whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication like this may fall." I think that that is a very good test, and that it is decisive against the appellant in this case. It has been contended for the appellant that the most objectionable passages in this book are only copies and extracts from the works of Roman Catholic divines, used at seminaries for the instruction of Roman Catholic youth. But that does not justify their republication in the present form, nor does it follow that the books themselves are not equally within the purview of the statute. I think that the book is obscene and most disgusting, and that the publication of it is a misdemeanor which might form the subject of an indictment. The appellant must be held responsible for the probable consequences of his unlawful act. He is not protected by the mere fact that the book is controversial, and that its object is to warn the public against the practices of the priests. I fully concur in the judgment of the Court of Queen's Bench in *Reg.* v. *Hicklin*, and on the facts stated here think that the present case distinctly falls within that decision. A further question that has been raised is, whether the book, containing a fair report of a trial, is thereby privileged. It is found as a fact that the book contains a fair report of the trial of one Mackey, except that The Confessional Unmasked was there taken as read, and was not actually read in court. The magistrates held the publication not privileged, and I entirely concur in that opinion. The publication of fair reports of trials that take place in courts of justice, is, like the fair discussion of all other public matters, considered to be for the benefit of the nation. But it is equally clear that the publication of matter tending to corrupt is not privileged, and may not be lawfully published. It is well put by Mr. Starkey (On Libel, p. 215), "Where the very object of the inquiry is to protect the interests of religion, morality, decency, and good order, by repressing infamous, blasphemous, and obscene or seditious publications, it would not only be impolitic, but weak and absurd to allow the same matters to be afterwards published as a parcel of the judicial proceeding." The same sentiment is uttered by Bailey, J., in his judgment in *Reg.* v. *Carlile*: "We are bound," he says, "for the purpose of justice, to hear evidence

in the course of judicial proceedings, the publication of which at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people." And again at the end of his judgment, the same judge says of the publisher of a report of such a trial, "It will be no excuse for him, that it was a faithful representation of that which a court of justice, in the discharge of its duty, is bound to hear." There are other passages in the books to the same effect. I entirely concur in the view expressed by Bailey, J. I may here add as a further ground for excluding the privilege in this case, that this book gives in detail parts of the first publication which were not read aloud at the trial. I think that the proper course was pursued at the trial, as reading the book aloud would have been offensive to public decency. The outer cover of the book hardly refers at all to the trial, but almost wholly to the matters which are said to be unmasked in the book, and from that, if there were nothing else, I draw the conclusion that the whole book was not intended as a fair report of the trial, but as a means of reproducing the subject of the first prosecution. I am clearly of opinion that the publication was not privileged and that the decision of the magistrate must be affirmed.

KEATING, J.—I am of the same opinion, and I will only notice, in passing, the preliminary objection of the Attorney-General, who contends that we have no jurisdiction to deal with the question submitted to us, in other words that 20 & 21 Vict. c. 43, s. 2 does not apply to 20 & 21 Vict. c. 83. I do not think the Attorney-General much relied on this point, but, as he made it, it is right to notice it. The 2nd section of 20 & 21 Vict. c. 43 provides that after the hearing and determination of any case before justices, any case which they have power to deal with in a summary way, either party being dissatisfied with the decision in point of law, may ask the justices to state a case, and the magistrate may thereupon state a case, for the opinion of the court. In pursuance of that section, the magistrate stated the case now before us. From that case it appears that he decided a book which had been published by the appellant to be an obscene book, within the meaning of 20 & 21 Vict. c. 83, s. 1, and of such a character that the publication of it was a misdemeanor, and that it was proper to be prosecuted as such. He now refers to us the question, whether he was right in this decision in point of law, by which I understand him to mean to ask us, whether he was right in saying that the book was so obscene, and of such character that the publication of it was a misdemeanor and a fit subject for a prosecution, and further, whether he was right in deciding that the publication was not privileged. I do not think we need have any difficulty in holding that, though it is quite true that the 4th section of 20 & 21 Vict. c. 83 gives an appeal, both as to law and fact, to the court of quarter sessions, it is notwithstanding competent to a party convicted under this Act to appeal upon any question of law under the 20 & 21 Vict. c. 43; nor do I think that the provision of the 4th section of Lord Campbell's Act was intended to supersede the provisions of the general Act as to an appeal against a decision in point of law. With reference to this case as stated, I quite agree with my Lord. The Confessional Unmasked purports to be a selection from works of Roman Catholic divines, and contains, amongst other things, directions to the priests with regard to the confessional. Those extracts undoubtedly, if correctly reported, contain obscene matter to an extent at which any proper mind revolts. Mr. Kydd has contended that the appellant has a right to discuss those questions as matters of public interest, and I quite agree that they are of public interest, and that a man has a right to discuss them as such. Mr. Kydd has next contended, that it is impossible to discuss these matters without giving extracts, and setting out those extracts. He therefore contends that, if the object of his client was not to pollute the public mind, but only to conduct a public controversy, the publication could not be a misdemeanor at common law. It may be the fact, and I see no reason to doubt it, that the object of the appellant was, as stated by Mr. Kydd, effectively to assail the doctrines of the Roman Catholic Church. But I quite agree with my Lord, that to accomplish that end, a controversialist cannot set forth matter that has a direct tendency to corrupt. I quite agree, too, that these filthy extracts have that tendency. To adopt Mr. Kydd's argument would be to allow evil that good may follow, and it would be a strange way of preventing pollution to allow the circulation of that which has a tendency to pollute. Though, therefore, it is a fact, as Mr. Kydd states, that many books are not prosecuted which contain matter equally worthy of reprobation (such as the book which he has especially referred to—The Garden of the Soul, which contains passages of a character cognate to the extracts in the Confessional Unmasked, and open to the same objection), I think it sufficient to say with my Lord, that it does not follow, that because the appellant has been guilty of a misdemeanor, the publisher of The Garden of the Soul is guilty. On that point, however, I express no opinion, as that book is not before us judicially. I think it sufficient to say, that no argument, founded on the impunity hitherto allowed to the publisher of "The Garden of the Soul," can avail to justify the appellant. Upon the second point I would refer to the passage from Starkey, cited by the Lord Chief Justice. It would be a self-contradiction in law to say that a man may be indicted for publishing an indecent work, and at the same time to sanction the re-publication of the same work under colour of being part of a report of the proceedings in a court of justice. The publication of reports of important cases in courts of law is for the protection of the public; but the law would defeat itself if it allowed in the course of such a report the republication of what it had decided to be an indictable offence to publish. Therefore, I agree with the Lord Chief Justice, and I may add that, if I was of a different opinion, I should, with reference to this book—The Confessional Unmasked—defer to a court of co-ordinate jurisdiction which has decided the publication of it to be an indictable offence at common law.

GROVE, J.—I am entirely of the same opinion. As to the questions submitted to us, they clearly arise on the facts stated in the case. After stating the facts, the magistrate says, "I was of opinion that the report of the trial of George Mackey, as sold and published, was not privileged." Whether it was so or not, is, I apprehend, a question of law which the magistrate has left to us. The magis-

trate continues: "I was further of opinion that the report of the trial, &c., is an obscene book, and of such a character and description that the publication of it would be a misdemeanor," &c. As to this latter point, which was dealt with first in the argument, I think *Reg.* v. *Hicklin* is a clear authority, and that, unless there is something very different in the present publication to that dealt with in that case, we ought to adopt it. I can see no reason why we should not follow it. I will make only one remark on *Reg* v. *Hicklin*, and that has reference to the last part of the marginal note in the Law Reports, that the appellant there "was not justified or excused by his innocent motives or object." That is almost the identical language of the Lord Chief Justice. It is a matter of almost every day occurrence that a man is indicted for doing a particular act with a certain intent, and the jury are in such cases told to infer the intent from the act. They are not, however, conclusively bound to find the intent. When we look at the whole of this question, it comes to this, when an act is done under circumstances which fairly imply a particular intent, the presumption of such an intent is not rebutted by showing that the man who did the act had another paramount intent. A man who is indicted for assaulting with intent to do grievous bodily harm, is not excused by showing that he intended to save the person assaulted from injury to his mind. That is the meaning of the passage I have alluded to, and I do not see that it at all conflicts with the law. In the present case, I see no reason why we should not infer from this publication the intent to do that which the publication has the strongest tendency to do, viz., to promote immorality. The matters contained in the book are so filthy, that they could not possibly be quoted, and no language can be strong enough in which to condemn them. Next it is said that this publication is a report of a trial, and that it is substantially correct. If a person were permitted to publish the report of a trial, in which the question was whether certain matter was obscene or not, and was allowed in such report to republish the whole of the filthy matter, we should have this result, that when any person was brought before a court of justice for publishing obscene matter, any other person might at once publish the whole of the obscenity with impunity. If that were the law, so far from putting a stop to these filthy publications, we should virtually license them by prosecuting the publisher. It seems to me to be a *reductio ad absurdum* that that is not the law. *Reg.* v. *Carlile* is an authority to show that that is not the law, and there is no authority the other way. Next Mr. Kydd asks, what is the remedy? How can you expose these obscene and demoralising practices except by thus giving extracts from the works in which they are set forth? It appears to me that this is not the only course to be pursued, though I am far from saying that if this were the only remedy, the publication of such a book as this would be justified. But if these Roman Catholic books contain matter of such obscenity, why not prosecute the publishers? If such books are, as was obscurely hinted by the Attorney-General, privileged, that would be set up at the trial. On that point I express no opinion. I merely mention it as a course which persons *anxious to promote* morality are at liberty to take. *If such books* came fairly within the grasp of the *law, the publishers* would be punished; if the publication were held privileged, we should understand the reason why.

Judgment for respondent.

Attorney for appellant, *Ellerton.*

Attorney for respondent, *Solicitor to Treasury.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, ESQ., Barrister-at-Law.

April 27 *and May* 4, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE, J., and QUAIN, J.)

REG. *v.* REA.

Bigamy—Marriage before registrar—Misnomer.

In 1866, *the prisoner married, and in* 1872, *whilst his wife was living, he married another woman in the presence of the registrar of marriages, describing himself, not as Edward Rea, his true name, but as Benjamin Rea. It did not appear whether or not the second wife at the time of the marriage knew that prisoner's name was misdescribed:*

Held, that the prisoner was guilty of bigamy.

Quære, whether he would have been guilty of bigamy if both parties had known of the misnomer.

CASE reserved for the opinion of this Court by Byles, J.

The prisoner was indicted at Shrewsbury Assizes for bigamy.

He was married in 1866 by the name of Edward Rea to his first wife now living, who refused to cohabit with him, and told him he might go and marry any other woman.

In 1872 he accordingly married another woman, in the presence of the registrar, describing himself, not as Edward Rea, his true name, but as Benjamin Rea.

There was no evidence to show whether the second wife, at the time of her marriage, knew, or did not know, that his Christian name was misdescribed.

He was convicted of bigamy, subject to the opinion of the Court of Criminal Appeal, whether on these facts the felony was proved.

April 27.—No counsel appeared to argue on either side. The court took time to consider its judgment.

May 4.—KELLY, C.B. now delivered the judgment of the court.—This case must be decided upon the same principle as applies to the case of a marriage by banns, because the language of the statute for marriages by a registrar (6 & 7 Will. 4, c. 85, ss. 4 and 42), follows the provisions as to banns and ought to receive the same construction. As to banns it is clear that to render a marriage invalid it must be contracted with a knowledge by both parties that no due publication of banns has taken place: (*Rex* v. *The Inhabitants of Wroxton*, 4 B. & Ad. 640; *Tongue* v. *Tongue*, 1 Moore P. C, 90.) In this case the man only appears to have known of the misnomer, and the presumption in favour of marriage and against fraud clearly threw the burden of proof of invalidity upon the party alleging it. This was assumed in *Tongue* v. *Tongue*, otherwise the statement of Baron Parke's dissent would have been superfluous. Therefore without saying that if both parties knew of the misnomer, there would have been no offence of bigamy against the statute, the conviction ought to be affirmed. *Conviction affirmed.*

REG v. WILLIS.

*penal servitude — Previous conviction — e—Amendment—*11 *&* 12 *Vict. c.* 78, *s.* 2; 3 *Vict. c.* 47, *s.* 2.

indictment for wounding with intent to do s bodily harm, which did not charge a s conviction for felony, the prisoner was d and sentenced to seven years' penal ser- the learned judge reserving for this court stion whether he had power to sentence for r term than five years (27 *&* 28 *Vict. c.* 47, *he sentence to stand or be reduced to five s this court should determine:*

t the sentence ought to be reduced to five enal servitude, and the sentence amended ngly (11 *&* 12 *Vict. c.* 78, *s.* 2.)

rved for the opinion of this Court by , B.

se was tried before me at the last Assizes y of Exeter.

an indictment for wounding with intent vous bodily harm, and the prisoner was lty of unlawfully wounding.

proved, though not stated in the indict- t he had been before convicted of felony. e had been three times so convicted, and on each occasions to long periods of ation.

se was a very bad one, and I sentenced ven years' penal servitude, which was not 1 an adequate sentence.

tenced him to penal servitude and had do so for more than five years, I was sentence him for seven.

d not such power, the sentence should exceeded five years.

s I desire the opinion of the Court of Appeal, and according to that the sen- stand or be reduced to five years.

7.—No counsel appeared to argue on e.

urt took time to consider its decision.

—KELLY, C.B. now delivered the judg- ne Court.—In this case we are of opinion much as the prior conviction was not men- the indictment, the statute requiring m sentence of seven years' penal servi- ot apply. Consequently to the question he judge was bound to pass a sentence of rs' penal servitude, we must answer that t so bound. The prisoner was entitled is identity tried by a jury which could the prior conviction was not upon the The case of *Reg.* v. *Simmons* (38 L. J. ; 11 Cox C. C. 248), is an authority to . In thus giving effect to the sentence of penal servitude instead of seven, we give he learned judge's sentence, and we are g a sentence of our own. The judgment nant to the statute 11 & 12 Vict. c. 78, amended into a sentence of five years' itude. *Judgment accordingly.*

Saturday. April 27, 1872.

(KELLY, C.B., WILLES, J., CLEASBY, B., GROVE, J., and QUAIN, J.)

REG. v. BEAUMONT.

*nor — Bankruptcy — Evidence—*32 *&* 33 *Vict. c.* 62, *s.* 11.

whose affairs were liquidated by arrange- ment, was indicted under 32 *&* 33 *Vict. c.* 62, *s.* 11, *for that he knowing that false debts had been proved under the liquidation, failed for the period of a month to inform B., the trustee, thereof.*

The evidence was that the debtor, on the 23*rd Sept.* 1870, *filed his petition in the County Court, alleging that he was unable to pay his debts, and that he was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors; that on the* 10*th Oct. the first meeting under the petition was held, and three false debts proved with his connivance. At the first meeting of the creditors, it was resolved that a composition of* 8*s. in the pound, payable by instalments, and to be secured, should be accepted, and B. was appointed trustee in the matter. On the* 12*th Oct. the registrar of the County Court certified that B. was appointed trustee, and was declared to be trustee under the liquidation by arrangement. At the second meeting of creditors on* 19*th Oct., it was resolved that the debtors' affairs should be liquidated by arrangement, and not in bankruptcy; that the remuneration of the trustee* (*B.*) *be left to a subsequent meeting, and that the trustee should pay the moneys received by him into the H. bank:*

Held, that upon the evidence, B. was proved to be the trustee under the liquidation by arrangement, notwithstanding that at the first meeting, when he was originally appointed, it was resolved to accept a composition of 8*s., and nothing was then resolved as to a liquidation by arrangement.*

CASE reserved for the opinion of this Court by Mr. Justice Quain.

Samuel Beaumont was convicted of a misdemeanour at the Spring Assizes for the West Riding of the county of York, holden at Leeds on the 21st March 1872.

The prisoner was indicted under the Debtors' Act 1869, sect. 11, sub-sect. 7, for that he, knowing that "certain false debts had been proved by certain persons under his liquidation, failed, for the period of a month, to inform his trustee thereof" contrary to the statute.

On the 23rd Sept. 1870 the prisoner presented a petition to the County Court of Yorkshire holden at Bradford, under sccts. 125 and 126 of the Bankruptcy Act 1869, and in the form No. 106 appended to the general rules in bankruptcy stating his desire to institute proceedings for the liquidation of his affairs by "arrangement or composition" with his creditors.

The first meeting under the said petition was held on the 10th Oct. 1870. The petitioner was present at the meeting. At this meeting divers debts were proved in the usual way by affidavit, and amongst other debts three persons formerly workmen in the employment of the prisoner proved debts to the amount of 10*l.*, 9*l.* 12*s.*, and 8*l.* 10*s.* respectively for wages alleged to be due to them from the prisoner. It was proved before me that these proofs had been obtained by the prisoner from the workmen who were induced by the prisoner to make them, the prisoner and the deponents well knowing that the amounts of the debts sworn to in these proofs were considerably beyond what was due to the deponents respectively.

In one case only 5*s.* 8*d.* was due to the deponent instead of 9*l.* 12*s.* the sum sworn to in his affidavit.

It was further proved that the prisoner furnished

each of the three workmen with fictitious particulars of the claims and directed them to copy those particulars and send them in to the trustee when demanded, and this direction was obeyed by the three deponents respectively.

The prisoner's attorney was appointed proxy by each of the deponents to vote for each of them at all meetings of creditors.

At the first meeting of creditors the following resolutions were passed by the statutory majority:

1. That a composition of 8s. in the pound shall be accepted in satisfaction of the debts due to the creditors from the said Samuel Beaumont.

2. That such composition be payable as follows, by three equal instalments, at four, eight, and twelve months from this date.

3. That the said composition be secured to the satisfaction of Messrs. Isaac Faulkner Oates and Ephraim Gibson.

4. That Charles Joseph Buckley be appointed trustee in the matter.

5. That the second general meeting of creditors be held at the Royal Hotel, in Cleckheaton.

On the 12th Oct. 1870 the registrar of the said County Court certified that the said Charles Joseph Buckley had been appointed trustee, and he was thereby declared to be trustee "under this liquidation by arrangement." The certificate was in the form number 121, appended to the General Rules in Bankruptcy.

The prisoner's attorney, as proxy for the above three creditors, voted for these resolutions, and these creditors were reckoned in the majority in value.

The second meeting of creditors was held on the 19th Oct. 1870.

The petitioner was present at this meeting, and the following resolutions were passed unanimously:—

1. We, the undersigned, being the statutory majority of creditors assembled at the second meeting in the above matter, duly held at the Royal Hotel, in Cleckheaton aforesaid, this 19th Oct. 1870, in accordance with the provisions of the said Act, do hereby resolve that the affairs of the said Samuel Beaumont be liquidated by arrangement and not in bankruptcy.

2. That Messrs. William Stead, Ephraim Gibson, and John Rhodes Cordingley be appointed a committee of inspection.

3. That the remuneration of the trustee (Mr. Charles Joseph Buckley) be left to a subsequent general meeting.

4. That the trustee (Mr. Charles Joseph Buckley), shall pay all sums of money on account of the estate from time to time received by him into the Huddersfield Banking Company's branch bank at Cleckheaton.

No debts were proved at the second meeting, but the creditors voted at the second meeting in respect of the debts proved at the first meeting, which proofs were on the file of the court.

The prisoner's attorney voted as proxy for the above three creditors at the second meeting in the same way as he did at the first.

There was no fresh express appointment of a trustee at the second meeting beyond what is contained in the above last-mentioned resolution, nor was there any fresh certificate of the registrar given after the second meeting in respect of the appointment of trustee.

The proceedings of a second meeting professed to be regulated by rules 282 and 283 of the General Rules in Bankruptcy.

After the second meeting the trustee, Charles Joseph Buckley, proceeded to act as trustee under the liquidation; he collected the assets, and he had paid at the time of the trial a dividend of 4s. in the pound. He treated the debts alleged to be due to the three above-mentioned creditors for wages as preferential debts, and paid them in full by cheque.

The said creditors immediately handed over the cheques to the prisoner, who got them cashed, and then paid over to the three creditors the sums really due to them, and appropriated the rest of the money to his own use.

On these facts it was contended for the prisoner that he could not be convicted of an offence under the Debtors Act 1869, sect. 11, sub-sect. 7, inasmuch as the liquidation by composition having been changed by the resolutions passed at the second meeting into a liquidation by arrangement, no debts had been legally proved under the liquidation by arrangement, nor had any trustee been legally appointed under that liquidation; that the trustee appointed on the 10th Oct. was appointed the trustee under the liquidation by composition only in pursuance of Rule 279, and that the powers and functions of such a trustee are entirely different from those of a trustee duly appointed under a liquidation by arrangement, according to the provisions of sect. 125, sub-sects. 1, 5, and 7, of the Bankrupt Act 1869.

On the other hand it was contended by the counsel for the prosecution that the liquidation, though changed at the second meeting from a liquidation by composition into a liquidation by arrangement, in pursuance of Rule 283, continued to be in effect the same liquidation, and that the creditors who voted at the second meeting were entitled to vote in respect of their debts proved at the first meeting, and were not under the necessity of proving those debts a second time, and that the trustee appointed at the first meeting became the trustee under the resolutions passed at the second meeting, and was impliedly, if not expressly, recognised as such trustee under those resolutions, and that the petitioner having been present at the said meeting, and having used by his attorney the proofs of debts made at the first meeting could not object that the proceedings at the second meeting were irregular in that respect.

The jury convicted the prisoner of knowing that the above three false debts had been proved under the liquidation, and that he failed for the period of a month to inform the trustee thereof.

I reserved for the opinion of this Court the question whether, on the above facts, the prisoner could be convicted of the offence charged against him.

Copies of the petition of the proceedings at both meetings of creditors, and of the certificate of the registrar of the appointment of the trustee as entered on the file of the court as below, were annexed to the case.

THE BANKRUPTCY ACT 1869.—In the County Court of Yorkshire holden at Bradford.—The humble petition of Samuel Beaumont, of Cleckheaton, in the county of York, machine maker.

Showeth,—That your petitioner alleges that he is unable to pay his debts, and is desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors, and hereby submits to the jurisdiction of this court in the manner of such pro-

ceedings, and that your petitioner estimates the amount of the debts owing by him to his creditors at 2500*l.*

That your petitioner does not reside or carry on business within the district of the London Bankruptcy Court.

Your petitioner therefore prays that notice convening such general meeting, or meetings of his creditors, as may be necessary to be given by him during the course of such proceedings, may be sent in the prescribed manner, and that such resolution or resolutions as his creditors may lawfully pass in the course of such proceedings, and as may require registration, may be duly registered by the registrar of the court. And your petitioner shall ever pray, &c.

Signed, SAML. BEAUMONT.

Signed by the petitioner, Samuel Beaumont, on the 23rd Sept. 1870, in the presence of (Signed) Jas. G. Hutchinson, Attorney-at-Law, Piccadilly-chambers, Piccadilly, Bradford, aforesaid.

THE BANKRUPTCY ACT 1869.—In the County Court of Yorkshire, holden at Bradford.—In the matter of a special resolution for liquidation by arrangement of the affairs of Samuel Beaumont, of Cleckheaton, in the county of York, machine maker. This is to certify that Charles Joseph Buckley, of Bradford aforesaid, accountant, has been appointed, and is hereby declared to be, trustee under this liquidation by arrangement.

Given under my hand and the seal of the court this 12th day of October, 1870.

(Signed) GEO. ROBINSON, Registrar.

County Court of Yorkshire, holden at Bradford. Filed, 12th Oct. 1870.

(Signed) J. R. QUAIN.

Waddy (*Wilberforce* with him) for the prisoner. —The offence charged was created by the Debtors' Act 1869 (32 & 33 Vict. c. 62, s. 11): "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act 1869, shall in each of the cases following be deemed guilty of a misdemeanor;" and then sub-sect 7: "If knowing or beliving that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof." Then the mode of appointing the trustee in cases of liquidation by arrangement is regulated by sect. 125 of the 32 & 33 Vict. c. 71 (the Bankruptcy Act). Two points arise, first, no false debts were proved in such a way that it was incumbent on the defendant to give the trustee notice thereof; and secondly, there was no trustee properly appointed that it was his duty to acquaint of such false debts. The Bankruptcy Act contemplates two modes of proceeding for winding-up the estate, first, by composition; secondly, by liquidation by arrangement. Rule 279 is: "where the creditors at the first general meeting duly pass a resolution that a composition shall be accepted in satisfaction of the debts due to them from the debtor, they shall specify in their resolution the amount of the composition and the instalments and dates at which the same shall be payable, and they may name some person as trustee for receipt and distribution of the composition, and any negotiable securities which may be given for the same." That is the only rule in which the trustee is mentioned. Then how stands the matter? On the 10th Oct. the first meeting was held, and debts proved, and a resolution passed to accept a composition of 8*s.* in the pound, and that Buckley be appointed trustee in the matter. On the 12th Buckley was certified by the court as the trustee, and on the 19th, at a meeting of creditors, it was resolved to liquidate the defendant's affairs by arrangement, and not in bankruptcy. The proceedings of the meeting on the 10th were rendered a nullity by those of the meeting on the 19th, the composition being changed into a liquidation by arrangement. The certificate of the registrar of the County Court was obtained on a misrepresentation of the nature of the meeting on the 10th Oct. [CLEASBY, B.—Sect. 125, sub-sect. 6, and sect. 18 of the Bankruptcy Act, make the certificate conclusive evidence of the appointment of the trustee.] But in this case there was no resolution then existing to liquidate by arrangement. (WILLES, J.—Buckley was appointed "trustee in the matter," whatever turn it might take—that is, although it might be turned from what it then was, a composition, into a liquidation by arrangement. QUAIN, J.—It was so changed because the creditors were not satisfied with the security for the composition.] The certificate could not be retrospective; and as there was no liquidation by arrangement before the 19th there could be no trustee under it before then. The certificate on the 12th does not therefore avail. The false debts being proved at a meeting which became null, and no trustee being properly appointed for the liquidation by arrangement, the charge in the indictment was not legally established, and the conviction cannot be sustained.

T. Campbell Foster for the prosecution, was not called upon to argue.

KELLY, C.B.—We are all of opinion that the conviction must be affirmed. I do not say, speaking for myself, that my mind is free from difficulty as to whether some proceeding which ought to have taken place may not have done so, and not been recorded. The charge against the defendant was that he, knowing that false debts had been proved, did not give the trustee notice thereof, and the facts were that certain debts were proved under a proceeding which, if not at the particular time such, became subsequently a liquidation by arrangement, and the defendant knew that such debts were false ones, and failed to inform Buckley, the trustee, thereof, and upon proof of those facts the offence was complete. For the defendant it was argued that, looking at the date of the proof of the debts and appointment of trustee, there was then no resolution by the creditors to liquidate the petitioning debtor's affairs by arrangement, but only to accept a composition, to be paid in a certain time, and that the trustee being appointed before it was resolved to liquidate by arrangement, there was, legally, no trustee at all. We must, however, look at the proceedings in their order; first, the defendant presented a petition to the County Court, wherein he alleged that he was unable to pay his debts, and was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition, and thereby submitted to the jurisdiction of the court in the matter of such proceedings. That was, in substance, a petition for the liquidation of his affairs by arrangement or composition. Then a meeting of his creditors was held on the 10th Oct., when a resolution was passed "that Charles Joseph Buckley be appointed trustee in the matter," which I read as in the matter of the petition of the defendant for liquidation of his affairs by arrangement or composition. Then again, on the 19th Oct., in the very matter of this petition, a creditors' meeting was held, and by the requisite majority it was resolved that the affairs of the defendant be liquidated by arrangement and not in bankruptcy, and that the remuneration of the trustee (Mr. C. J. Buckley) be left to a subsequent general meet-

ing, and that the trustee (Mr. C. J. Buckley) shall pay all sums of money on account of the estate, from time to time received by him into the Huddersfield Banking Company's Branch Bank at Cleckheaton. That was a clear recognition and treating of Buckley as trustee by the creditors, and a continuation and confirmation of his appointment both prospectively (and retrospectively, as I think), Buckley then being appointed by resolution of the creditors, trustee in the liquidation of the defendants by arrangement. We have next the certificate of the registrar of his appointment in the form provided by the statute, which is clear proof that Buckley was duly appointed trustee in the liquidation founded on the petition before the County Court. It was next said that the date of the certificate was 12th Oct., a week before 19th Oct., when the meeting of creditors was held, at which it was resolved to liquidate by arrangement. If those dates are to be taken as conclusive, there might be a difficulty, but not an insuperable one, because we have only to say in answer that the resolutions at the meeting on the 19th have a retrospective operation. It is, however, unnecessary to consider that question, because the three requisites were proved to complete the case. First, there is the petition praying for a liquidation of his affairs by arrangement or composition; secondly, there was a meeting of creditors under that petition, at which Buckley was appointed trustee; thirdly, there was another meeting at which it was resolved to liquidate his affairs by arrangement, and finally there was the certificate of the trustees' appointment, and the matter of the special resolution for liquidation by arrangement of the affairs of the defendant of the appointment of Buckley as trustee. Sect. 18 of the Bankruptcy Act makes that certificate conclusive evidence of the appointment of the trustee; and we cannot, therefore, look at the dates. Without referring to the dates the proceedings are such as to establish a liquidation by arrangement, and the appointment of the trustee. The conviction, therefore, must be affirmed.

The rest of the Court concurring,

Conviction affirmed.

Attorneys for the prosecution, *Terry* and *Robinson*, Bradford.

Attorney for the prisoner, *Kerry*, Bradford.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PEAT, Esqrs., Barristers-at-Law.

Thursday, May 23, 1872.

(Before the LORD CHANCELLOR (Hatherley) and the LORDS JUSTICES.)

Re THE MEYRICKE FUND.

Endowed Schools Commissioners—Endowment—University—Jurisdiction—Discovery—District—Endowed Schools Act 1869 (32 & 33 *Vict. c.* 56), *Charitable Trusts Acts* 1853 *and* 1855 (16 & 17 *Vict. c.* 137, *and* 18 & 19 *Vict. c.* 124).

The Endowed Schools Commissioners have jurisdiction under the Endowed Schools Act 1869 *to compel a college in an university to make discovery of matters relating to an endowment of which the managing body of the college are trustees for exhibitioners to be selected from a particular district, and whose exhibitions are tenable at the university, although they are not connected with any particular school.*

Wales is a "district" within the Endowed Schools Act 1869.

THIS was an appeal motion from a decision of Wickens, V.C.

By his will, dated the 25th March 1712, the Rev. Edmund Meyricke, after reciting, amongst other things, that he had always intended to bestow a good part of what God should please to bless him withal for the encouragement of learning in Jesus College, in Oxford, and for the better maintenance of six of the junior scholars who were or should be scholars of the foundation of the said college, out of the six counties of North Wales, gave, devised, and bequeathed all his real and personal estates (except as therein mentioned) unto and for these several uses and purposes; that was to say, unto every one of the said six scholars particularly and severally the annual sum of 10*l.* of lawful money of Great Britain during his residence in the said college; and for the maintenance and settlement of six exhibitioners in the said college, natives of the six counties of North Wales, or of any or either of the said six counties, and of his kindred, if such, of that number of exhibitioners, else such exhibitioners to be others of the said six counties to make up the number of six, he gave to each and every of the said six exhibitioners the annual sum of 8*l.* of lawful money of Great Britain during his residence in the said college; the said 10*l.* per annum to each and every of the said scholars, and the said 8*l.* per annum to each and every of the said exhibitioners as aforesaid, to be paid unto them severally and respectively, yearly, and every year during their respective residence in the said college as aforesaid out of the yearly rents, issues, and profits of his said estate; and the remainder of the yearly rents, issues, and profits of such part of his estate (other than as therein mentioned) he gave, devised, and bequeathed to and for these further uses and purposes, that was to say, for the buying of advowsons of rectories, impropriations, or vicarages, to which the principal for the time being, and the fellows of the said college, should or might, as patrons thereof, present fit persons thereto out of the said number of the said six scholars, or if it happened that there were none of such scholars capable to be presented thereto, then any of the said six exhibitioners that should be capable to be presented thereto should be so presented thereto; such scholars and such exhibitioners to be so presented to such advowsons of such rectories, impropriations, or vicarages, as there should be any vacancy or vacancies of such livings or benefices; or if it happened that there were none of such scholars or of such exhibitioners capable to be so presented thereto, then one of the North Wales Fellows of the said college was to be presented instead of such of the said scholars, or of such of the said exhibitioners as should not be capable to be presented as aforesaid, to such vacancy as might be of such of the said rectories, impropriations, or vicarages. And his will and further meaning and intent was, as to the said exhibitioners, that they and each and every of them, should be well and duly paid yearly the said sum of 8*l.* per annum as aforesaid, until they did or should take their several and respective degrees of Masters of Art, or until they, or any or either of them, should have received and enjoyed a care

of souls really worth 40*l.* per annum. And he thereby gave, devised, and bequeathed such part of his said estate so given, devised and bequeathed, for and to the said six scholars and the said six exhibitioners, and for the buying of such advowsons of rectories, impropriations, or vicarages as aforesaid, and for the uses and purposes aforesaid, and the yearly rents, issues, and profits thereof yearly and every year for ever, for and to the same uses and purposes for ever, and to and for no other use intent or purpose whatever. The testator then nominated and appointed four trustees of his will to order and manage his said estate, and provided that from and after the deceases of the said four trustees thereinbefore named, then for the future and for ever the trustees of his said estate so given, devised, and bequeathed as aforesaid, to and for the said six scholars and the said six exhibitioners, and for the buying of such advowsons as aforesaid, for the uses and purposes as aforesaid, and all and every the matters and things relating to the same as aforesaid, should be the principal of the said Jesus College for the time being for ever, and two of the senior fellows of the said college for the time being for ever. And they were by him thereby constituted, authorised, empowered, and appointed to be such trustees for the said uses and purposes relating to the said college as aforesaid; and to act and do in and touching the same, and in and concerning such part of his said estate so given, devised, and bequeathed for and towards the said six scholars and the said six exhibitioners, and the buying of such advowsons as aforesaid, for the uses and purposes aforesaid, and the management of such part of his estate, as appropriated to and for those uses and purposes as aforesaid, from time to time and at all times, as occasion should be, as they should think fit or judge necessary, yearly, and in every year for ever, that the same might be truly and duly done as aforesaid, yearly, and in every year for ever, according to his true intent and well meaning therein expressed, for the said several uses and purposes as aforesaid.

The testator executed a codicil dated the 14th May 1712, whereby he devised a piece of land at Bala, in Merionethshire, for the use and benefit of a school, and made certain provisions out of the rents of his estates in Merionethshire "above the sum of 108*l.* per annum given by his last will to six scholars and six exhibitioners in Jesus College, in Oxford," and otherwise, for the maintenance of a schoolmaster, and thirty scholars at Bala.

The testator died in 1713.

The property devoted to the Meyricke scholarships and exhibitions had very much increased in value since the testator's death, and had been the subject of several decrees and orders of this court. Under or by virtue of these decrees and orders the six scholars now received 40*l.* each annually instead of 8*l.*, and the exhibitions were increased in number to 24, and in value to 35*l.* annually.

On the 3rd April 1857, the Commissioners under the Oxford University Government and Extension Act 1854 (17 & 18 Vict. c. 81), framed an ordinance with reference (amongst other things) to the exhibitioners on the Meyricke Foundation, by the 36th clause of which ordinance it was provided that "the emoluments of the twenty-four exhibitions of the foundation of Edmund Meyricke, clerk, of the three exhibitions of the foundation of Mr. Bloom, and of the two exhibitions of the foundation of Mr. Rice Powell, should be consolidated as the same respectively became vacant, and applied in maintaining as many exhibitions of the value of 40*l.* per annum respectively, as the amount of the said consolidated emoluments for the time being would allow; that the exhibitions should respectively be filled up by the election of deserving persons, being natives of Wales or Monmouthshire, whom the principal and fellows should have ascertained to be in need of support at the university; provided that no person should be elected whose merit and fitness to be an exhibitioner should not have been previously tested by an examination; that no person should be entitled to preference, or ineligible in elections to any of the said exhibitions by reason of his place of birth, otherwise than by reason of his being a native of Wales or Monmouthshire as aforesaid; that no person should be eligible to any of the said exhibitions who should be a scholar of the college, and every exhibitioner who should be elected to a scholarship within the college, should thereupon vacate his exhibition; and that each of the said exhibitions should be tenable until the holder thereof should have completed his twentieth term inclusive from the date of his matriculation, and no longer." And by the 37th clause of the ordinance it was provided that "notice of every intended election to any of the exhibitions should be given by the principal in such manner as he should deem best adapted to insure publicity, thirty days at least before the day of election."

In 1860 a suit of *The Attorney-General* v. *Jesus College, Oxford*, was instituted in which a decree was pronounced in 1861, by which it was declared that the school at Bala was entitled to a proportionate part of the improved surplus rents of the testator's Merionethshire estates.

In 1870 a scheme was approved by the Master of the Rolls, by which the ordinance of the 3rd April 1857, was carried out, and the annual sum of 840*l.* was appropriated to the purposes of the 36th clause of that ordinance.

In 1871 the Endowed Schools Commissioners called upon the principal of Jesus College to answer certain inquiries with respect to the Meyricke Foundation. In the course of a long correspondence which ensued, the commissioners stated that they desired to investigate the matters relating to the Meyricke property, quite irrespective of any connection between it and the school at Bala. Eventually the authorities of the college declined to furnish the information required by the commissioners.

Thereupon the commissioners moved before Wickens, V.C., in the matter of "The Meyricke Fund," and also in the matter of the Endowed Schools Act 1869, the Charitable Trusts Act 1853, and the Charitable Trusts Act Amendment Act 1855, for an order of committal against the bursar of Jesus College, Oxford (who was the actual custodian of the documents relating to the Meyricke Fund), for contempt of court, and for a writ of sequestration against the property of the college for a like contempt in that they had refused to furnish the commissioners with the information required by them.

This was merely a formal motion, the real object of the motion being to determine the jurisdiction of the commissioners over the Meyricke Fund.

The inquiries made by the commissioners (a

list of which was appended to the notice of motion) were as follows:

(*a*) An account of the property belonging to the said endowment; (*b*), an account of the receipts and expenditure for the four years ending the 31st Dec. 1870; (*c*), a list of the persons holding exhibitions under the foundation; (*d*), a list of the trustees in whom any portion of the endowment is legally vested; (*e*) a list of the managing trustees, if different from those who hold the property; (*f*), a statement of the schemes, statutes, or ordinances which now govern the endowment.

The motion also asked that the principal, fellows, and scholars might be ordered to pay the costs of the motion, or that such other order might be made as should be proper.

The motion was entitled in the above-mentioned Acts for the following reasons: By the 11th section of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), all officers having the custody of documents relating to any charity are bound to furnish copies and extracts, if required by the Board of Commissioners under that statute; and by the 14th section of the Act, if any person from whom the board is authorised to require information refuses to render accounts, statements, or answers to the board when requested so to do, or to attend before them, if desired, he is liable to summary committal for contempt of this court. By the Charitable Trusts Act Amendment Act 1855 (18 & 19 Vict. c. 124), sects. 6, 7, 8, and 9, the powers of the Board of Commissioners to inquire into charities, and to require persons to attend and be examined before them, and to obtain orders for committal against persons refusing to give information, were considerably enlarged. And by the 49th section of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56) it is provided that sect. 11 of Charitable Trusts Act 1853, and sects. 6, 7, 8, and 9 of the Charitable Trusts Act 1855, shall extend to the commissioners and assistant commissioners under the Endowed Schools Act.

The motion came before Wickens, V.C., on the 11th Jan. last.

In delivering his judgment, the Vice-Chancellor said.—It has been argued, in this case, on behalf of the Endowed Schools Commissioners, that they have the power of framing a scheme with regard to this fund, and that in that case they are entitled to the discovery which they seek. It was further argued, that even if they have not the power to frame a scheme which shall be operative, without the assent of the college, they are still entitled to the discovery which will enable them to frame a draft scheme for the purpose of seeing whether the college will consent to it or not. In the view which I take of this case, it is not necessary for me to decide the second point. It is also unnecessary for me to decide whether this fund is or is not part of the foundation of Jesus College, a question which seems to me to admit of considerable doubt. I prefer to decide the case on broader grounds. Mr Morgan may or may not be justified in saying that if this fund is within the Endowed Schools Act, it is so by inadvertence, and not intentionally. If the words of the Act clearly bring the fund within the jurisdiction of the commissioners, I must give effect to those words; but I may suggest that nothing could be more *conformable to* the apparent intention of the Act, *than that in a* case where, for example's sake, an *endowed school* exists in a particular parish, and exhibitions are founded for the use of the parishioners not connected with the school, the commissioners should have power to deal with both together. Many more instances might be given; but if Mr Morgan is right in his argument, the commissioners would, in such a case, be excluded. I think, however, that if the words of the 5th and 14th sections receive their natural construction, they bring this endowment within the jurisdiction of the commissioners. It seems to me unfair to restrict the general expressions of the 5th section by the latter part of it; especially considering the words "otherwise howsoever," and that there are no other words in the latter clause which refer to exhibitions tenable at an university. But exhibitions tenable at an university are expressly mentioned both in the 5th section and also in the 14th section which limits in some way the operation of the empowering sections. Then it is said, Wales is not a "district", because it is coextensive with the old principality of Wales, and that to adopt the commissioners' view would be to treat the old principality as a "district of England." But surely Wales is a district in ordinary parlance just as the counties of Durham, or York, or Middlesex, would be districts: though the Act of Parliament probably contemplated in the first instance, much smaller areas, both here and in the 11th section. It was also said, that the commissioners might possibly make a scheme, which would not be a proper scheme, having regard to the nature and origin of this fund. If so, there is a remedy. Therefore I decide that the commissioners have the jurisdiction that they claim, and are entitled to the discovery they seek, and with costs.

From this decision the Principal and Fellows of Jesus College appealed.

Osborne Morgan, Q.C. and *Grenside* (with them *Dickenson*, Q.C.) in support of the appeal.—We contend that this Meyricke Fund is not an educational endowment within the Endowed Schools Act at all. The object of that Act was to remedy the abuses which were very prevalent with regard to school endowments. But we contend that the Act is strictly confined to purely scholastic endowments. This is evident from the 9th section of the Act, which empowers the commissioners to frame schemes in such manner as to render any educational endowment most conducive to the advancement of the education of boys and girls or either of them. There being no girls at the universities, it is clear that the Act contemplated endowments in connection with schools only, and not pure University endowments. It is true that the 5th section of the Act defines the term "educational endowment" as meaning, amongst other things, an endowment applicable for the purposes of "exhibitions tenable at a school, or an university, or elsewhere," but the latter part of the section restricts exhibitions tenable at an university, to such as are tenable by scholars belonging to a particular school or persons connected with a particular school. After defining the term "educational endowment" to mean "an endowment or any part of an endowment which, or the income whereof, has been made applicable or is applied for the purposes of education at school of boys and girls or either of them, or of exhibitions tenable at a school, or an university or elsewhere," the section proceeds: "wherever the same has been made so applicable by the original instrument of foundation or by any subsequent Act of Parliament, letters

patent, decree, scheme, order, instrument or other authority, and wherever it has been made applicable or is applied in the shape of payment to the governing body of any school or any member thereof, or to any teacher or officer of any school, or to any person bound to teach, or to scholars in any school, or their parents, or of buildings, houses or school apparatus for any school, or otherwise howsoever." We submit that this section clearly restricts the operation of the Act to scholastic endowments. The Meyricke Fund possesses none of the characteristics defined in the latter part of the 5th section, and we submit, therefore, that it is not within the section or the Act at all. The words at the end of the section, "or otherwise howsoever" cannot be held to take in this fund, for those words can only apply to matters *ejusdem generis*. That is quite settled. In *Sandiman* v. *Breach* (7 B & C. 96) which turned upon the construction of the 29 Car. 2, c. 7, by the 1st. section of which it is enacted "that no tradesman, artificer, workman, labourer, *or other person or persons*, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day," in defence to an action to recover the expense of hiring a post-chaise to convey the plaintiff, the defendant, who contracted to take him in his stage-coach, having neglected to do so, it was contended that the contract was illegal, and it was sought to bring a stage-coach driver within the words "or other person whatsoever," Lord Tenterden says: "It was contended, that under the words 'other person or persons' the drivers of stage-coaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*". The commissioners may possibly have jurisdiction to require information and make alterations with reference to the school at Bala. But if they are held to have jurisdiction over this fund, where is their jurisdiction to stop? The Act may as well be held to extend to the Eldon, Vinerian, Craven, and such like scholarships. Indeed, the professorships and fellowships, and the universities themselves, will be in danger if the Vice Chancellor's decision be upheld. The Legislature clearly did not intend anything of the kind, and if endowments like the Meyricke Fund are within the Act at all, we submit that it is by mere inadvertence that they have been made subject to its operation, and not intentionally. The recital in the will shows that the testator's object was the "encouragement of learning in Jesus College." He wished to benefit by this endowment, not any school or schools, but Jesus College, which was his own college. To effect this purpose he vested his property in the principal and fellows of the college, so that the property in fact became part of the foundation of the college. If this is so, it is clear that this fund is not within the jurisdiction of the commissioners, from which it is carefully exempted by the provisions of the Act. The 14th sect. of the Act (subsect.4) expressly exempts from the jurisdiction of the commissioners "any exhibition (other than one restricted to any schools, or school or district) forming part of the foundation of any college in Oxford or Cambridge, unless the college assent to the scheme." The manner in which this court has dealt with the fund, and the manner in which the University Commissioners under the Act of 1854 have dealt with it, show that it is part of the foundation of the college. The fund was well *and effectually settled* by the Master of the Rolls in 1870. No sufficient grounds have been shown why the Endowed Schools Commisioners should seek to disturb the scheme proposed by the University Commissioners and sanctioned by the Master of the Rolls. That scheme works well, and the fund, we submit, should not be given over to the tender mercies of the Endowed Schools Commissioners, who may not be at all qualified to judge the requirements of such a foundation as this. But the Vice Chancellor has held that Wales is a district within the words of the 4th subsection of the 14th section of the Act, and that, therefore, these exhibitions, even if they form part of the foundation of the college, are not exempted from the jurisdiction of the commissioners. That is the only section of the Act where the word "district" is used, the term "area" being employed in other parts as *e.g.* in sect. 11. The Act does not extend to Scotland or Ireland, so that the Vice Chancellor's decision amounts to calling Wales a district of England. An area co-extensive with the old Principality of Wales cannot reasonably be held to be a "district" within the meaning of the Act. It is quite clear that the word was intended to be applied to a much more limited area; it might perhaps apply to a county of England, but we submit that even that is a too extensive meaning to assign to it; it means rather something in the nature of a school district or a parish.

Without calling upon

Sir *Roundell Palmer*, Q.C. and *Lindley*, Q.C., who appeared in support of the Vice Chancellor's order.

The LORD CHANCELLOR (Hatherley) said: I believe, Sir Roundell Palmer, we are all agreed in thinking that we ought not to call upon you for any answer to this appeal. The appeal is from a decision of the Vice-Chancellor Wickens, who has held that certain endowments made by Mr. Meyricke for the purpose of founding exhibitions, payable to young men educating at Jesus College, Oxford, which exhibitions are restricted by his will to a particular portion of the Principality of Wales, namely the six northern counties of that principality, are within the operation of the Endowed Schools Act, and the question for us to determine upon this appeal is whether they are or are not within the operation of that Act. The argument has arisen principally upon this, that this Act contemplated merely funds which were devoted to the education of boys and girls, or boys or girls at schools, although the education might have commenced at schools and afterwards terminated as to boys or young men at college, and as a consequence of the education being so terminated at college, exhibitions might be necessary or desirable for the maintenance of these young men whilst they were at college. But in another sense it is contended, and must be contended for the purpose of supporting the argument that has been addressed to us, that the exhibitions which are held at the University are not to be considered as included within the terms of the Act so far as those terms relate to educational endowments, because it is said that it has been found in scanning the Act, that in the 5th section of the Act, and in several other sections which have been pointed out to us in the course of the argument (although the principal reliance is upon the 5th), that it was really applicable to the supervision of schools that were benefited by endowments

and only consequentially, as it were, following up the subsequent education of the persons trained at those schools through the medium of exhibitions afforded to them for maintaining their place at the University. I confess that it appears to me that nothing has been pointed out during the course of the argument, which shows that any such restricted sense was contemplated by the legislature in the application of the term "educational endowments." Why, in the first place, one might ask, was so large a term adopted, if it was intended to deal simply with schools, and with persons educated there, and pursuing their course of study in their subsequent education? Why should not a term have been employed to confine and narrow it, as the argument has endeavoured to confine and narrow it upon the present occasion? Why was the Act not called "an Act for the better management of Endowed Schools, and the several endowments connected therewith,"—something that would lead one to look forward simply to the question of schools and nothing else? One does not see any principle or reason in the original printed report of the commissioners, nor is there anything which appears upon the face of the Act, or anything that has been referred to, to show that education was not the main object, or that it it was a limited education confined to a school or schools, and not touching in any way the education which might afterwards have to be provided for. It seems to me that this 5th section, upon the very face of it, plainly and distinctly points to two classes of educational endowments which might be necessary for the completion of a young man's education, while as regards primary education it applies to both boys and girls. As regards that part of the section which applies to or deals with exhibitions, I may say that, in the present state of the University, at all events, it could not be held to have had any application in the mind of the Legislature to the education of girls, because up to the present time there has been no provision for the education of women at the Universities. But that does not in any way prevent the general application of these words, which in themselves ought not to be restricted beyond any restriction imposed upon them by the section itself. The section speaks of "educational endowments" as being a term which is to be applicable to an endowment or any part of an endowment which, or the income of which, has been made applicable in the first place for the purposes of education at school of boys and girls, or either of them. Then it goes on to say, or has been made applicable for the purposes "of exhibitions tenable at a school or an university." Then it goes on further to take the largest view of what the educational purposes may be said to be, by pointing out various purposes which do not seem *primâ facie* to be for the immediate purposes of education, but which are so connected with it as to be within the purport and meaning of the Act. I said just now "applicable for the purposes of exhibitions at a school or an university," but the section goes further, saying, "at a school or an university, or elsewhere," in the largest imaginable terms. The first object of the Legislature in passing this Act, which is a highly remedial Act—an Act *for the purpose* of dealing with charitable funds *devoted to the* purposes of education—the first *immediate object* was to be sure that the commissioners should have the largest powers conferred upon them, lest by any means something unthought of, which might escape the attention of the legislature, should afterwards be found to be left unprotected by the supervision and care of the commissioners. After having given these very large powers, which are meant and introduced to sweep in every possible denomination of educational endowment, it appears to me that it did then occur to the Legislature that it was proper and desirable to make exceptions from those large powers. The Legislature seem to have contemplated this: they said, "We will not leave any portion of these educational funds, as far as they come within our ken, unprotected, but there are many which are protected already in other and different ways. There are many purposes also as to which the machinery which we intend to employ for the purpose of carrying out the provisions of this Act is not complete, and the machinery provided by the Act is not such as we consider desirable for that purpose. We think, therefore, that there are certain exceptions and restrictions which ought to be imposed upon these large powers which were in the first instance given, and in order that, if possible, nothing may be found to escape attention as to particular things that do not attract our attention, we insert these exceptions in cases where we think endowments ought not to be interfered with by the commissioners, either from their not having special powers appropriated for the purpose of dealing with them, or from any other good reason that may make it improper that the particular fund or particular foundation should be so dealt with. These (they say) we will afterwards except, but we will have the opening powers conferred by the definitions in the earlier parts of the Act large and extensive, so as to embrace everything which we shall not afterwards except." That being so, I think the intention of the Legislature is manifest from the various clauses that have been called to our attention. It is very remarkable how many of the arguments that were used by Mr. Morgan are met by the single observation that they may be cogent as arguments *ab inconvenienti*. A great part of the arguments adduced before us has been of this nature, that it was not, and could not be intended to give this body such large powers as those to which I have referred. That appears also to have occurred to the framers of the Act, because they seem to have said: "Large as the powers are which we have conferred upon you, we restrict them;" and accordingly they do restrict them in the matters to which attention has been directed in the course of the argument. For instance, Mr. Morgan says that this construction, which has been given to the Act by the Vice-Chancellor, would lead to the conclusion that all university endowments, not only the Craven Scholarship, but the Ireland Scholarship, and several others of later foundation, would be comprised within the power and grasp of the commissioners, or left, as Mr. Morgan says, to the tender mercies of these commissioners. When an Act of Parliament creates commissioners, I think every court is bound to assume that the commissioners, or the persons to whom the duties are entrusted, are persons who are fit and proper to be entrusted with such powers as are committed to them; and that all such powers as we find entrusted to them are not to be dealt with as if they were conferred

upon persons who were likely in any way to abuse or misuse them; but, on the contrary, we must assume that they are very fit and proper persons to exercise all the powers that the Legislature has thought fit to commit to them. I do not trouble myself, therefore, to inquire into that or any other of those points by which Mr. Morgan has endeavoured to lead us aside from the scope and purport of the Act. I assume that the commissioners are most fit and proper persons to exercise every power that the Legislature has given to them. That being so, we find that, with respect to university scholarships, there is very great protection afforded by the Act. In the first place, there is the fifty years clause which is applicable to every scholarship except the Craven Scholarship. There are very large and general provisions applying to all the powers exercisable by the commissioners. They have not the power arbitrarily, at their own mere will and pleasure, to direct the changes to be made which they may think it essential to carry into effect. They are obliged first to have a scheme, and then that scheme is to be subjected to certain provisions, and from that, there is an appeal to the Queen in Council, and the Council of Education in certain cases. Further than that, the scheme is to be laid before both Houses of Parliament, and either House of Parliament, dissenting from the scheme, may stop at once its adoption, a course to which one branch of the Legislature has already had recourse with regard to one of the schemes so sanctioned by the commissioners. All these guards are imposed upon their powers, and all these guards being imposed tend to show that the construction which gives the widest sense and meaning to the original powers, is the correct construction. Another argument used by Mr. Morgan was this: that if their full force is given to the words "applicable for the purposes of exhibitions tenable at a school, or an university, *or elsewhere*," in the 5th section of the Act, then the section will apply to scholarships founded by artists, for the purpose of promoting the study of art at Rome, and exhibitions founded for special local purposes as regards certain particular religious bodies and the like—that all these might be swept in by the 5th section. And so they might be swept in by the operation of the 5th section but you find several exceptions—you find that the 6th sub-section of the 8th section says that nothing in the Act shall apply "to any endowment applicable and applied solely for promoting the education of the ministers of any church or religious denomination, or for teaching any particular profession, or to any school (unless it is otherwise subject to this Act) which receives assistance out of such endowments," which would exclude, for instance, such exhibitions as might be founded here under the late arrangement with regard to legal education for legal exhibitions coupled with the study of the law. So with regard to exhibitions for the study of art in painting and the like. Then there is a careful exception of the particular foundations for the purposes of religious instruction or education, whether of the Church of England or other religious bodies. When you look carefully at the whole scope and frame of the Act therefore, these very exceptions all tend to show how large the original powers were meant to be, and how carefully drawn these original clauses were, and how necessary it is, if you want to restrict them, not to put a narrow interpretation upon the clause which defines what educational endowments are, by which means you might exempt a very large amount of educational endowments from the beneficial operation of the Act; but you are to see how far the Legislature has in the subsequent sections of the Act thought that restrictions were necessary to be imposed upon those powers, and you are to limit yourself to those restrictions only, thus giving a wider sense to the original definition of the scope and frame of the Act. When I come to consider the sort of argument that was addressed to us in order to induce us to narrow the effect of the 1st section of the Act, really I must say it would lead one to a very unreasonable conclusion because it is argued: true it is if there be an endowment for the education of boys at a school, and if you afterwards find another endowment giving exhibitions to boys at the university who have been educated at that school, then the intervention of the commissioners is lawful, for they have full power to deal with the subject matter of the exhibitions. But if it should so happen, as was mentioned by way of illustration during the argument with regard to Cowbridge School, that there were two endowments, one of them being for an exhibition at the university for boys educated at Cowbridge School, and the other endowment being by some other citizen or denizen of Cowbridge who was minded to benefit the inhabitants generally, and not the particular school, and who chose to say that every person born in Cowbridge or resident in Cowbridge should have the benefit of an exhibition at the university, you would give the commissioners the power of regulating the exhibitions for boys educated at Cowbridge School, and you would not give them equal control over the boys who happened to have been born or to have lived or resided at Cowbridge. With regard to educational endowments, when once you get to exhibitions, the school is left, the school is passed, it is altogether gone by. When you get to exhibitions you see how you can best employ them for the benefit of education. You may touch them, it is said, if it so happens that the possessor of the exhibition has been educated at a particular school; but you cannot touch them, you cannot improve them, you must leave them with all their defects, whatever they may be, if it happens that the exhibitioner has not been educated at a particular school, but has a right to the exhibition because he has been born or has resided for a certain time in a particular town. Nothing can be more unlikely than that there should be such an exception from the general definition of the words "educational endowment;" and I am happy to say that I agree with the Vice-Chancellor in not finding any such restriction in the 5th section, but am, on the contrary, of opinion that the words must be taken in the larger general sense and that they apply to exhibitions paid to persons who are sent to the university to be educated. Then comes the question about restricting the powers of the commissioners as applied to the particular case which we have before us. It is said that the restrictions in the 5th section are binding upon the commissioners; that is the clause principally relied upon, and any observations I have made upon that will be sufficient for the purpose I have in view as showing that the restrictions in ques-

tion do not touch the case we have now here before us. Assuming the construction of the 5th section to be as large as I have said, the 14th section of the Act provides for certain specified cases, in which it prohibits the interference of the commissioners. Then, the 4th sub-section of the 14th section says simply that nothing in the Act shall authorise the making of any scheme interfering "with the constitution of the governing body of any school or with any exhibition (other than one restricted to any schools or school, or district) forming part of the foundation of any college in Oxford or Cambridge, unless the college assent to the scheme." Therefore it is said that no exhibition can be dealt with "other than one restricted to any schools or school, or district" forming part of the foundation of any college in Oxford or Cambridge, unless the college assent to the scheme. It is said that this restriction with regard to any school or district does not apply to these particular exhibitions, which exhibitions are confined not to any district, but to the whole principality of Wales. The original founder confined his exhibitions to the six counties of North Wales. I think it has hardly been argued, and that it could hardly be argued that that would not be a restriction in the strictest possible construction of the term. Subsequently, and before the passing of this Act, this restriction was, by the operation of the University Commissioners, enlarged, and all the counties of Wales, and also Monmouthshire, were included as districts from which persons might come and have the benefit of these particular exhibitions. It was said that when this Act was passed the Legislature would find the charity in this position, that the whole of Wales was to have the benefit of the exhibition, and that therefore the exhibitions could not be said to be confined to a district. Really, one has heard no positive definition of a district as applied to this Act which would support such an argument. I apprehend that the rule intended to be introduced by the exception was this, that wherever the restriction exists, the commissioners are let into the enjoyment of all their powers, and as to that restriction it is said that it does not matter whether the exhibition is confined to persons coming from a particular school or to persons coming from a district. A common distinction is north and south of the Trent, and this distinction north and south of the Trent would be a restriction to a district. North of the Trent would be one district, and south of the Trent would be another district. A county like Yorkshire would be in the same way a district; and within the meaning of this Act a district means something different from the whole area with which the Act deals. The whole area with which the Act deals is England and Wales. It does not extend to Scotland or Ireland. A district is a portion of that area, and not the whole of it. That is the plain and simple meaning of the word. An argument might be founded, no doubt, upon the improbability in the first place—the *primâ facie* improbability—of an Act of this kind dealing with the institutions of an university at all, after an Act had been passed which established the university commissioners, and gave them power—which they have exercised in reference to *this particular* charity—to deal with and regulate *a number of* educational endowments which were *connected with* the university, and which powers, it might be said *primâ facie*, having been once granted to a body competent to deal with, and having power to deal with the whole university, could not afterwards be delegated to a different body dealing with a different area, and with different jurisdiction, in such a manner that their jurisdiction should appear to overlap the jurisdiction which had been conferred on the previous body. But even that argument fails entirely when you come to consider the very last section I have been considering, namely, the 4th sub-sect. of the 14th section of the Act, because, undoubtedly that very 4th sub-section implies that with the consent of the college it is restricted as to the larger powers given under the definition in the 5th section, and you measure in some degree, no doubt, those powers by the restraint which is imposed upon them. Well, you find therefore, that there are powers extending to the very foundation of the college, if the college chose to assent. That shows that as far as the original powers went, they contemplated going even to the very matter of educational endowment which might form part of the very endowment or foundation of the college or university, provided you obtained the assent of that body. The assent is to be given to the exercise of the power and the power then exists. There is a restriction of that power in certain cases and that very restriction shows how large and wide the power was in order to render it necessary that such a restriction should be imposed. I think the more every section and sub-section of the Act is considered, the more it will be found that the construction I have suggested is the correct one, and the more you consider it the more you will see that the scheme of the Act is one of very large powers in the first instance, which are afterwards fettered by the Act with restrictions and provisions on account of the largeness of those powers, and only fettered to that extent; and that it is one on which this court is not at liberty to impose any additional fetters or restrictions. It appears to me, therefore, that the view of the Vice-Chancellor was perfectly correct, and that this particular endowment is under the jurisdiction of the commissioners appointed.

Lord Justice JAMES.—I am of the same opinion. I desire to be understood as adopting and repeating every word of the judgment of the Vice-Chancellor as reported, and, of course, the conclusion he has arrived at. I only desire to add one thing further, which is that, being myself a Welshman, I do not find anything derogatory in the decision that Wales is a district.

Lord Justice MELLISH.—I am of the same opinion.

Appeal accordingly dismissed with costs.

Solicitors for the appellants, *Richards*, and *Clarke*.

Solicitors for the respondents, *Farrer*, *Ouvry*, and *Co.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Wednesday, Jan. 17, 1872.

WHITE (app.) *v.* FEAST (resp.)

Wilful damage to property—"Fair and reasonable supposition" of right—Jurisdiction of justices— 24 *&* 25 *Vict. c.* 97, *s.* 52.

24 *&* 25 *Vict. c.* 97, *s.* 52, *enacts that "whosoever shall wilfully or maliciously commit any damage, injury or spoil to or upon any real or personal property whatever, either of a public or a private nature," may be convicted before a justice of the peace, and imprisoned or fined, "provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of," &c.*

The express proviso in this section excludes the implication of the proviso ordinarily implied in cases of summary jurisdiction, that the jurisdiction of justices is ousted by a bonâ fide claim of right. In order to oust their jurisdiction the justices must be shown that there are fair and reasonable grounds for the supposition that the party complained of was acting in the assertion of a right.

Appellant, with thirteen other men, acting under the orders of one D., dug a ditch from forty to fifty yards long in respondent's garden, without any previous communication being made to respondent. D. in giving these orders acted under what he considered a public right, on the ground that about fifteen years before there had been a ditch over part of this ground, which was inclosed as a garden by respondent's father. Appellant having been convicted under the above section by justices, who found that he did not act under a "fair and reasonable supposition that he had a right to do the act complained of:"

Held, that the conviction was right.

CASE stated by justices under 20 & 21 Vict. c. 43.

This was an information, dated 3rd Aug., preferred by Joseph Feast against John White, for that the said John White, on the 1st Aug. 1871, at the parish of Walsoken, in the county of Norfolk, did unlawfully, wilfully, and maliciously commit damage, injury, and spoil to and upon certain real property of the said Joseph Feast, of a private nature, to wit, the land and soil of a certain garden of the said Joseph Feast there situate, by then and there digging and cutting a certain gripple therein, thereby then and there doing injury to the said Joseph Feast to the amount of 1*l.*, contrary to the form of the statute in such case made and provided. And after hearing the parties and the evidence adduced by them, on the 7th Aug. 1871, we, the undersigned, being three of Her Majesty's justices of the peace in and for the said county of Norfolk, did thereupon convict the said John White of the offence charged against him in the said information, and did adjudge the said John White for his said offence to forfeit and pay the sum of 1*s.*, over and above the amount of the injury so done as aforesaid, and for such injury the sum of 1*l.*, to be paid and applied according to law (and also to pay to the said Joseph Feast the sum of 15*s.* 6*d.* for his costs in that behalf), and in case the said sums should not be paid forthwith, we adjudged that the said John White should be *imprisoned* in the house of correction at Swaffham, in the said county of Norfolk, and there kept to hard labour for the space of seven days, unless the said several sums should be sooner paid.

And the said John White, alleging that he is dissatisfied with the said determination as being erroneous in point of law, &c., we hereby state and sign this case.

The defendant having appeared upon summons before us, the undersigned, to answer to the said information, it was thereupon contended on his behalf by Mr. John Walter Watson, his attorney that we had no jurisdiction to hear and determine the said information, but the said John Walter Watson did not show to us by evidence or otherwise that the said defendant acted under a fair and reasonable supposition that he had a right to do the act complained of in the said information, nor that such act was a trespass, not being wilful or malicious, committed in hunting, fishing, or in the pursuit of game, nor that the said defendant was acting *bonâ fide* in the assertion or exercise of any right or supposed right in doing the act complained of in the said information. We thereupon determined to proceed with the hearing of the said information, and it was thereupon proved before us on the part of the said informant, and we find.

1. That the said informant lives at Walsoken, in the county of Norfolk, and is the owner and occupier of a garden there, of which his father, now deceased, was the owner at the time of his decease.

2. That the said defendant lives at Leverington, Parson Drone, about six miles distant from Walsoken aforesaid, and on the 1st Aug. he came with thirteen other men, and without any communication with the said informant, forcibly entered the said garden of the said informant, and dug and cut in the land and soil thereof a gripple (which term we find and adjudge to mean a small ditch), about four feet wide at the top, and about three feet deep, and from forty to fifty yards in length, extending from one end of the said garden to the other.

3. That the father of the said informant, and the said informant (who immediately succeeded his said father) have occupied the said garden in succession uninterruptedly for thirty-six years, and there never was during that period or at any previous time, any gripple or ditch whatever upon the site of at least from fifteen to twenty yards in length of the gripple dug and cut as aforesaid by the said defendant, to wit, at that end of such gripple which lies next the road called the Silt-road.

4. That no gripple has existed for many years, if ever, upon the site of the residue of the said gripple dug and cut as aforesaid by the defendant, until he so dug and cut the same.

5. That the damage and injury done by the said defendant to the land and soil of the said garden, and to the said informant as the owner thereof, by the digging and cutting of the said part of the said gripple of the length of from fifteen to twenty yards, where none formerly existed as aforesaid, amounts to the sum of 1*l.*

And the said John Walker Watson, on behalf of the said defendant, thereupon produced and examined the following witnesses (that is to say):

1. Adam Dawson, who deposed as follows:—

I live at Wisbech, and know Chapel-street, Walsoken. I purchased property there in 1839; at that time there

was a gripple from Chapel-street to the Silt-road, about three feet wide and a foot and a half to two feet deep; it took the surface drainage of Chapel-street when it got to the Silt-road; I don't know where it went to; at that place it passed near the property of Mr. Feast, the informant's father; there was a cart road between the gripple and Mr. Feast's property; the gripple continued there the whole way from Chapel-street to the Silt from the time I purchased the property in 1839 for twenty-two years, when Mr. Feast's father inclosed the whole of that portion which was on the south side of the property; I cannot say whether he filled in the dike or not; the dike was there when he inclosed it; I gave directions for the dike to be cut.

On cross-examination:

I was exercising what I considered to be a public right. I never asked Mr. Feast to cut the gripple out; I think it was a proper thing to do; I swear the gripple ran through to the Silt-road; I can't say when I saw it open last; I swear it was open fifteen years ago; I can't say whether water went down it. Mr. Osborn, the chairman of the board of health, said if we would find a drainage the board would take the road; I submitted to the drainage being closed fifteen years ago; I don't remember the gripples being first cut; I cannot remember the common being inclosed.

2. Joseph Larmet, who deposed as follows:

I live in Wisbech, and know Chapel-street, Walsoken, and South-street, and the Silt-road. South-street intervenes between Chapel-street and the Silt-road; I remember a gripple in 1855 extending from Chapel-street to the Silt-road; I should call it a small ditch, 4ft. wide at the top, and two or three feet deep; I've seen water in it the whole way; it passed the property now occupied by Mr. Feast, and there was a road between it and such property for foot passengers with a hand-cart; Mr. Feast the elder inclosed his part in about 1860 or 1861; he inclosed it with boards at both ends; I expect it was used as a drainage, and inconvenience has arisen from the inclosure to the drainage, and the road was afterwards inclosed up to Chapel-street.

On cross-examination:

I have nothing to do with the cutting of the ditch; I speak to the best of my knowledge; the gripple was open in 1855; I cannot say when I saw water; I came to Wisbech in 1850, and since that time I saw water at the Chapel-street end. I cannot speak to the other end.

The said John Walter Watson then again contended that we, the undersigned, had no jurisdiction to entertain this case or to adjudicate thereon, but he adduced no evidence before us in support of such his contention, nor was it made to appear to us in any way that the said defendant had any reason to believe, although set to work by the witness Adam Dawson, that the said Adam Dawson so employed him in order to assert or exercise any right possessed or supposed to be possessed by the said Adam Dawson, but so far as appeared before us, the said defendant was a stranger to the said informant, and did the act complained of in the information under the mere direction of the said Adam Dawson, and without any knowledge that the said Adam Dawson asserted the claim mentioned in his evidence.

We therefore, upon consideration of all the circumstances of the case found and determined that the said defendant did not act under a fair and reasonable supposition that he had a right to do the act complained of in the said information, and that such act was not a trespass, not being wilful and malicious, committed in hunting, fishing, or the pursuit of game, and that the said defendant was not acting *bonâ fide* in the assertion or exercise of any right or supposed right in doing such act. We also found and determined that the said Adam Dawson and Joseph Larmet were in error in deposing that the gripple or ditch to which they deposed as formerly extending from Chapel-street to the Silt-road, extended throughout the whole of that distance, and that in fact such gripple, if the same ever existed at all in the line deposed to by them, only extended from Chapel-street to a point short of the Silt-road and distant therefrom at least from fifteen to twenty yards, and that throughout such fifteen or twenty yards no gripple ever existed until the gripple complained of was dug and cut by the said defendant as charged in the said information.

Whereupon we the undersigned did adjudge and determine that the said defendant was guilty, and should be convicted of the said offence charged in the said information in manner and form aforesaid, and did adjudge that he should forfeit and pay such penalty, and should pay such compensation for the said injury, and such costs, and in default thereof should be imprisoned and kept to hard labour as respectively hereinbefore mentioned.

If the court shall be of opinion that we the undersigned justices had jurisdiction or power to hear and determine the said information, and that having such jurisdiction or power we had sufficient authority upon the evidence before us to convict the said defendant of the said offence charged against him in the said information, then the conviction shall be confirmed. But if the court shall be of a contrary opinion then the said conviction shall be quashed.

CHARLES CURRIE.
JOHN BRAMHALL.
RICHD. YOUNG.

The enactment (24 & 25 Vict. c. 97, s. 52) under which the appellant was charged was as follows:

Whosoever shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding two months, or else shall forfeit and pay such sum of money not exceeding £5, as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of £5; provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed.

G. Bruce, for the appellant, contended that a *bonâ fide* claim of right having been set up, the jurisdiction of the justices was ousted. In *Reg.* v. *Stimpson* (4 B. & S. 301), a conviction under 24 & 25 Vict. c. 96, s. 24, for attempting to take, otherwise than by angling, fish in a river in which the prosecutor had a private right of fishing, was quashed on the ground that a *bonâ fide* claim of title to fish in the river was made by the defendant before the justices, and that there was no reasonable evidence on which they could find that it was not made *bonâ fide*. "The general rule of law," said Blackburn, J., "applicable to justices exercising summary jurisdiction, is that they are not to convict where a real question as to the right to property is raised between the parties; then their jurisdiction ceases, and the question of right must be settled by a higher tribunal; for the justices, by convicting, would be settling a question of property conclusively and without remedy,

if their decision happened to be wrong." So in *Reg.* v. *Pearson* (L. Rep. 5 Q. B. 237; 22 L. T. Rep. N. S. 126), it was held, that if on the hearing of a complaint for an assault, under 24 & 25 Vict. c. 100, s. 42, it be shown that a *bonâ fide* question as to title to land is involved, the jurisdiction of the justices is at once ousted. [BLACKBURN, J.—The real question here is whether the justices, under the proviso at the end of the 52nd section of the Act (24 & 25 Vict. c. 97), have not got jurisdiction where they are of opinion that the supposition of right was not fair and reasonable; and (2), whether they were not justified in holding that it was not.] It is submitted that whether Mr. Dawson's supposition was or was not fair and reasonable, the appellant at any rate might reasonably believe that Mr. Dawson had a right to give the order which he gave. Quite independently of the statute, whenever a question of title arises, the jurisdiction of the magistrates ceases by a restriction placed on their authority by common law in all cases of summary convictions. Paley on Convictions (edit. 5, p. 137) says, "It has always been held as a maxim that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted. This principle is not founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, and is always implied in their construction; and so rigid is this rule, that even where a statute allows the accused to go into the question of title, he is not obliged to do so, and may object to the jurisdiction of the justices." In *Leath* v. *Vine* (30 L. J. 207, M. C.), a person charged, under 1 & 2 Will. 4, c. 32, s. 30, with trespassing in pursuit of game in the daytime on land in the occupation of a tenant to A., set up a claim of right to shoot over the land, on the ground that he and everyone who chose had always shot there till some recent acts of interruption, and declared his readiness to try the right with A., and it was held that the mere assertion of such a general right in himself and everyone else, though he really believed it, without showing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict under the statute in question; but Wightman, J., who delivered the considered judgment of the court, observed, "I am disposed to think that the mere belief that he had a right is not sufficient under the terms of the statute now in question to oust the jurisdiction of the magistrate, *as it might under the Malicious Trespass Act.*" [COCKBURN, C. J.—If the proviso of the statute is more restricted than the general qualification which exists by implication in all other cases, surely we are bound to act according to what the Legislature points out in the statute? BLACKBURN, J.—If the general qualification is to be implied here, the express proviso of the statute would be rendered useless.] *Hudson* v. *MacRae* (4 B. & S. 585) was also referred to. Finally, the word "wilfully," in the 52nd section of the Act, taken as it is, in connection with the word "maliciously," must mean something more than intentionally.

Thesiger, for the respondent, was not called upon.

COCKBURN, C. J.—I think we need not call on Mr. Thesiger. Our judgment must be for the respondent. Without at all questioning for a moment the truth of the *general proposition*, that in cases where summary jurisdiction is given to justices for trespasses or similar matters, there must be an implied restriction on their jurisdiction where there is a *bonâ fide* claim of right, yet it is quite competent to the Legislature to qualify that general proposition, and to cut it down within such limits as they think proper; and I think we must adjudicate on this on the terms of the statutory enactment. When we look at it we find that it comes to this—that a person shall be liable to be summarily convicted where he has committed, wilfully or maliciously, damage or injury to the property of another, and that he is not entitled to call on the magistrates to hold their hands if he has entertained, upon unreasonable grounds, the opinion that he was justified in what he was doing, although he may have honestly believed that he was justified in doing the act; because the Legislature has chosen to put only such a restriction on the jurisdiction of the magistrates. It is expressly enacted that in order to oust their jurisdiction there must have been fair and reasonable grounds for the supposition that the party was acting in the assertion of a right. That being expressly stated by the Legislature as the limit of the magistrate's jurisdiction, it is not for us to extend the limit. The general rule applies here, that that which is expressed gets rid of that which would otherwise be implied. Then comes the other question—whether the magistrates were justified in finding that the appellant had no fair and reasonable ground for supposing that he had a right to dig the ditch. In my opinion there was abundant evidence on which they might come to that conclusion. It is said that, inasmuch as the appellant was employed as a mere labourer by another person to do the act in question, he was justified in supposing that there were fair and reasonable grounds for the order given him by Dawson. But I cannot assent to that proposition. I think it cannot be a just ground for holding a person exempt from the jurisdiction of the justices. The appellant can be in no better position than the person who employed him. We will suppose, in his favour, that he inquiries, before he does what would be an act of trespass, of the person who employed him, on what grounds the act ordered would be justifiable; and let us suppose, further, that his employer states to him the grounds on which he gives the order. If the grounds alleged are not fair and reasonable grounds, then the servant can be in no better position than the master. Now, it appears here that about fifteen or sixteen years ago there was a similar ditch existing—and even as to that there is some evidence to the contrary—a ditch into which the water flowed, either accidentally or of right, which latter there is no evidence to show. About fifteen or sixteen years ago it was stopped up, without any one asserting a right to have it open. After such a lapse of time the appellant comes with twelve or thirteen other men employed by Dawson—without any notice whatever being given to the respondent, or any prior assertion of right—into the private garden of the respondent and cuts open the ditch in derogation of the legal right of the respondent. On such a state of facts I think that the magistrates were fully justified in coming to the conclusion at which they arrived. I quite agree that the magistrates cannot give themselves jurisdiction by finding as a fact that for which there is no evidence. But

where there is evidence, and the conclusion is a reasonable one, we cannot interfere. I think their decision on the point was right, and our judgment must therefore be for the respondent.

BLACKBURN, J.—I am of the same opinion. It is an inaccurate phrase to speak of a common law restriction on the summary jurisdiction of magistrates, for the very excellent reason that there is no summary jurisdiction at common law. All summary jurisdiction is the creature of statute. But this principle has existed for several years; that inasmuch as questions of title to lands are questions of much difficulty, it must be considered, unless there is something to show the contrary, that where a statute gives summary jurisdiction, there is an implied restriction on that jurisdiction wherever a question of title to land is *bonâ fide* raised before the magistrates. They are in such a case to hold their hands, probably because they are not well fitted to decide such questions. Where it appears from an Act of Parliament, as in the case of the Highway Acts, that it was not the intention of the Legislature that such a restriction should exist, this rule does not apply. The justices are not bound in such a case to hold their hands, though that will not prevent the question of title being afterwards raised. There is a series of decisions establishing another rule, that an act cannot be a crime unless there is a *mens rea*. If, therefore, the person doing it believes that he had a *bonâ fide* right to do it, there is to be no conviction for a crime, because of the absence of the *mens rea*. If the intention is to protect property from injuries done even by innocent persons, as in the case of a trespass, as distinguished from a guilty act, this rule applies. In the present case the words of the 51st section of the Act of Parliament are "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding 5*l.* shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour." Then comes the 52nd section providing that "whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding two months," &c. To this a proviso is added that "nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass not being wilful and malicious, committed in hunting, fishing, or the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed." It is noticeable that "wilfully and maliciously," in the 51st section, is changed to "wilfully or maliciously" in the 52nd; and also that, in the case of *hunting, fishing,* or the pursuit of game, any *trespass not malicious* is exempted from the operation *of the enactment*. If the "or" were to be read "and" the first part of the section would be most insensible, but, read as it is, the section has a very sensible meaning. It seems to me that it was purposely provided that a distinction should be made between a trespass wilful or malicious and one which is both wilful and malicious. And we must remember that many of the injuries to property, wilful, but not malicious, are done by very poor persons, against whom it would be absurd to proceed by civil actions in the Superior Courts; the remedy would be worse than the disease. It was desirable, however, to provide remedies for the protection of property in such cases; but, at the same time, it was not desirable that the poor man should not be dealt with in the manner provided by the statute, where he has a *bonâ fide* claim of right; and the Legislature has not given the magistrates jurisdiction to decide on that claim, whether it be a well-founded claim or not; but the Legislature has trusted them with the power of determining whether the supposition is a "fair and reasonable" one or not; and of convicting where any person does such an injury to property wilfully without any reasonable ground for the supposition that he has a *bonâ fide* claim of right. The real thing is the power given to the magistrates to grant compensation to a certain amount to the party injured by the wilful act of another, whether the act so done be done under a *bonâ fide* claim of right or not, if it is not founded on a fair and reasonable ground, the words of the proviso being, that nothing contained in the section shall extend to "any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of." I can read these words in no other way than as giving the magistrates a right to decide whether the supposition acted on is a fair and reasonable one or not. The decision of that point is to be within their jurisdiction. Taking this to be the proper view of the construction of the statute, the question next arises, were the magistrates right in determining that the appellant in digging this trench was not acting under a fair and reasonable supposition of right? He was hired to dig the trench by Mr. Dawson, and he does not seem to have made any inquiry, but simply to have done what he was ordered to do by Mr. Dawson. I am far from saying that that might not in many cases be a fair and reasonable ground for so acting. I might put the case of a farmer ordering one of his labourers to dig up an adjoining hedge, an act which might, so far as the farmer was concerned, be a wilful injury to the property of another; but the labourer might well say, "I had a fair and reasonable ground for supposing that the farmer for whom I was working had a right to order me to do the act," though, in fact, the farmer had no such right. But where we have to deal with the case of a man who simply says to another, "Go and dig a ditch in my neighbour's garden," we must at once see that that is not a similar case. If Mr. Dawson had shown a fair and reasonable ground for a claim of right, that would, I think, extend to those persons who acted under his directions or orders. But what he says comes simply to this, "I had a right to dig this ditch, and in doing so I was exercising only a public right; and the reason why I think I had a fair and reasonable right to do so is that about fifteen years ago there was a ditch open there. About that time

the persons occupying this place stopped up the ditch and enclosed it, and turned the gripple as well as the cart road into a garden for himself; and because, more than fifteen years ago, there was a ditch *de facto* existing there, I have now a right to make a common sewer of the place." The justices were quite right in holding that this was an unreasonable supposition of right. At the trial of a civil action at Nisi Prius, Mr. Dawson may possibly make out such a case as he has set up; but, so far as the case came within the jurisdiction of the magistrates, we cannot say that they were not at liberty to come to a different conclusion. I fully agree with what my lord has said as to the calling in of twelve other men, and the high-handed manner of the whole procedure.

MELLOR, J.—I am of the same opinion. Wherever a statute creates an offence of this description, and also enacts a proviso as to the restriction which is to be placed on the jurisdiction of the magistrates, we are not at liberty to imply any other restriction on that jurisdiction. There is no doubt that in some cases the reasonableness of the conduct of the person doing the act is involved in the words "*bonâ fide* claim of right," but there may be a *bonâ fide* claim of right in some cases where there is no reasonable ground for the claim. The jurisdiction of the magistrates is ousted only where there is reasonable ground for the supposition, and as to the existence of such reasonable ground in the present case I entirely concur in the observations which have fallen from the other members of the court.

QUAIN, J.—I am entirely of the same opinion. I think that the appellant must show to the justices that he had a fair and reasonable ground for supposing that he was acting in the assertion of a claim of right. He can here be in no better position than Mr. Dawson himself, and I can find no evidence whatever that Mr. Dawson had a fair and reasonable ground for the supposition that he had a right to cut a ditch through the private property of the respondent. In his direct evidence he says he cannot say whether the respondent's father filled in the dike or not. In cross-examination he says he cannot say whether the water ever went down it; and his only witness says "I expect it was used as a drainage." I think such evidence shows no reasonable grounds, on the face of the case, for Mr. Dawson's supposition that it was used as a common sewer. I think, therefore, that the respondent was right and that this appeal must be dismissed.

Judgment for the respondent.

Attorneys for appellant, *Jenkins* and *Abbott*, for *Watson*, Wisbeach.

Attorneys for respondent, *Wing* and *Du Cane*.

Monday, Jan. 22, 1872.

REG. *v.* HARRALD.

Married woman—Right of to vote at municipal election—32 & 33 Vict. c. 55, s. 9; 33 & 34 Vict. c. 93.

Married women who are such at the time the burgess list is made, are, notwithstanding 32 & 33 Vict. c. 55, s. 9, disqualified to vote at municipal elections.

Sect. 9 of 32 & 33 Vict. c. 55, which enacts that in the Municipal Corporation Acts, "words importing the masculine gender, shall be held to include females for all purposes connected with and having reference to the right to vote in the election of councillors, auditors and assessors," removes only the disqualification previously existing on the ground of sex, and does not affect the disqualification arising from marriage.

The Married Women's Property Act (33 & 34 Vict. c. 93), does not remove the latter disqualification.

Semble, that a woman who is single at the time she is put on the burgess roll, but marries before the election, is disqualified to vote.

IN this case a rule had been obtained by *Herschell* calling on Charles Harrald to show cause why a *quo warranto* information should not issue calling on him to show by what right he exercised the office of town councillor of the borough of Sunderland.

It appeared from the affidavits that at an election of town councillors for the borough of Sunderland, held on 1st Nov. 1871, Charles Harrald was elected for the Sunderland ward by a majority of one over the next candidate.

Amongst those who voted for him were two married women. Mrs. Thompson and Mrs. Storey.

Mrs. Thompson, at the time she was put upon the burgess roll was a married woman, but lived apart from her husband, and occupied a house and paid rates as a single woman.

Mrs. Storey was a single woman at the time she was put on the burgess roll, but married about ten days before the election.

Crompton showed cause against the rule.—Sect. 9 of 32 & 33 Vict. c. 55, empowers women to vote at municipal elections. That section enacts that "in this Act and the 5 & 6 Will. 4, c. 76, and the Acts amending the same, wherever words occur which import the masculine gender, the same shall be held to include females, for all purposes connected with and having reference to the right to vote in the election of councillors, auditors, and assessors." There is nothing whatever in the Act to prevent a married woman from exercising the municipal franchise: the words are quite general, applying to all women, married and unmarried alike. The first of the two women, therefore, was not disqualified to vote. As to the second, she was unmarried at the time she was put on the burgess list, and was then clearly entitled to vote. Can a marriage occurring subsequently, and before the next burgess roll is made out, deprive her of that right? The effect of marriage is simply to transfer her property to her husband; but suppose a male had transferred, after being put on the burgess roll, the property in respect of which he had been put there, would that have disqualified him to vote? It clearly would not, and why then should an act which has merely the same effect, disqualify a woman? The roll is conclusive as to those persons who are entitled to vote, and it has been decided that you cannot question by *quo warranto* against the person elected, the qualification of a person who has been put there: (*Reg.* v. *Tugwell*, L. Rep. 3 Q. B. 704)—"I think," said Blackburn, J., in this case, "the Legislature intended that the burgess roll should be conclusive. By sect. 15 of 5 & 6 Will. 4, c. 76, the overseers are to make out the burgess list which must be duly published. By sect. 17, persons omitted from the lists may claim to have their names inserted, and the names of persons not entitled to be on the list may be objected to, and the town clerk is to make out lists of claimants

and lists of persons objected to, which must also be duly published. By sect. 18, the mayor and two assessors are to revise the lists. By sect. 22 the burgess lists revised by the mayor are to be delivered to the town clerk, who is to cause the burgess lists to be copied into one general list in a book, with every name numbered, and 'every such book in which the said burgess lists shall have been copied, shall be the burgess roll of the burgesses of such borough entitled to vote in the choice of councillors . . . . of such borough.' It is clear from these enactments, by which careful provision is made for revising the burgess lists, that the burgess roll ought to contain the names of all persons entitled to vote, and that no person whose name is not in the roll can vote, and the Legislature intended the burgess roll to be conclusive on the point. The only argument that can be suggested against this view is grounded on sect. 9, and it is said that it is only persons *duly* enrolled according to the provisions of that Act who shall be burgesses of a borough; but I think that there is no weight in the argument, as a careful provision is made for revising the lists." There is, it must be admitted, no instance of a married woman voting before the statute, but this was because before the statute no woman at all could vote. As to the other woman, by 33 & 34 Vict. c. 93, a married woman is now entitled at law to hold property, and, if so, the disqualification formerly arising from coverture is done away. It was a question to be determined before the making of the burgess roll whether her property was or was not of such a character as would entitle her to vote; and as an adverse determination was not come to the burgess roll is decisive. [HANNEN, J.—It has been held that a married woman, though on the list of Parliamentary voters, cannot exercise the franchise. MELLOR, J.—Bright, in the very beginning of his book on the Law of Husband and Wife, lays it down that "By marriage, the husband and wife are as one person in law. Upon this union depend almost all the legal rights, duties, and disabilities, which either of them acquires or incurs by the intermarriage. The very being or legal existence of the woman is by the common law suspended during the marriage, or at least it is incorporated and consolidated into that of her husband, under whose wing, protection, and cover, she performs everything."]

Herschell, in support of the rule.—Both women are disqualified to vote. Neither being *sui juris* has any legal existence at the time of voting. Their votes were, therefore, when given, absolutely void. Further, neither of them is a "person" in the eye of the law, the legal existence of each being merged in that of her husband. The Legislature never intended to give the municipal franchise to married women. 32 & 33 Vict. c. 55 only removed the disqualification of sex, but did not touch in any way the disqualification arising from marriage. In the case of married women a double disqualification previously existed, and only one part of it has been abolished by the statute.

COCKBURN, C.J.—I think there is quite enough to entitle Mr. Herschell to have this rule made absolute, because it seems to me that as to the vote of one of these two married women it is impossible to say that it is good, and I am strongly *inclined to think* that the vote of the other is *bad also. The* first vote is that of a married *woman, originally* single, put on the burgess roll. It is quite certain that according to the old common law of the land, a married woman was considered to have all her rights merged in those of her husband—she was disqualified to exercise any rights apart from him. That was thought to be a hardship in the case of her possessing property, and it was often argued and strongly urged that, inasmuch as the qualification for being put on the burgess roll was the possession of property, married women possessed of such property ought to be allowed to exercise the right of voting, for which right the possession of property was the sole required qualification. It was thought that at least unmarried women should be allowed to exercise this right. Accordingly the statute 32 & 33 Vict. c. 55, gave effect to these views by enacting that wherever, under any municipal statute, men were entitled to vote, women who were in the same situation should also be allowed to vote. The women intended by this were women possessed of property. I cannot think that the Legislature intended, by a general enactment that women should be entitled to vote, to alter the status of married women according to the general law of England. That statute has certainly not done so. The only way of bringing married women within that statute is by saying that by a subsequent statute their status has been altered by giving them a property independently of their husbands. It is plain that this subsequent statute was passed altogether with a different object—*alio intuitu*—from that of 32 & 33 Vict. c. 55; and I cannot think that it was intended by a side-wind to give them a different status as to political and municipal rights of voting. I have no doubt, therefore, as to the case of one of these married women. As to the other the case is somewhat different. At the time she was put on the burgess roll, she was not married, and therefore by the Act 32 & 33 Vict. c. 55, she was entitled to vote. Shortly before the election she married, and by the act of marriage her status became altered to that of a married woman, with all the incidents attaching to that condition. But it is said that once a person is put on the list, though the qualification is lost, and she could not then for the first time be put upon it, yet the right conferred by being placed there is not lost; and generally, no doubt, that is so in the case of a man, whose right is not altered by reason of something happening, which, if it happened before he was put on the roll, would have disqualified him. The question is, whether the same thing applies to the case of a married woman, whose legal status is altogether altered by the act of marriage. I am strongly inclined to think it does not, but that the case is the same as if she had originally been a married woman, and as such disqualified to be put on the roll. It is not necessary, however, to decide either of these points; for either is sufficiently doubtful to entitle Mr. Herschell to have his rule made absolute for a *quo warranto*.

MELLOR, J.—I am entirely of the same opinion. As to the married woman, there is no doubt that the effect of marriage is to affect all such rights as she could exercise whilst single, and to merge them in those of her husband. After marriage she can only exercise any right under his protection. The passage which I cited from Bright's Law of Husband and Wife is still in its general principles applicable. Mrs. Thompson, therefore, was disqualified at the time she was put on the burgess list; and I agree with my Lord that the subse-

quent act referred to was not intended to have the effect contended for by Mr. Crompton, and that her disqualification existed during the whole of the time. As to the woman who was single at the time she was put on the burgess roll, I quite agree that were it not for the subsequent marriage, she would be entitled to vote by virtue of the 9th section of 32 & 33 Vict. c. 55, which destroys and abrogates the disqualification arising from sex, but not any other disqualification whatever, as, for instance, that of marriage. I think the fact of her having been married before the election extinguished the right which she had acquired as a single woman. The only effect to be given to the 9th section is to hold that it simply removes the disqualification arising from sex, but leaves all other disqualifications undisturbed.

HANNEN, J.—I am of opinion that the Married Women's Property Act was intended only to protect a married woman in the enjoyment of her property, and was not intended to extend the political rights of women; and that the question of their political rights must be clearly raised before the Legislature and be decided by it and that we must not by a sidewind give an extension to the Act not contemplated by the Legislature. I am not equally clear as to the point concerning the second vote. But there is sufficient doubt existing to make it desirable that the matter should be raised on the record. The rule must therefore be made absolute.

Rule absolute.

Attorneys for relator, *Harle* and *Co.*

Attorneys for defendant, *J. W. Hickin*, for *Brown* and *Son*, Sunderland.

Saturday, April 27, 1872.

SECOND COURT.

REG. *v.* AYLESFORD UNION.

Rateable value of chalk pit—Neighbourhood of cement works—Profits of actual tenant.

The occupiers of cement works, and also of a chalk pit situated close by, were assessed separately as to their works and their pit. There were other equally good chalk pits in the neighbourhood, the chalk from which was used only for ballast and other purposes not so profitable as that of manufacturing cement, for which the appellants used theirs. They appealed to quarter sessions against the assessment of the chalk pit; and the counsel who supported the rate, proposed to ask the appellants' manager for information as to the profits the appellants obtained from the chalk, but the quarter sessions refused to admit evidence upon that subject.

Held, upon a special case stated for the opinion of the Court of Queen's Bench, that the quarter sessions were right, and that although the convenience and situation of the chalk pit were to be considered in estimating what rent a tenant would reasonably pay, the actual profits derived by the appellants were not material in forming that estimate.

AT a general quarter sessions of the peace holden by adjournment at Maidstone, in and for the county of Kent, on Thursday 29th June 1871, upon an appeal of John Messer Knight, and Thomas Bevan (hereinafter called the appellants,) against the guardians of the North Aylesford Union, and the churchwardens and overseers of the poor of the parish of Northfleet, in the same county (hereinafter called the respondents), touching a certain rate or assessment made for the relief of the poor of the said parish of Northfleet, on the 28th March 1871; by which said rate the appellants were assessed in the sum of £1156 for the gross estimated rental, and in the sum of £1136 for the net rateable value of certain premises in the said parish, in the occupation of the appellants: The said court of quarter sessions amended the said rate by striking out the said sum of £1156, gross estimated rental, and inserting in the said rate the sum of £1083 in lieu thereof; and by striking out the sum of £1136 net rateable value and inserting in the said rate the sum of £1063 in lieu thereof, subject nevertheless to the opinion of the Court of Queen's Bench upon the following case:

The appellants Messrs. Knight and Bevan are large cement makers carrying on their business, and owning and occupying large works in the said parish of Northfleet.

The rate against which the said appeal was brought so far as relates to the premises in the occupation of the appellants is as follows, that is to say:

Number.	Dua, or if exonsed.	If exonsed, write the word exonsed.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Estimated extent. a. r. p.	Gross Estimated Rental.	Rateable value.	Rate at 1s. in the £.
1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.
								£	£	£ s. d.
216			Knight, John M., and Bevan, Thomas.	W. H. Poynder.	Buildings, tramways, tunnels, land and premises, and land occupied and used for digging chalk, &c.	Bow-street, on each side.	17 0 6	1156	1136	56 16 0
217			Knight, John M., and Bevan, Thomas.	Messrs. Knight and Bevan.	Cement works—viz., washmills, backs, buildings, sheds, furnaces, kilns, machinery, tramways, tunnels, land, wharf, jetty, premises, and appurtenances.	On the shore.	15 0 9	3902	2836	136 15 0
218			Knight, John M., and Bevan, Thomas.	Messrs. Knight and Bevan.	Land occupied and used for digging chalk, &c., with tramway and tunnel thereto from the works.	Near the shore.	1 2 0			
			Knight, John M., and Bevan, Thomas.	Messrs. Knight and Bevan.	Backs, buildings, sheds, furnaces, kilns, machinery, lands, wharves, docks, premises, and appurtenances.	Cement works on the shore.	13 1 11			

The tenements mentioned under the No. 216 in the said rate are those whose rateable value was in dispute on the appeal.

This land consists of a chalk pit, lying on both sides of a certain public road, called Bow-street. The tenements, Nos. 217 and 218 in the said rate, lie immediately adjoining to the chalk pit, being separated from it only by the public road running from Bow-street to the river Thames.

The premises, Nos. 217 and 218, contain the cement manufactory properly so called, which consists of wash mills, backs, kilns, and grinding mills; sheds for making cement casks, warehouses for storing the cement, and wharves, extending into the river, for shipping it. The whole of the premises up to the road separating them from those in 216 is the freehold property of the appellants.

The premises, No. 216, were hired by the appellants, and are used by them solely for the purpose of getting chalk for making cement, the same being a necessary ingredient in that substance. There is a tramway by which the chalk, when quarried, is conveyed directly into the works by a tunnel. The chalk, after being brought from the pit, is thrown into the wash mills, where it is mixed with water, and a certain proportion of mud, so as to form a paste of about the consistence of cream. It is then pumped from the mills into large open spaces, called backs, in which the water drains away and evaporates; and the residue, when nearly dry, is broken up and placed in kilns, in which it is burnt. It is then ground to powder, and is packed in casks and bags, and is then ready for sale as cement. The whole of the premises in No. 216 are held by the appellants from a Mr. Poynder, under a lease for twenty-one years, from the 25th March 1864, subject to a rent of 600*l.* per annum, and the payment of an annuity of 200*l.* per annum, to a lady whose age was sixty-four at the date of the lease. The former occupier held the property mentioned in the lease, under a yearly letting, at the annual rental of 300*l.*, but shortly before the 25th March 1864, the rent was raised to 500*l.* a year, and the lessor knew that the appellants wanted it to get chalk for the manufacture of cement.

In the year 1870 the appellants obtained the whole of the chalk used in the manufacture of cement from this pit. The number of cubic yards of chalk actually excavated from the pit in question, and used in the making of cement in the year 1870 was 50,000, which, according to the calculation of the appellants, would represent 65,000 tons, but, according to the calculations of the respondents, would represent 86,250 tons.

The sessions have, as a matter of fact, adopted the calculations of the appellants,

There are several other chalkpits in the neighbourhood, producing chalk of about the same quality as that of the appellants'. These, however, are used only for the purpose of obtaining chalk for ballasting ships, and are held on the terms of paying to the landlord a royalty which varies from 4*d.* to 6*d.* per ton on the chalk got. It was admitted that much greater profit would be made of chalk by making it into cement than by using it for ballast.

Upon the trial of the appeal, Mr. Bevan, who was the partner managing the works, was called, and gave evidence for the appellants; and on his cross-examination by the counsel for the respondents, gave certain answers, from which these facts have been found by the court; and after he had stated the number of cubic yards of chalk got in the year 1870, the counsel for the repondents proposed to ask him how many casks of cement were produced from that quantity of chalk, and what was the price of the cement per cask. This question was objected to by the counsel for the appellants, on the ground that it was evidently intended as a step in an inquiry into the profits of the trade.

The counsel for the respondents thereupon admitted that his object in asking the question was to obtain information as to the profits made from the manufacture of the cement, and contended that although it was necessary that the two sets of premises should appear in the rate under distinct items, by reason of the different ownerships of the two, yet that they were virtually all part of the same factory, and that the rent which could be reasonably expected to be obtained for the chalk pit in the terms of the statute 6 & 7 Will. 4, c. 96, was not to be estimated by such a royalty as another tenant would pay for the purpose of getting ballast, but by such a royalty as a tenant could afford to pay who was enabled to connect the pit with a cement factory, and who used the pit in the way in which the appellants actually use it; and that its connection with the cement works was to be taken into consideration as increasing the value to the present appellants.

The appellants admitted that they made a large profit by the manufacture of the chalk into cement, but they contended that they ought not to be obliged to disclose the amount of profit made by them; they further contended that they ought to be rated upon an estimate of the rent at which the property might reasonably be expected to let from year to year free of all usual tenants' rates and taxes.

The court refused to allow evidence of the amount of the profits made by the appellants in manufacturing chalk into cement to be gone into, subject to the opinion of the Court of Queen's Bench on the propriety of such rejection; and they eventually amended the rate by reducing the gross estimated rental from 1156*l.* to 1083*l.*, and net rateable value from 1136*l.* to 1063*l.*

The question for the opinion of the Court of Queen's Bench is,

Was the court of quarter sessions wrong in refusing to allow these questions to be put, viz.:

How many casks of cement did you make last year?

What was the price of the cement per cask?

These questions being admitted to be put with a view of ascertaining the profits on the cement works, to show that chalk so used is more valuable, and how much more so than chalk used for ballast.

If the Court of Queen's Bench answer this question in the negative, the order of sessions amending the rate is to be confirmed.

If the court answer this question in the affirmative, the order of sessions amending the rate is to be quashed, and the original rate confirmed.

Poland appeared to support the order of sessions; but the court called upon

Barrow and *Biron* for the churchwardens and overseers of the parish of Northfleet, the respondents at the quarter sessions. The court of quarter sessions refused to consider the advantage which the appellants derived from the proximity of this chalk pit to their cement works.

They ought to have taken into account the further rent which a tenant would pay for the chalk pit, if he had all the advantages which the appellants enjoy for using it, the value of this chalk pit ought not to be estimated at the amount which a tenant would pay for another pit which produced the same quantity and quality of chalk. The only true mode of estimating the value of the whole of the appellants premises is by obtaining their profits and making the necessary deductions, just in the same way as a railway company is assessed. The principles for rating the occupier of a brickfield, which for this purpose would be premises analogous to the appellants', are laid down in *Reg* v. *Westbrook* (10 Q. B. 178); there it was held that the royalty per thousand of bricks made in the year, and the fixed annual charge, both of which the occupier paid to the lessor of the land, were properly considered as the rent. These cement works and all the premises held by the appellants in connection with them ought to be assessed according to the established principles concerning railways and gasworks:

Reg. v. *London and South-Western Railway Company*, 1 Q. B. 556;

Reg. v. *Grand Junction Railway Company*, 4 Q. B. 18;

Reg. v. *Sheffield Gaslight Company*, 23 L. J. 169, M. C.

BLACKBURN, J.—Upon the facts stated in this case, I think there cannot be the smallest doubt that the quarter sessions rightly refused to consider the matters which the respondents proposed to raise. The rateable value of this chalk pit is the amount of rent at which the same might reasonably be expected to let from year to year, free of the expenses necessary to maintain it in a state to command such rent. There are two elements which should be considered in order to arrive at this rateable value:—what would a tenant pay for it? and what would he give for another equally good ground? The contiguity of the cement works must be considered in this way: Would he pay more rent for the chalk pit on that account? The sessions may have thought that as there were equally good chalk pits in the neighbourhood, the hypothetical tenant would not have preferred one to the others. If that were so, it matters not how much the appellants can manage to make out of this particular pit, and the sessions were quite right in disallowing inquiries into their profits.

MELLOR, J.—I am of the same opinion. The respondents seem to have contended that the proper criterion of the rateable value was the amount of yearly profits. No doubt the convenience and advantages of the situation of the chalk pit ought to be considered, but not the profits actually derived from it by the appellants. All the quarter sessions ask us is were they right in refusing to admit these questions? I think they were.

Order of sessions affirmed.

Attorneys for appellants, *Nickinson, Prall*, and *Nickinson* for *Richard Prall*, Rochester.

Attorneys for respondents, *T. Simey* for *Essell, Knight*, and *Arnold*, Rochester.

Wednesday, Jan. 24, 1872.

COLAM v. MANFIELD.

Quarter sessions—Power to quash conviction without hearing evidence—Jurisdiction of Queen's Bench—12 & 13 Vict. c. 92, ss. 2, 23, 26.

An order of quarter sessions quashing on appeal a conviction, stated on the face of the order that it was made "upon the said appeal coming on to be heard, and reading the said recited conviction, and hearing the allegations of counsel on both sides, and upon due proof and consideration of the premises."

Held, that this order was good on the face of it, and that it was not necessary that the quarter sessions should hear evidence before quashing the conviction. It is competent to them to do so where the statement of facts which the prosecuting counsel is prepared to prove does not disclose sufficient to sustain a conviction.

Quære, whether the Court of Queen's Bench can review an order of quarter sessions quashing a conviction solely on a point of form, contrary to 12 & 13 Vict. c. 92, s. 26.

THIS was a rule *nisi* to quash an order of quarter sessions made upon an appeal of William Manfield against a conviction under the hands and seals of Richard Oliver and others, justices for the county of Dorset, dated 29th April 1871, whereby the said William Manfield was convicted, for that he on 29th March 1871, at, &c., unlawfully did cause to be cruelly illtreated and tortured, a certain animal, to wit, a horse.

The following was the order of quarter sessions:—

Upon an appeal made unto this court by William Manfield, from and against a certain conviction of him, the said William Manfield, by Richard Oliver Francis Steward, and Edward Leigh Kindersley, Esquires, two of Her Majesty's justices of the peace, acting in and for the county of Dorset, bearing date the 29th April last past, for that he, the said William Manfield, on the 29th of March last past, at Higher Burton Farm, in the parish of Charminster, in the county aforesaid, did unlawfully cause to be cruelly illtreated and tortured a certain animal, to wit, a horse. And the said justices thereby adjudged the said William Manfield for his said offence to forfeit and pay the sum of 5*l.*, to be paid and applied according to law; and also to pay to John Colam, the complainant, the sum of 5*l.* 13*s.* for his costs in that behalf. Now upon the said appeal coming on to be heard, and reading the said recited conviction, and hearing the allegations of counsel on both sides, and upon due proof and consideration of the premises, this court doth therefore order that the said conviction be quashed, and the same is quashed accordingly; and this court doth also order that the said John Colam, the said respondent, do and shall, upon notice of service of this order, pay or cause to be paid unto the said William Manfield, the appellant, the sum of 34*l.* 14*s.* 1*d.*, being such costs and charges as appears to this court reasonable and just in his prosecuting the said appeal.

BY THE COURT.

The following affidavit was made by Mr. Colam on the motion for a rule *nisi*.

That I was the prosecutor in the case of Reg. v. William Manfield, of Dorchester, in the county of Dorset, gentleman, for cruelty to an animal, to wit, a horse, and

H. H.

upon my complaint proceedings were taken under the provisions of an Act of Parliament passed in the 12th and 13th of Vict. c. 92, intituled "An Act for the more effectual Prevention of Cruelty to Animals," which complaint was heard and determined on the 29th April 1871, before two of Her Majesty's justices of the peace for the county of Dorset, sitting in petty sessions at Dorchester, in and for the county of Dorset, when the said William Manfield was adjudged to be guilty, and was convicted of the said offence and ordered to pay a fine of 5*l.* and 5*l.* 13*s.* costs, or to be imprisoned for the term of two calendar months, and the conviction was returned to the court of quarter sessions held at Dorchester on the 28th June 1871, the said conviction being in the form conformable to the requirements of the said Act.

That the said William Manfield entered an appeal against the said conviction on the grounds, first, that he was not guilty of the offence of which he had been convicted; secondly, that the formal conviction drawn up and returned to the said sessions was not in law sufficient to support the conviction; thirdly, that the said conviction was bad on the face thereof.

That afterwards, that is to say, on the 28th June 1871, being the day appointed for holding the quarter sessions of the peace in and for the said county, at Dorchester aforesaid, before the Right Hon. Lord Portman, chairman, the Rev. Charles William Bingham, and William Charles Lambert, Esq., then and there being justices of the peace for the said county, and then sitting and constituting the said court of quarter sessions, the said appeal of the said William Manfield came on to be heard, and the said conviction was, by order of the said court of quarter sessions, quashed, on the ground that it ought to have been in the words provided by the said Act, and that the form in which the said conviction had been returned was not applicable to the case, and that the said conviction was therefore invalid.

That I, the said deponent, do now apply by my counsel that a writ of *certiorari* may issue to bring up the said conviction and the proceedings thereon, that the said order of the said court of quarter sessions may be quashed or otherwise dealt with as to this honourable court may seem fit, on the grounds that—first, the form of conviction returned as aforesaid, being in accordance with the provisions of the said Act, is a good conviction under the said Act, which authorises the use of the form provided by the 23rd section of the said Act or any form made according thereto, or to the effect thereof, or as near thereto as the case shall permit; secondly, that the said statute under which the conviction was made enacts in the 26th section thereof that no conviction made under the authority of this Act, nor any order, judgment, or proceeding relative thereto, shall be quashed for want of form.

The affidavit of the attorney for the appellant, against the rule, stated as follows:—

The said William Manfield duly entered an appeal at the then next general quarter sessions of the peace for Dorset, against the said conviction, and that the grounds of the said appeal were -first, that the said William Manfield was not guilty of the said offences or either of them; secondly, that the formal conviction drawn up and returned to the said sessions was not in law sufficient to support the conviction; thirdly, that the said conviction was bad on the face thereof.

That I acted as the attorney of, and was present at the hearing of the said appeal, for the said William Manfield, at the said general quarter sessions of the peace for Dorset, which were held on the 27th June 1871, at Dorchester aforesaid, before the Right Hon. Lord Portman, chairman, Willam Charles Lambert, Esq., and others, justices of the peace for the said county, then sitting and constituting the court of the said quarter sessions; that the said appeal then came on to be heard by and before the said court, when counsel on the part of the respondent, John Colam, opened the case, and stated matters he should prove in evidence; that, thereupon, counsel on behalf of the said appellant submitted to the said court that if all those matters were proved, as stated by the said respondent's counsel, no offence was shown.

And he also submitted that the said conviction *was bad; that* the said court of quarter sessions *quashed the said* conviction with costs, and refused the application of the said respondent's counsel to give the reasons of such course for quashing the said conviction, and also refused the application of the said respondent's counsel to grant a case for the opinion of this honourable court.

Maule, Q.C. and *A. Collins* showed cause against the rule.—This court will not interfere unless there is something in the order showing error on the face of it. This court is not a court of appeal from quarter sessions, and has no jurisdiction to quash orders made on matters within the jurisdiction of the justices, even though those orders may not be such as the court can approve. In *Rex* v. *The Justices of Monmouthshire* (8 B. & C. 137), this court refused an application for a *certiorari* to remove and quash an order of quarter sessions, adjourning the hearing of the appeal, on the ground that even if the order of sessions were erroneous, the Court of Queen's Bench had no jurisdiction to review it. "This," said Lord Tenterden, C.J., "is an application to the court to quash an order of sessions made for adjourning an appeal, on the ground that upon the question whether the order of removal should be confirmed, the justices were equally divided in fact, though it is alleged that, in point of law, two were for quashing the order, and one only for confirming it; because it is contended that the vote given by one of the justices for confirming the order was a nullity, and therefore the sessions ought to have quashed the order of removal, and not to have adjourned it. The late decisions establish, however, that we cannot assume to ourselves the jurisdiction of a court of error and revise the judgments of the court of quarter sessions." In *Rex* v. *Gudridge* (5 B. & C. 459), as pointed out by Lord Tenterden in this case, the rule which had been obtained was not to review the order of the court of quarter sessions, but to quash a writ of *certiorari quia improvide emanavit*. In *Reg.* v. *The Justices of Cheshire* (8 A. & E. 398), it was also distinctly held that this court would not notice objections not appearing on the face of the order. There, on appeal against an order of removal, the respondent, at sessions, objected to the statement of grounds, and the court held the statement bad; the respondents demanded to have the order confirmed, but the sessions quashed it for a defect in the order, and this court refused to grant a *certiorari* to bring up the order of sessions. "Certainly," said Lord Denman, C.J., "the circumstances of this case are very peculiar, and we cannot approve of the conduct of the magistrates. But this court is always extremely scrupulous in interfering with magistrates, where they have jurisdiction. . . . The sole question for us is whether, at the time when the court decided they had power to decide;" and similar views were expressed by the other judges. He also referred to *Rex* v. *The Justices of Cambridgeshire* (4 A. & E. 111). In *Rex* v. *James* (2 M. & S. 321), it was held that this court will not, upon removal of an order of sessions allowing overseers' accounts, which is good upon the face of it, go into the merits of those accounts upon affidavit. "If there is likely to be a defect of justice," said Lord Ellenborough, "the remedy must be by application to the Legislature, for the court cannot enlarge the limits of its jurisdiction in order to supply a remedy." Archbold's Crown Office Practice, p. 179, and the cases there cited were also referred to.

Harris and *Castle*, for the appellants, argued that though this court would not receive affidavits to prove facts not appearing on the face of the order made at quarter sessions in cases where the matter had been regularly heard and determined at quarter sessions, yet such affidavits should be received where the quarter sessions does not hear evidence on the matter, but decides merely on a question of form. [COCKBURN, C.J.—It is denied by the other side that the matter was determined on a mere question of form.] There is no statement on the face of the order that they heard any evidence on the subject before them, and as a matter of fact no such evidence was heard. [COCKBURN, C.J.—If a counsel states the facts which he is in a position to prove, and the other side says, "If you prove all you state, it comes to nothing in point of law," what objection is there to determining the matter on such a statement? It is like nonsuiting a counsel on his opening.] This court should look at the affidavits which show that, contrary to the express provisions of the statute 12 & 13 Vict. c. 92 s. 26, the conviction was quashed on a mere point of form. [BLACKBURN, J.—The authorities cited by Mr. Maule go to show that we cannot look at affidavits where there is nothing irregular on the face of the order.] Those authorities refer to cases where the quarter sessions have acted within their jurisdiction; it is submitted that they had no jurisdiction to determine the present matter without hearing evidence on the subject. [COCKBURN, C.J.—They clearly had jurisdiction over the subject matter before them.]

COCKBURN, C.J.—I think we have no jurisdiction to interfere in this matter. Even supposing that the quarter sessions had, in deciding upon that which was clearly within their jurisdiction, gone wrong, and had believed that it was competent to them to dispose of the case on a question of form, I entertain serious doubt whether, the subject matter of the complaint being within their jurisdiction, it is competent to us as a court of error to bring up their order and quash it. But I am very far from resting my decision in the present case upon that ground. If it were necessary to decide that point, it might require more deliberate consideration. What I go upon here is this—that there is nothing at all on the face of the proceedings or in the facts to show that the conviction was quashed by the quarter sessions on a matter of form. All that appears on the face of the case is that the quarter sessions heard the allegations of counsel as to what he could prove, and thereupon quashed the conviction. Now, if there be any state of things which could have happened which would be consistent with that, it cannot be said that the order of the quarter sessions has upon the face of it evidence of error. Is there, then, such a conceivable state of things? Yes. Suppose the person who has to support the order appealed against opens a state of facts which, if admitted by the opposite counsel, would not make out a case for a conviction, and the quarter sessions, or any other court, sees that that is so, it would be the idlest waste of time to go into evidence on a matter of that kind. It is a thing that happens every day at Nisi Prius and at criminal trials. Counsel opens his case, and states the facts which he is prepared to prove, and the judge says to him, "If you succeed in making out these facts you cannot gain your case." The case then is quite a conceivable one, and the affidavits which have been produced by the other side tend to illustrate it. I do not say that we are to take those affidavits as conclusive, but they show a state of facts on which the justices may have proceeded. But if it be said that the true ground of their decision was their thinking that they saw some defect of form on the conviction, and that they proceeded on that, it is sufficient to say here, without expressing any decided opinion about our competency to sit as a court of error upon the matter, that the affidavits are conflicting; and I know of no authority in support of the position that the court should, on conflicting affidavits, proceed at once to quash an order of the justices at quarter sessions. That is a thing which we cannot do. We must confine ourselves to what appears on the face of the order; and, looking at that, I see nothing more than a statement of facts which, if true, would justify the quarter sessions in making the order which they did.

BLACKBURN, J.—I am of the same opinion. As far as I can see, from looking at the conviction, it appears that the conviction was perfectly good. It follows the very words of the Act, and, so far as I am aware, is perfectly valid. If the ground of the decision of the quarter sessions was that the conviction was bad in form, then they were wrong in two things—first, in quashing the conviction on a question of form; and, secondly, in thinking that this particular conviction was wrong in form. I do not wish to decide the question whether, if they had decided the matter on a point of form, we should be entitled to quash their decision on that ground, or whether we should not say that though they were wrong in doing so, yet we are not a court of error to reverse their decision. I wish to guard myself against being supposed to decide that question one way or the other at present. The decision of the quarter sessions may have proceeded on either of two grounds—first, that the conviction was bad in form; secondly, that the defendant was not guilty. They say that, upon reading the said recited conviction, and after hearing the allegations of counsel on both sides, and upon due proof and consideration of the premises, they ordered the conviction to be quashed. Now, it is quite plain that they have jurisdiction to quash if it appears to them that the person accused is not guilty. It is also quite clear that there may be cases in which, without going into any evidence in the matter, they can so decide. The objection on this head therefore fails. As to the point whether we can receive affidavits to show that the quarter sessions were wrong in the conclusion they came to on the subject of the guilt of the person accused, or that the reason given for their decision on the face of their order was not the real reason which influenced them, I think the authorities are very strong to show that we cannot do so. If the justices at quarter sessions do anything maliciously and with a high hand, contrary to law, the proper remedy is by criminal information against them; and, further, I have no doubt that if such a case really existed, and it were brought to the notice of the Lord Chancellor, he would advise Her Majesty to remove such justices from their office. I hope no one will for a moment understand me as saying that the present was a case of this description, for I know nothing whatever about the present case. These affidavits cannot, therefore, be admitted, and, even if they were admitted, as they are directly

conflicting, the practical result would be the same.

LUSH, J.—I am of the same opinion.

Rule discharged.

Attorney for appellant, *Scarborough.*

Attorneys for defendant, *Rhodes, Son,* and *Duffett.*

Saturday, April 27, 1872.

SECOND COURT.

SIMPKIN (app.) v. THE JUSTICES OF BIRMINGHAM (respts.).

Excise licence—Special sessions—New tenant—9 Geo. 4 c. 61 ss. 4 and 14.

A person occupying a house in the borough of Birmingham was licensed by the Commissioners of Inland Revenue to sell excisable liquors by retail to be drunk upon the premises, under 9 Geo. 4, c. 61. His last licence was dated 10th Oct. 1870, for one year; on the 25th Aug. 1871 he applied at the general annual licensing meeting to renew his licence, and at the adjournment on the 15th Sept. 1871 his application was refused on account of convictions for selling liquors on Sundays, which were recorded against him. Three days after his licence expired by effluxion of time, viz., on the 13th Oct. 1871, he left the premises, and the appellant subsequently entered into possession of them. On the 4th Jan. 1872, at a special session holden under 9 Geo. 4, c. 61, s. 4, the appellant applied for a licence until the 10th Oct. following; but at the adjourned special sessions on the 15th Feb. 1872, the justices refused the application on the ground that under the circumstances they had no jurisdiction under the 14th section. By that section if any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or if any person so licensed shall remove from or yield up the possession of the house specified in such licence it shall be lawful for the justices assembled at a special session to grant to any new tenant or occupier of any house so become unoccupied a licence until the 10th Oct. then next ensuing.

Held, upon a case stated, that the justices of the special session were right, and that the appellant came neither within the words nor the spirit of the Act of Parliament.

CASE stated for the opinion of the court under sect. 11 of 12 & 13 Vict. c. 45, intituled, "An Act to amend the proceedings in courts of general and quarter sessions of the peace in England and Wales, and for the better advancement of justice within the jurisdiction of those courts," by consent of the parties, and under an order of John Unthank, Esq., dated the 13th March 1872.

That Chas. Woodin, the tenant and occupier of a certain house and premises situate in Newtown-row, in the borough of Birmingham, in the county of Warwick, victualler, was under and by virtue of an Act of Parliament 9 Geo. 4, c. 61, intituled "An Act to regulate the granting of licences to keepers of inns, alehouses, and victualling houses in England," duly licensed to sell excisable liquors by retail to be drunk and consumed in the said house and premises by virtue of a licence granted to him by Her Majesty's Commissioners of Inland Revenue, dated 10th Oct. 1870, for one year.

That the said license so granted to the said Chas Woodin, expired on the 10th Oct. 1871, by effluxion of time.

That while in the occupation of the same premises under a similar licence, that is to say, on the 23rd Dec. 1868, the said Chas. Woodin was duly convicted at the police court of the said borough for having, on Sunday the 13th of the same month, as a licensed victualler at the borough aforesaid, otherwise than for refreshment of travellers, opened his said house for the sale of wines, spirits, beer, and other fermented and distilled liquors, before half-past twelve in the afternoon, and fined 5*s.*, and 10*s.* costs; and also that on 2nd Dec. 1870, he was convicted for having on Sunday, 23rd Oct. 1870, as a licensed victualler at the borough aforesaid, otherwise than for refreshment of travellers, opened his house for the sale of wines, spirits, beer, and other fermented and distilled liquors before half-past twelve in the afternoon. And that at the hearing of the last-named charge, he, in the opinion of the magistrate suborned a witness on his behalf to commit perjury, and was fined 5*l.* and 12*s.* costs.

That the said Chas. Woodin in due form of law as provided by the 10th section of the said Act of Parliament, 9 Geo. 4, c. 61, applied at the general annual licensing meeting for the said borough of Birmingham, held on the 25th Aug. 1871, for a renewal of his license, which annual licensing meeting and application were adjourned until the 15th Sept. 1871.

That on the said 15th Sept. the said application of the said Chas. Woodin was refused by the magistrates.

That the said Chas. Woodin gave notice of appeal against the said refusal as provided by the 27th section of the said Act of Parliament, but such appeal was not prosecuted, and he continued to occupy the said house and premises until the 13th Oct. 1871, being three days after his licence expired, but he did not continue to sell excisable liquors by retail under his said licence after expiration thereof on the 10th Oct. 1871.

That on the 30th Dec. 1871, William Simpkin, being then the new tenant or occupier, and in possession of the said house and premises, duly gave the notice required by the 14th section of the said Act of Parliament, alleging that the said Charles Woodin, the person in the occupation of the said house and premises, and duly licensed to sell excisable liquors to be drunk or consumed in such house and premises, having removed from and yielded up possession of such house and premises, it was the intention of him, the said William Simpkin, as the new tenant and occupier of the said house and premises, to apply at the next special session to be holden at the public office in Moor-street, in the said borough of Birmingham and county of Warwick, on the 4th Jan. 1872, being a special session duly convened under the 4th section of the said Act, for a licence to sell excisable liquors by retail, to be drunk or consumed in the said house and premises, which house he intended to keep as an inn, alehouse, or victualling house.

That the said William Simpkin duly made such application in pursuance of the said notice at the said special session holden on the 4th Jan. 1872; and such special session and application were adjourned until the said 18th Jan., when such application was renewed, and such special session and application were again adjourned until the

15th Feb., when such application was refused on the ground that the magistrates at such special sessions were not authorised under the 14th section of the said Act, to entertain such application because the said Charles Woodin, having remained in possession of the said house and premises until after the expiration of the said licence by effluxion of time, he was not a person so licensed at the time of giving up possession, and that the said William Simpkin was not a new tenant or occupier within the meaning of the said section of the said Act made and passed in the ninth year of the reign of his late Majesty King George the Fourth.

The said Wm. Simpkin has duly given notice of appeal against the said refusal, and entered into recognizances as required by the 11th section of the Act of Parliament (12 & 13 Vict. c. 45).

The question submitted to the court is: If the court shall be of opinion that the respondents were correct, then the appellant agrees that a judgment in conformity with such decision, and for such costs as the court may adjudge, may be entered on motion by the respondents at the sessions next or next but one after such decision has been given.

If the court shall be of a contrary opinion, then the respondents agree that a judgment in conformity with the decision of such court, and for such costs as such court may adjudge, may be entered on motion by the appellant at the session next or next but one after such decision has been given.

H. Matthews, Q.C. for the appellant.—This question depends upon sects. 4 and 14 of 9 Geo. 4, c. 61. By sect. 4 it is enacted—

That the justices assembled at the general or quarter sessions which shall be holden at Michaelmas next after the passing of this Act, and at the general annual licensing meeting in every subsequent year, shall appoint not less than four nor more than eight special sessions to be holden in the division or place for which each such meeting shall be holden, in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant; at which special session it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they, the said justices, shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail, to be drunk or consumed on the premises.

By sect. 14 it is enacted—

That if any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, for any other public purpose; or shall be by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn; it shall be lawful *for the justices assembled as* aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent; or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall, by sale or otherwise, have *bonâ fide* conveyed, or otherwise made over, his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging; or to grant to the person whose house shall, as aforesaid, have been, or shall be about to be, pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail to be drunk or consumed therein — provided always that every such licence shall continue in force only from the day on which it shall be granted until the 5th April or to the 10th Oct. then next ensuing, as the case may be, provided also that every person intending to apply in any of the above-mentioned cases at any such special session for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house or premises thereunto belonging, in which exciseable liquors shall not have been sold by retail to be drunk or consumed on the premises by virtue of a licence granted at the general annual licensing meeting next before such special session shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and of four in the afternoon, affix, or cause to be affixed, on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, or such other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not heretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place.

It has been held under this section that a new tenant, taking possession during the existence of the licence of his predecessor, and not having time to give the necessary notices under sect. 10 for the annual general licensing meeting, was not prejudiced by the refusal of his predecessor's application for a renewal at the general sessions, but was entitled to apply at a subsequent special sessions: (*Reg.* v. *Justices of Middlesex*, L. Rep. 6 Q. B. 781; 25 L. T. Rep. N. S. 43.) The only difference between that and the present case is that here the previous occupant gave up possession of his house three days after the expiration of his licence, instead of during its continuance, as in that case. The refusal of a licence to the former occupant was also held to be no bar to the application of a new tenant in *Reg.* v. *Justices of the West Riding* (L. Rep. 5 Q. B. 33).

Field, Q. C., for the respondents.—The scheme of the Act is to make a licence a personal matter, and although there are some provisions for the protection of the landlord's interest, they are exceptional, and must be construed strictly. Sect. 14 relates only to the time of the existence of a licence, and the clause governing this matter is "if any person so licensed shall remove from or yield up the possession of the house specified in such licence." Here Woodin had no licence when he gave up the house, and the application by the

appellant was in fact an application to obtain a licence for a new house. By the form of licence in sect. 13 and the schedule C., the licence continues until the day named, and "no longer." The landlord must stand or fall by the acts of his licensee, except in those cases specially provided for in sect. 14.

Matthews, in reply.—This was a change in the tenancy which prevented the appellant from obtaining a licence for the house under ordinary circumstances, and is exactly a matter for which the 14th section was intended to provide. The interpretation of this clause suggested by the other side requires the insertion of the words "at the time of removal," for which there is no authority. It is sufficient if the person has been "so licensed" since the last opportunity another occupant would have of applying to the general sessions.

BLACKBURN, J.—I think the sessions were right. After trying for some time to construe the Act, I believe the appellant has not come within the words nor within the spirit of its provisions. Probably the Legislature contemplated by sect. 4, that a person, situated like the applicant in the case of *Reg.* v. *Justices of Middlesex*, should have an opportunity of going to a special sessions under sect. 9; but in sect. 14 the words are not of themselves sufficient to bear out that intention; they merely refer to the death or incapacity of the previous occupant, or his removal, or his omission to apply for a continuance of his licence, or the house being rendered unfit, and to such cases only. There is nothing about a failure of the previous occupant on the ground of convictions, to obtain a renewal, and his then yielding up possession to another person. If he yields before the conclusion of his licence, there is nothing, taking the two sections together, to prevent his successor applying for a renewal after the general meeting, but we are bound, I think, to limit the change of tenancy to that date; and when a licensed person remains in a house after his licence expires, his successor must apply at the next annual general licensing meeting for a licence to keep the house as an inn not previously kept as such, in pursuance of sect. 10. I thought at first that this was a hard case upon the applicant and the landlord, but upon carefully considering the Act, I think it is by a mere accident, and I doubt whether it is in accordance with the spirit of the whole Act that sect. 14 should apply to all cases where the change of possession occurs even before the 10th Oct. At all events, the landlord's privileges go no further.

MELLOR, J., concurred.

Judgment for respondents.

Attorneys for appellant, *Robinson* and *Preston*.
Attorneys for respondents, *Williams* and *Blyth*.

Wednesday, May 1, 1872.

SECOND COURT.

NORRIS (app.) *v.* BARNES (resp.)

Nuisance—Smoke from manufactory of minerals—18 *&* 19 *Vict. c.* 121, *s.* 44—29 *&* 30 *Vict. c.* 90, *ss.* 14 *and* 19.

The appellants, the occupiers of a manufactory of bichrome, which is the produce of ores and minerals, were charged, upon information, with having, as part of their works, a chimney sending forth black smoke in such quantity as to be a nuisance, under the Sanitary Act 1866, *s.* 19. *The justices found that the smoke from the appellants' chimney was a nuisance, and ordered its abatement:*

Held, by Blackburn and Mellor, JJ. (*Lush, J. dissenting*), *that the appellants came within the exemption contained in the Nuisances Removal Act* 1855, *s.* 44, *of mines, smelting, and the manufacturing of the produce of ores and minerals; that these two Acts, being, by sect.* 14 *of the later Act, to be construed as one, the exemption in the earlier Act applied to the nuisances created by the later Act; and that the justices had no jurisdiction to make the order.*

THE following case was stated for the opinion of the Court of Queen's Bench, under the provisions of 20 & 21 Vict. c. 43, by two of Her Majesty's justices of the peace, acting in and for the West Riding of the county of York:—

By the 14th section of the Sanitary Act 1866 (29 & 30 Vict. c. 90, part 2) it is, amongst other things, enacted that:

The expression "Nuisances Removal Acts" shall mean the Acts passed in the years following of the reign of her present Majesty, that is to say, the one in the session of the 18th and 19th years, c. 121; the other in the session of the 23rd and 24th years, s. 77, as amended by this (the second) part of this Act, and this part of this Act shall be construed as one with the said Acts.

By the 19th section of the said At it is enacted that:

The word "nuisances" under the Nuisance Removal Acts, shall include, *inter alia*, Any fireplace or furnace which does not, as far as practicable, consume smoke arising from the combustible used in such fireplace or furnace, and is used within the district of a nuisance authority for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gas work, or in any manufactory or trade process whatsoever: Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance.

By the second proviso to the said 19th section it is provided:

That where a person is summoned before the justices, in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke, arising from the combustible used in such fireplace or furnace, the justices may hold that no nuisance is created within the meaning of this Act, and dismiss the complaint, if they are satisfied that such fireplace or furnace is constructed in such manner as to consume, as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.

By the 44th section of the Act passed in the 18 & 19 Vict. c. 121 (being one of the Acts incorporated with the Sanitary Act 1866, part 2) it is enacted, *inter alia*, that:

The provisions of this Act shall not extend or be construed to extend to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufacturing of the produce of such ores and minerals.

On the 13th June the appellants were summoned to answer the complaint of the respondent, an inhabitant of Sowerby Bridge in the parish of Halifax, in the West Riding of the county of York, for that they the appellants on 3rd June inst., at the district of Sowerby Bridge in the riding aforesaid "unlawfully did send forth black smoke from a certain chimney situate on the west side of, and near to the Sowerby Bridge Gasworks, belonging to certain premises called 'Calder Works,' in the occupation of the appellants (not being the chimney of a private dwelling house), in such

quantity as to be a nuisance, contrary to the form of the statute in such case made and provided." But no prior order had been made for the removal of or to discontinue using the said chimney.

The summons came on for hearing on the 1st July 1871, when it was proved on behalf of the respondent that he was an inhabitant of Sowerby Bridge in the said parish. That black smoke did issue from the said chimney on the day in question at different intervals, for periods of time amounting altogether to twenty-eight minutes of the one hour during which it was watched, in such a quantity as to be a nuisance. That Calder Works were in the occupation of the appellants, and that the said premises were used as a manufactory, and not as a private dwelling house.

On the part of the appellants it was then proved hat the chimney complained of communicated with four furnaces, which were all used solely for the manufacture of bichrome, and that bichrome was the product of ores and minerals. That in three of the furnaces ironstone and limestone were put in, and in the fourth limestone, small coal and potash were placed to produce a substance necessary for, and used solely in the manufacture of bichrome in the other three furnaces. That, in order to manufacture bichrome, it is necessary to have a flame in the furnaces used for that purpose 17ft. in length, and that the necessary flame could not be produced either from coke or wood, but only from coal; but in cross-examination it was shown that the defendants had formerly carried on the process of bichrome manufacture in their present premises by the use of coke, and there was then no nuisance of black smoke from the chimney: but it was stated that bichrome, manufactured in furnaces in which coke was used as the combustible, was less in quantity by ten per cent. than when coal was so used; and it also appeared that the ore which had been smelted by coke for the production of bichrome was inferior in quality to the ore which had been subsequently used for that purpose with coal as the combustible. It also was stated by the defendants that by the use of coke they could not extract the full quantity of bichrome from the richer material now used by them. That the black smoke which it was proved that the chimney sent forth was smoke produced by the use of coal in the said furnaces for the purpose of manufacturing bichrome. That the appellants had tried experiments to make the chimney consume its own smoke, and that they had fitted up and had a smoke-consuming apparatus in work at the furnaces in question at the time of the nuisance complained of, but from the evidence it did not appear to be efficient for the purpose. Witnesses were also called to prove that the furnaces during the several periods when the said chimney sent out the black smoke had been carefully attended to by the several persons who had the charge thereof, but one of the defendants expressly stated that they could not by any known mode consume the smoke so long as coal was used as the combustible. From the evidence before the justices it was not proved to their satisfaction that by the use of coke as a combustible, bichrome could not be manufactured of equal quality to that produced by the use of coal, but it appeared to them that there would be an increased quantity of bichrome produced by the use of coal over coke, thus leaving a larger profit to the manufacturer.

It was also contended on the part of the appellants that the justices ought not to make any order upon the summons, but ought to dismiss the complaint for the reasons: First, that the manufactory carried on by means of the chimney, which sent out the black smoke, was a manufactory of the produce of ores and minerals, and, therefore, did not come within the Acts in question; secondly, that the furnaces in question were constructed in such a manner as to consume as far as practicable, having regard to the nature of the manufacture of bichrome, all smoke arising therefrom, and that the furnaces had been carefully attended to by the persons having charge thereof.

On the part of the respondent it was contended that the information being laid under the latter part of the 3rd sub-section of the 19th section of the Sanitary Act 1866, neither the previous part of the said 19th section, nor the second proviso to the said 19th section, applied to this information.

Being satisfied by the evidence laid before them on the part of the respondent, that black smoke was on the day in question sent forth from the said chimney in such a quantity as to be a nuisance, and that the same might be prevented by the use of coke as a combustible: and being of opinion that notwithstanding the proviso, and the said 44th section of the Act of 1855, the said appellants were not justified in committing so serious a nuisance for the sake of profit, more or less, which might be derived, the justices made an order upon the appellants for the abatement of the nuisance, and for the payment of certain costs; and the appellants, being dissatisfied with this decision, requested the justices to state a case for the opinion of this honourable court.

The question was, whether they ought, upon the evidence laid before them by the appellants, to have dismissed the complaint.

If the court should be of opinion in the affirmative, the order was to be quashed; if in the negative, then it was to stand and to be carried into effect.

Manisty, Q.C. (with him *Beresford*) argued for the appellants.—The Legislature has thought fit to exclude manufactories of ores and minerals from the operation of the special remedies for nuisance provided by this series of acts. These remedies are highly penal, and every doubtful expression must be construed in favour of the parties against whom they are to be put in force; an exemption of a particular class of persons from the effect of these remedies cannot be repealed by implication. [The other point raised by the justices was not argued.]

Field, Q.C. (with him *R. G. Williams*) for the respondent.—This latter part of sect. 44 of the Act of 1855, is impliedly repealed by the very strong words in sect. 19 of the Act of 1866, "in any manufactory or trade process whatsoever:" or if it still stands, its application is limited to the provisions of the Act of which it forms a part. Sect 8 contains the list of what were to be deemed nuisances under that Act of 1855; and until the extension of that list in the Act of 1866, the exemption in sect. 44 could only apply to "Any premises in such a state as to be a nuisance or injurious to health," or to "Any accumulation or deposit which is a nuisance or injurious to health." It cannot be believed that it could have been intended by the Legislature in 1866, to exempt the premises of a mineral manufactory from the provisions of the Sanitary Act concerning an overcrowded house, or

a workshop insufficiently ventilated, which are the other things included with smoke-causing furnaces and chimneys in the definition of nuisances in sect. 19 of that Act. That section enacts that "the word 'nuisances,' under the Nuisance Removal Acts, shall include" the further matters there mentioned, but it does not necessarily mean that all the provisions concerning what were nuisances before should apply to these further nuisances. The only words upon which the appellants can base their exemption from being included in any manufactory or trade process whatsoever, are those in section 14, "this part of this Act shall be construed as one with the said Acts."

Manisty in reply.

BLACKBURN, J.—This case lies in a small compass, but the point raised is not easy to decide. In my opinion Mr. Manisty is right, and we cannot apply the power given to justices to convict for a smoke nuisance to manufactories of the produce of ores and minerals. 18 & 19 Vict. c. 121 has by sect. 8 included in the definition of nuisances some new matters, none of which by sect. 44 were to extend to mines or the manufactory of ores and minerals. The remedy for a nuisance was given by sect. 12, by which justices might make an order of abatement. The words of the 44th section are, in my opinion, such as to render it impossible to say that, as the legislation concerning nuisances then stood, there could be any order of abatement affecting the manufactory of the produce of ores and minerals. 29 & 30 Vict. c. 90, was intended to meet and prevent many other nuisances besides those previously dealt with, amongst them, unnecessary smoke from any manufactory or trade process whatsoever. That Act by itself would, without doubt, meet the case before us, but unfortunately, by sect. 14, it is enacted that the Act shall be construed as one with two earlier Acts; in one of these, the Nuisances Removal Act 1865, sect. 8, there is a list of matters which "nuisances" are defined to include. Similarly, in sect. 19 of the Act of 1866 "Nuisances" are defined to include other matters. Construing these two Acts together, as required, we must read "Nuisances" to include the whole of the matters in both these sections; and sect. 44, which was passed originally to affect only the first list must, upon construing the acts as one, be read to affect all nuisances. I entirely agree with what has been said on behalf of the respondent's view, that it is obviously absurd to apply this exemption with respect to mines, smelting, and the manufacturing of the produce of ores and minerals, to the nuisances created by the Act of 1866. I cannot think that the Legislature could have meant it, but as they have to my mind clearly said it, we can only leave them to mend it. I think these Acts have failed to give justices jurisdiction over nuisances arising in the cases described in sect. 44 of the Act of 1855.

MELLOR, J.—I am of the same opinion. The effect of the Act of 1866 is, I think, only to extend the application of the earlier Acts to other nuisances than those before provided for, and it in no sense repeals the exemptions which before existed.

LUSH, J.—I am sorry to differ from the judgment of the majority, but it does not appear to me that *the Legislature obliges us to put a construction upon these Acts* which is different from their *obvious intention*. The nuisances provided for in the Act of 1855 are few in number, and by sect. 44 mines and manufactories of minerals are exempted from the special remedies enacted for those nuisances. It seems to me, however, that the exemption may well be limited to the nuisances there described, and it need not be read to apply to another class of nuisances which had not then been created.

BLACKBURN, J.—This is far too doubtful a case to carry costs.

Judgment for appellants.

Attorneys for appellants, *Emmets, Watson,* and *Emmet,* for *J. R. Ingram,* Halifax.

Attorneys for respondent, *Chester* and *Urquhart,* for *Clough* and *Son,* Huddersfield.

Thursday, May 9, 1872.

GASLIGHT AND COKE COMPANY *v.* VESTRY OF ST. GEORGE, HANOVER-SQUARE.

Construction of statute—Incorporation of inconsistent provisions—23 & 24 Vict. c. 125—*31 & 32 Vict. c. cvi.*—*31 & 32 Vict. c. cxxv.*

The plaintiffs were one of the gas companies included in the Metropolis Gas Act 1860, *and under sect.* 36 *they had elected to adopt its provisions. In* 1868 *The City of London Gas Act and the Gaslight and Coke Company's Act, two local Acts, received the Royal assent on the same day. By the former of these two Acts certain provisions in the Act of* 1860, *concerning the purity and illuminating power of gas, were repealed, and others were enacted in their stead. By the latter of these two Acts, which was an Act promoted by the plaintiffs, it was enacted that the plaintiffs' company should be and continue subject to the powers and provisions of the Metropolis Gas Act* 1860, *as if this Act were not passed, so far as the same were not varied by this Act; and that nothing in this Act contained should exempt the plaintiffs' company or their gasworks from the provisions of the Metropolis Gas Act* 1860. *It was also enacted that if the former of these two local Acts should pass into a law in that session, then the plaintiffs' company and their undertaking should be subject to the provisions of the City of London Gas Act.*

Held, in an action to recover the price of gas supplied to the defendants, the amount of which depended upon whether the plaintiffs were bound by the provisions of the Metropolis Gas Act 1860, *repealed by the City of London Gas Act* 1868, *that the plaintiffs were, by the terms of their Act of* 1868, *subject to all restrictions imposed upon them for the benefit of the public, by both the Metropolis Gas Act* 1860, *and the City of London Gas Act* 1868.

The Gaslight and Coke Company, hereinafter called the company, sued the vestry of the parish of St. George, Hanover-square, hereinafter called the vestry, for gas supplied for lighting the public lamps within the said parish, and for maintaining, cleaning, and keeping in repair the said lamps, and upon accounts stated; and claimed 2160*l.* 5*s.* 11*d.*

The vestry paid into court 1787*l.* 1*s.* 7*d.*, and denied their liability to pay the residue, upon which issue was joined.

The cause came on to be tried before Mellor, J., and a special jury, on the 13th Feb. 1871, and a verdict was recorded for the plaintiffs for 373*l.* 4*s.* 4*d.*, being the balance of the claim above

the payment into court, subject to the opinion of the said court of Queen's Bench upon a special case, to be stated in the event of any disagreement by the parties or either of them, by Henry Manisty, Esq., Q.C., and subject also to a reduction of the amount of the verdict to be named by the said Henry Manisty, in the event of the court being of opinion that the defendants have a right to any reduction whatever. The company were re-incorporated by the Gaslight and Coke Company's Act 1868, s. 5.

The parish of St. George, Hanover-square (which is without the limits of the City of London and the liberties thereof) has been supplied with gas by the company ever since 1810, when it was first incorporated by Royal Charter; and the vestry which was formerly governed by a private Act of 7 Geo. 4, is now subject to and incorporated by the Metropolis Local Management Act 1855.

The claim by the company in this action against the vestry is in respect of 1162 public or street lamps, and four private lamps or jets used in their office for the six months from the 1st Jan to 30th June 1870. The pleadings were annexed to and formed part of this case. The account delivered before action is as follows:

From Dec. 31, 1869, to 31st March, 1870.

	£	s.	d.
1161 lamps, at 3*l.* 14*s.* 4*d.* per ann.	1077	16	8
1 " 12*s.* "	0	3	0
1 " 3*l.* 14*s.* 4*d.* " from Feb. to Mar. 31	0	12	0
4 jets, 5*l.* 12*s.* " office, Farm-street.	1	8	0
	£1079	19	8

From 31st March, 1870, to 31st June, 1870.

	£	s.	d.
1162 lamps, at 3*l.* 14*s.* 4*d.* per ann.	1078	15	3
1 " 12*s.* "	0	3	0
4 jets, 5*l* 12*s.* " office, Farm-street.	1	8	0
	£1080	16	3

Total £2160 15*s.* 11*d.*

The particulars in the action stated that the gas supplied to 938 lamps and the 4 jets was of the description called cannel gas, and the gas supplied to 224 lamps was of the description called common gas. That the amount claimed for the cannel gas, including the lighting, cleansing, and repairing of the lamps, is £1763 13*s.* 7*d.*; and the amount claimed in respect of common gas, including the lighting, cleansing, and repairing of the lamps, is £396 12*s.* 4*d.*

Since the particulars were delivered it has been ascertained that the actual number of lamps supplied with cannel gas is 942, and the number supplied with common gas is 220.

Cannel gas of an illuminating power of 23 candles was supplied to 942 lamps consuming 2½ft. per hour, and common gas of an illuminating power of sixteen candles was supplied to 220 lamps consuming 4ft. per hour. The four private lamps or jets in the stoneyard of the Vestry were supplied with cannel gas of the like illuminating power as aforesaid, consuming 3ft. per hour but no question arises in respect of the four lamps or jets.

Upon an estimate of the yearly consumption of cannel gas by each lamp consuming 2½ft. per hour, and of the yearly cost of repairs, &c., the company charged £3 14*s.* 4*d.* per lamp per year. Upon a similar estimate for common gas consumed at 4ft. per hour, and the repairs, the charge would be £3 19*s.* 8*d.* per lamp per year. But as the company could not supply cannel gas to all the lamps, those which consumed *common gas* were also supplied at £3 14*s.* 4*d.*, including repairs, per lamp per year, being a reduction in favour of the vestry.

The gas mains are the property of, and are laid down by and are under the control of the company, and the company have full power to lay down and carry their cannel gas mains under and along such parts of the parish. But the public have no power to require, nor is the company under any statutory obligation to lay, mains for the supply of a particular kind of gas. The company under the provisions of the Gas-Light and Coke Company's Act 1868, can discontinue the manufacture and supply of cannel gas altogether upon giving three months' notice thereof.

In certain parts of the parish there were and are no cannel gas mains, of which fact the vestry had notice, and knew that cannel gas could not be supplied in those parts of the parish, and it was agreed in the year 1857 between the company and the vestry, that in those parts burners should be used which consumed 5ft. per hour of common gas, which is equal to 2½ft. per hour of cannel gas of the illuminating power of fifteen candles, and that a uniform charge per lamp should be made to the vestry for an uniform illuminating power throughout the parish.

Up to the year 1861, the plaintiffs had supplied the defendants with gas upon the terms of a written contract between them.

By the Metropolis Gas Act 1860 (22 & 23 Vict. c. 125), s. 4:

The words 'common gas' shall mean gas of an illuminating power, hereinafter defined of not less than twelve candles. The words 'cannel gas' shall mean gas of an illuminating power hereinafter defined of not less than twenty candles.

By sect. 25:

The quality of the common gas supplied by any gas company shall be, with respect to its illuminating power, at a distance as near as may be of 1000 yards from the works, such as to produce from an Argand burner, having fifteen holes, and a 7in. chimney, consuming 5 cubic feet of gas an hour, a light equal in intensity to the light produced by not less than twelve sperm candles of six to the pound, each burning 120 grains an hour; and the quality of cannel gas supplied by any gas company shall, with respect to its illuminating power at the distance aforesaid, be such as to produce from a batswing or fishtail burner, consuming 5ft. of gas per hour, a light equal in intensity to twenty such sperm candles; and each such gas shall, with respect to its purity, be so far free from ammonia and sulphuretted hydrogen, that it shall not discolour either turmeric paper, or paper imbued with acetate or carbonate of lead, when those tests are exposed to a current of gas issuing for one minute under a pressure of five-tenths of an inch of water, and shall not contain more than twenty grains of sulphur in any form in 100 cubic feet of gas.

By sect. 26 a penalty of 50*l.* by summary conviction is imposed upon a gas company for supplying gas of less illuminating power or of less purity than according to this Act it ought to be.

By sect. 27:

Every local authority taking any supply of gas according to this Act, shall provide all proper and sufficient apparatus, machinery, and instruments, for testing the illuminating power and purity of the gas, and from time to time shall appoint, and out of any funds applicable by them for their local purposes may pay, a chemical examiner of gas engineer, or other competent person, to be an examiner for the purposes of this Act; and every gas company shall within six months after the passing of this Act, cause to be erected in some convenient place, as near as may be to 1000 yards from their works . . . an experimental meter, furnished with a suitable burner, capable of consuming 5 cubic feet of gas per hour, with

other necessary apparatus for testing the illuminating power of the gas.

By sect. 28:

The examiner . . . when and so often as is necessary, or as he is so directed by the local authority appointing him, shall examine the illuminating power and the purity of the gas applied, and shall present to the local authority, so often as they require, a report stating the number of examinations on which the report is founded, and the maximum, minimum, and average illuminating power and purity, or the illuminating power and purity from day to day, or at longer intervals, of the gas supplied during the whole period to which the report relates, with such other information and remarks thereon as may be deemed necessary.

By sect. 36:

All contracts made or existing before the 1st Jan. 1860, between any of the gas companies included in this Act, and any local authority, for or relating to the supply of gas, shall terminate on the 1st Feb. 1862, and thereafter the provisions of this Act in all particulars shall apply to such company; provided that from the time of the passing of this Act until the said 1st Feb. 1862, the provisions of this Act relating to price, purity, and illuminating power of gas shall not apply to any such company, unless such company shall elect to adopt them.

The company did elect to adopt the provisions of the said Act, as to price, purity, and illuminating power, and continued to supply the vestry with gas for the public lamps in the same manner as previously, and upon terms agreed upon by letters between them; the vestry paid to the company the amount due upon these terms without remonstrance until Jan. 1870.

On the 13th July 1868, two Acts of Parliament received the Royal assent, viz., The Gaslight and Coke Company's Act, and the City of London Gas Act.

By the City of London Gas Act 1868 (31 & 32 Vict. c. cxxv.), s. 2, "this Act shall be read as one with the Act of 1860."

By sect. 3:

Such parts of the Act of 1860 as are described in the first schedule to this Act, and any part of any special Act of any company inconsistent with this Act, as far only as they respectively relate to the companies and the City, are hereby repealed.

Amongst the repealed sections mentioned in the schedule, sects. 25, 26, 27, and 28 are included.

By sect. 29, the Board of Trade shall appoint three competent and impartial persons, who shall be called the gas referees.

By sect. 33:

The gas referees shall, subject to the provisions of this Act, from time to time prescribe and certify the mode to be adopted for testing and recording the illuminating power of gas supplied by the companies, and the number of the times of testing.

By sect. 36:

The gas referees shall from time to time ascertain with what degree of purity each company can reasonably be required to make and supply gas continuously, without occasioning a nuisance to the neighbourhood in which the works are situate, and shall thereupon prescribe and certify the maximum amount of impurity in each form with which gas supplied by the company shall be allowed to be charged, and the time from which the allowance thereof shall be enforced as against each company, regard being had to the necessity for any alteration of works by a company consequent on any such certificate.

By sect. 37:

The gas referees shall from time to time prescribe and certify the mode to be adopted for testing and recording the purity of gas supplied by the companies, and the number of the times of testing.

By sect. 40:

The gas referees shall from time to time prescribe and certify what testing places, and what apparatus therein for testing the illuminating power and purity of gas, shall be provided by each company.

By sect. 44 the Corporation shall appoint a gas examiner for each of these testing places.

By sects. 46 to 52 the gas examiners shall test daily the illuminating power and purity of gas supplied by the company, and report to the Corporation, the chief gas examiner, and the company.

By sects. 53, and 54, the gas (except cannel gas) supplied by each company, shall be of an illuminating power of not less than sixteen candles, and the maximum price chargeable by any company shall be at the rate of 3*s.* 9*d.* per 1000 cubic feet.

By sect. 56 the maximum price chargeable by a company for cannel gas shall be at such rate per 1000 cubic feet as for gas of the illuminating power supplied by that company will be proportional to the price of 3*s.* 9*d.* per 1000 cubic feet, for sixteen candle gas.

By sect. 73:

If on any day the gas supplied by a company from any station is of less illuminating power than it ought to be under this Act, the company shall forfeit a sum equal to the value of the defective power, estimated at the rate of 20*s.* for every half candle of defective power on every 100,000 cubic feet, or any fractional part less than 100,000 cubic feet of gas, whether cannel or common respectively, made at that station on the day of default.

By sect. 74:

If on any day the gas supplied by a company from any station is of less purity than it ought to be under this Act, the company shall forfeit a sum of 50*l.* for each station in respect of which they are so in default.

On the 15th Dec. 1869, the company addressed the following letter, in the form of a printed circular, by their secretary to the vestry:—

Chartered Gas Company, Chief Office, Horseferry-road, Westminster, S.W., 15th Dec. 1869.

Sir,—I am instructed to inform you that, in pursuance of the City of London Gas Act 1868, the illuminating power of the common gas supplied by this company will, on and after the 1st Jan. next, be increased to sixteen candles, and the price will at the same time be reduced to 3*s.* 9*d.* per 1000 cubic feet. The illuminating power of the cannel gas will, on and after the same day, and in pursuance of the same Act, be increased to twenty-three candles, and the price will be reduced to 5*s.* 5*d.* per 1000 cubic feet.—Your obedient servant, JOHN O. PHILLIPS, Secretary.

The cannel gas supplied to the vestry was of the illuminating power of twenty-three candles, and the price named in the said letter was according to the requirements of the said 56th section of the City of London Gas Act 1868.

By the Gaslight and Coke Company's Act 1868 (31 & 32 Vict. c. cvi.), s. 8:

The company shall be and continue subject to the powers and provisions of the Metropolis Gas Act 1860, and of any Act passed, or hereafter to be passed, for amending the same, and entitled to the powers and privileges of those Acts, as if this Act were not passed, so far as the same are not varied by this Act.

By sect. 109:

If the Bill, the short title of which, when passed, is intended to be "The City of London Gas Act" (in this Act referred to as the City Gas Act), now pending, pass into a law in the present session, then the company and their undertaking shall be subject to the provisions of the City Gas Act without, as well as within, the City of London and the liberties thereof, and such Act shall extend to the whole undertaking of the company; and for the purposes of the City Gas Act, in relation to the undertaking of the company beyond the limits of the City of London and the liberties thereof, the Metropolitan Board of Works shall have all the same rights, powers, authori-

ties, and obligations, as are given to or imposed upon the mayor, aldermen, and commons of the city of London in the City Gas Act, as fully as if that board had been named in such Act instead of the said mayor, aldermen, and commons, so far as relates to the part of the undertaking of the company beyond the limits of the city.

By sect. 110:

Nothing in this Act contained shall exempt the company or their gasworks from the provisions of the Metropolis Gas Act 1860, or the Act for Regulating Measures used in Sales of Gas, as amended by subsequent Acts, or any other general Act already or hereafter passed, in the present or any future session of Parliament, for regulating gas companies in the metropolis, or for regulating the supply or sale of gas in the metropolis, and applicable to the company, or from any future revision and alteration by Parliament of the gas rents and meter rents by this Act authorised.

The company contend that their whole undertaking is now subject to the provisions of the City of London Gas Act 1868 as to illuminating power, price, and purity of the gas, and not to the provisions of the Metropolis Gas Act 1860, which, so far as the company are concerned, is repealed in those respects as well as to the mode of testing. The vestry contend that the provisions of the Metropolis Gas Act 1860 are, so far as the company are concerned with and as affects the said supply of gas to the said 1162 lamps, unrepealed and in full force.

In pursuance of the provisions of the City of London Gas Act 1868, the Board of Trade has appointed gas referees and fixed testing places where the gas has been daily tested, and the gas examiners have daily furnished the Board of Trade, the chief gas examiner, and the company, with the previous day's testings.

All the gas supplied to the vestry has been duly tested accordingly at 17, Arundel-street, Haymarket, and daily reports of illuminating power and purity have been furnished by the gas examiner.

From these reports it appears that the gas supplied during the said six months by the company to the vestry was above the illuminating power and purity required by the Acts of 1868, except on two occasions—viz., 4th May and 15th June—when the common gas was 15·6 and 15·9 instead of 16 candles; and on the 17th Jan. and 11th June, when the cannel gas was 22·5 and 21·1 instead of 23 candles.

The gas referees have not up to the present time certified the number of grains of sulphur beyond which the gas shall not be allowed to be charged.

In reply to an application by the company for payment by the vestry of the quarter's account for gas to March 1870, the following letter and copy of a resolution were sent to the company on the 5th May 1870:

St. George, Hanover-square Board Room,
Mount-street, London, W., May 5th, 1870.

Dear Sir,—I beg to forward you the copy of resolution agreed to to-day, when your company's account to Lady-day last for lighting street lamps was laid before the vestry of this parish. Will you please lay the same before the directors of your company?—I remain, dear Sir, yours faithfully,

J. H. SMITH, Vestry Clerk.

T. Bunk, Esq., Secretary,
Chartered Gas Company.

[Copy resolution referred to in letter.]

"At a meeting of the vestry duly assembled on Thursday, 5th May 1870, present the Rev. H. Howarth, B.D., rector, in the chair, &c., &c., resolved unanimously That the account of the Chartered Gas Company to Lady-day last be disputed, on the two-fold ground that the common gas is not of the quality specified in the circular of the gas company of Dec. 1869; and that the cannel gas as represented is not such, but gas made from a mixture of inferior coal.'—Extract from the Minutes. J. H. SMITH, Vestry Clerk."

The vestry did not before action brought make any complaint whatever of the purity or quality of the gas being supplied in the said half-year other than by the said letter of the 5th May 1870. They now complain that the company did not during the said six months supply the said lamps with such gas as they were bound to supply, and contend that on the facts stated they are not liable, if at all, beyond the amount paid into court.

The question for the opinion of the court is whether the provisions of the Metropolis Gas Act 1860 are in force and binding on the company as respects the supply of gas to the said 1162 lamps.

If the court decide the question in the affirmative, the verdict entered for the plaintiffs is to be vacated, and a verdict entered for the defendants with costs; or to stand for the plaintiffs with costs for such amount as the said Henry Manisty shall find to be due, or as the said Henry Manisty shall direct.

Otherwise the verdict is to stand, with costs subject to such reduction in the amount thereof as the said Henry Manisty shall direct, provided that the court are of opinion the defendants are entitled to any reduction.

Pollock, Q. C. (with him *Besley*) argued for the plaintiffs.—The effect of the two Acts of 1868 is to make the illuminating power the test of the gas to be supplied; this does away, therefore, with the test of purity imposed by the Act of 1860, except so far as that matter rests in the discretion of the gas examiners and referees appointed by the City of London Gas Act 1868. The defendants contend that the plaintiffs are still subject to the purity test of 1860, as well as to the illuminating test, and the examination of the Board of Trade officers, as instituted by the City of London Gas Act 1868. On that point the two Acts are inconsistent, for the earlier one makes twelve candles the standard of light, and the later makes sixteen candles the standard. [BLACKBURN, J.—The plaintiffs were the promoters of the second Act of 1868; and the meaning of the Legislature, to be derived from sects. 109 and 110, may be this: "We are content to oblige you by putting you under all the restrictions of the City of London Gas Act 1868, but we will not set you free from the other Act of 1860. You must be bound by the earlier Act; but if the referees find that you can procure a greater purity than that Act requires, you shall also be subject to their discretion." MELLOR, J.—The gas consumers would then have the benefit of both Acts.] That would be a very hard construction upon the plaintiffs, for if they had not adopted the provisions of the City Gas Act they would have been bound under the Act of 1860 to provide only three-fourths of the illumination now required. [BLACKBURN, J.—When the plaintiffs were promoting their private Act in 1868, they asked a great many boons from the Legislature. The committees may have said, "We will grant you this Act, but we will attach a condition to it, namely, that all those further restrictions for the benefit of the public which the City of London Gas Act contains shall apply to you, although the clauses in that Act which would relieve you from the restrictions of

the earlier Act shall not apply. You shall be subject to both Acts so far as the public can derive any benefit from them." Has not the Legislature expressed this in sections 109 and 110 of the plaintiffs' private Act of 1868?] If the Act of 1860 is to be read with this private Act, other persons besides the plaintiffs would be affected by it. Sect. 27 of the Metropolis Gas Act provides that every local authority taking any supply of gas shall provide all proper and sufficient apparatus for testing the illuminating power and purity of the gas, and may appoint a chemical examiner, and shall also erect an experimental meter. By the City of London Gas Act these matters are all to be cared for by the Board of Trade; and in consequence there would be a double testing process going on unnecessarily at the same time.—[BLACKBURN, J.—The Legislature may possibly have so ntended. I do not find that to be a difficulty.] There is not one word in the findings of fact contained in the case, to support the resolution of the vestry passed on the 5th May 1870, and the gas referees have not yet made any certificate. [BLACKBURN, J.—If we decide that the Gas Act of 1860 still applies, it will be for Mr. Manisty to ascertain whether there is to be any deduction from the plaintiffs' claim; and if the amount of deduction is such that the money paid into court is sufficient to cover the amount due to the company, I apprehend that there will be a verdict for the defendants. We have solely to inquire whether the Act of 1860 is still in force and then leave Mr. Manisty to apply our decision according to the circumstances.] By sect. 26 of the Metropolis Act a most stringent power is created against a gas company, by which it may forfeit 50*l.* upon a summary conviction, if the gas be of less illuminating power or purity than prescribed by that Act; and by the City Gas Act, sects. 73 and 74, this same gas company is subject to further provisions of forfeiture. [BLACKBURN, J.—And why not? The Legislature has furnished an additional protection to the public in return for the advantages which have been granted to the company. There are two conditions imposed: the first is by sect. 109, that the plaintiffs are to be subject to anything provided for the benefit of the public in the Act passed at the same time; the second is by sect. 110, that the plaintiffs are not to be exempted from any provisions for the benefit of the public contained in the Act of 1860. This is confirmed by sect. 8 of the plaintiff's private Act 1868.] The 110th section must refer only to those provisions of the Metropolitan Gas Act 1860 which are not repealed by the City Gas Act 1868. [LUSH, J.—Then that section would be unnecessary.] Sections to this effect are often inserted in Acts of Parliament with no other object than greater caution.

Streeten for the defendants.—If the court decide this question in the affirmative, the verdict entered for the plaintiff is to be vacated, and a verdict is to be entered for the defendants with costs. [BLACKBURN, J.—No, we adopt the other alternative, and the case must go back to Mr. Manisty. If it is proved (which does not seem to have been found as a fact) that the gas was impure, he will say how much deduction shall be made, and if that deduction covers all the amount in dispute, then the verdict will be for the defendants; otherwise *it will be for* the plaintiffs, for such sum as he *thinks fit.* It would be a monstrous injustice, and *a very hard bargain* for the company, that if there were a single gallon of gas deficient in quality, or a grain of ammonia beyond the purity prescribed, they were to forfeit the whole.]

BLACKBURN, J.—We decide that the Act of 1860 does apply to this company, and that this case must go back to the arbitrator, to be dealt with as he thinks right.

MELLOR and LUSH, JJ. concurred.

Attorneys for plaintiffs, *Curtis* and *Bedford.*

Attorneys for defendants, *Capron, Dalton,* and *Hitchins.*

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, April 22, 1872.

(Before KELLY, C.B., and MARTIN, BRAMWELL, and CLEASBY, BB.)

WHITECHURCH AND OTHERS *v.* THE EAST LONDON RAILWAY COMPANY.

Poor rate—Railway company—Rating of lands taken under compulsory powers—Liability of company to make good deficiency in rate—East London Railway Act 1865 (28 *Vict. c.* 7, *s.* 128).

The defendants, under the powers given them by their special Act, had taken certain lands for the purpose of constructing various railways, one of which passed through the parish of which the plaintiffs are overseers.

Under sect. 128 *of their Act* (28 *Vict. c.* li), *corresponding to sect.* 133 *of the L. C. C. Act* 1845 (8 *& 9 Vict. c.* 18), *the defendants are liable to make good the deficiency in the rates of any parish in which they shall have taken rateable property for the purposes of their railway,* "*until the railway or the works thereof are completed and assessed, or liable to be assessed to such rates.*"

Held (*dissentiente Martin, B.*), *by Kelly, C.B., and Bramwell and Cleasby, BB.* (*distinguishing* Reg. *v.* The Metropolitan District Railway Company, *L. Rep.* 6 *Q. B.* 608; 40 *L. J.* 113, *M. C.*), *that such liability ceased as soon as such portion of the railway and works thereof as was situated in the plaintiffs' parish was completed and opened for traffic, and had thereby become rateable property.*

Per Martin, B., contra, Reg. *v.* The Metropolitan District Railway Company, *in the Q. B. is directly in point and governs the present case.*

THIS was a special case stated for the opinion of the court by consent of the parties. The facts, as set forth in the special case, were as follows:—

The plaintiffs are the Churchwardens and Overseers of the Poor in the Parish of St. Mary, Rotherhithe, and the defendants are the East London Railway Company, incorporated by the East London Railway Act, 1865.

The company are possessed of some lands for the purposes of their Act. The lands taken in the parishes of Deptford and Rotherhithe have been appropriated to and form a completed railway, and the land taken by the company in other parishes is being used for the purpose of constructing the incompleted portions of the unfinished railways authorised by the Act. Clause 22 of the East London Railway Act 1865 (28 Vict. c. li.), specifies the railways which the company were authorised to make, and which said railways, when complete, are to be called the East London Railway, referred to in the said Act. They are therein described as Railways No. 1, No. 2, No. 3, No. 4,

No. 5, No. 6, and No. 7, respectively. No. 1 is the principal line, and is to commence in Bethnal-green and to terminate at New Cross, Deptford, passing in its course through the Thames Tunnel, and through, amongst others, the parish of St. Mary, Rotherhithe. The case proceeds as follows: "6. As much of Railway No. 1 as is within the parishes of Rotherhithe and Deptford is complete, and also the stations thereof. So much of the said Railway No. 1 as is in the parish of Wapping is also nearly finished. The completed part aforesaid is let to the London, Brighton, and South Coast Railway, under an agreement dated the 17th Nov. 1869, confirmed by 33 & 34 Vict. c. 55, s. 16. The London, Brighton, and South Coast Railway Company opened the said completed portion of Railway No. 1, for traffic in December, 1869, and have ever since occupied and worked it. 7. The whole of the Railway No 1, is also completed, and is let to and worked by the said Brighton Company under the said agreement; but Railways No. 2, No. 3, No. 5, No. 6, and No. 7, are commenced but not completed. 8. Clause 128 of the said East London Railway Act provides that:

If and while the company are possessed under this Act of any land assessed or liable to be assessed to any sewer rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall from time to time, until the railway or the works thereof are completed and assessed or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railway or works, and the deficiency shall be computed according to the rental at which those lands with any building thereon are now rated.

And accordingly, pursuant to such clause, the defendants, whilst they were constructing their railway within the plaintiffs' said parish, paid to the plaintiffs the deficiency of rates in their parish; but after that portion of the railway from New Cross to Wapping station was so completed, the defendants considered it 'liable to be assessed,' within the meaning of the said clause, and refused to pay to the plaintiffs, as by them required, any farther sum for the deficiency of rates within their parish under that section."

9. Concurrently with the defendants so refusing to pay, the said Brighton Company claimed of the plaintiffs to be rated in respect of the said completed portion of railway within their (the plaintiffs') said parish, as the sole occupiers thereof, upon the true gross and rateable value thereof, and they the said Brighton Company were afterwards rated by the plaintiffs in the rate made by them on the 13th April 1870, upon the sum of 1181*l.* 15*s.*, rateable value, which rate was based upon the same rentals as those in respect of which the defendants had paid rates during the construction of the said portion of railway No. 1. The said Brighton Company, however, objected to such rating, alleging that the true rateable value of the portion of railway within the plaintiffs' said parish was 150*l.*, and they accordingly claimed as sole occupiers thereof to be assessed at that sum in lieu of the sum of 1181*l.* 15*s.*, the amount at which the property on the site of which the railway had been constructed was originally assessed.

10. The plaintiffs did not collect the said rate from the said Brighton Company, being advised that they were in error in rating them, and contended that the defendants were and are liable, under the said clause 128 of the said East London Railway Act to make good the deficiency in the assessment for rates, notwithstanding that so much of the said railway No. 1 is, as before stated, completed within the plaintiffs' said parish, and is occupied and used by the Brighton Company under the said agreement for the purposes herein mentioned.

11. The deficiency in the assessment of rates made by the plaintiffs in their said parish on the 13th April and the 5th Oct. 1870 amounts in the whole to 310*l.* 4*s.* 3*d.*

The question for the opinion of the court is, whether the defendants are liable to pay the said deficiency.

Prentice, Q.C. (with him *Morgan Howard*) for the plaintiffs. — The question is, have the company, under the provisions of the Acts, to make up the deficiency until the whole line, or till that part of the line which lies within the parish, is complete. The section says, "the railway or the work thereof;" this clearly means the railway authorised by the company's Act, and not only a part of it. See

Reg. v. *Metropolitan District Railway Company*, L. Rep. 6 Q. B. 698; 40 L. J. 113, M. C.;
Wheeler and others v. *Metropolitan Board of Works*, 20 L. T. Rep. N. S. 984; 38 L. J. 165, Ex.; L. Rep. 4 Ex. 303;
Metropolitan Board of Works v. *West Ham*, L. Rep. 6 Q. B. 193; 40 L. J. 30, M. C.

Sect. 128 of the East London Railway Company corresponds with sect. 133 of the Lands Clauses Consolidation Act, and must be construed in the same way. There are two things required to exempt the company from their liability—first, that the railway undertaken by them shall be completed; secondly, that it shall be assessed or liable to be assessed. This is a stronger case than *Reg.* v. *Metropolitan District Railway Company*. There the whole system of railways had to be completed. Here we only contend that the liability extends till the completion of railway No. 1.

Sir *J. Karslake*, Q. C. (*Poland* with him) for the defendant.—*Reg.* v. *The Metropolitan District Railway Company* is distinguishable, for there the railway was not completed within the parish. It was an assessment of St. James's parish on the railway as far as Westminster-bridge, beyond which spot there was a portion in the same parish unfinished. It is manifest that great injustice would be done if there were such delay as the decision in *Wheeler* v. *Metropolitan Board of Works* contemplates in the case of a long railway, say extending for some hundreds of miles. The true principle is, that the deficiency is to be made up, so long as there is not a rateable property in the parish to take the place of the former rateable property which has been compulsorily taken. Where houses have been taken and pulled down, as soon as you have a place to rate instead of those houses, as, for instance, a practical working railway in the parish, the rating should take place; till then the old rating has to be supplied. Parochiality is the basis of these assessments. Further, in this case an assessment of the railway has actually taken place, and the act of the plaintiffs in making an assessment shows that the time for assessment has arrived, and is an act from which they ought not to be permitted to retreat.

Prentice in reply.—All depends on the words of the Act. Read by the light of the interpretation clause, it is difficult to see how "the railway" in sect. 128 can mean the part of the railway in the parish of St. Mary, Rotherhithe. The very reason

why the completion of the railway is the period allotted for beginning to assess, is that then the railway is presumably more valuable. As to the assessment which has taken place, this court has never decided that the parish cannot at once assess if they prefer it. *The Mayor of London* v. *St. Alban's, Holborn* (16 L. T. Rep. N. S. 665; L. Rep. 2 C. P. 574; 36 L. J., M. C. 95) only shows that you cannot recover the deficiency by rate.

CLEASBY, B.—I am called upon to deliver my opinion first on this case, because, as I understand at present, the court is not unanimous. It appears to me that the defendants are entitled to the judgment of the court. The question turns entirely upon the construction of the 128th section of the East London Railway Act of 1865. But I think we cannot deal with that well without considering first what general legislation there has been upon the subject, and first we have the 133rd section of the Lands Clauses Consolidation Act. Now by this section it was enacted that if the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor rate, they shall from time to time, until the work shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency in the several assessments for land tax or poor's rates by reason of such lands having been taken for the purposes of the works. I cannot help thinking that if land had been taken in several parishes and made use of, and the works had been completed and assessed to the poor rate in one parish, then the liability to make up the deficiency would not have existed. At the same time I do not find that there is any compulsion upon them to assess. Under certain circumstances, if it were made to appear that they had not assessed for some improper reason, the Court of Queen's Bench, in all probability, would have compelled them to assess. But they were not compelled to assess for the purpose of ascertaining whether there was or was not a deficiency. But it was left to them, and as soon as the property in a particular parish, according to their clear judgment, was in such a condition as to make it for their benefit to assess, they would assess; and the Act of Parliament would be applicable, without reference to the completion of the whole of the works of which the company were promoters. This being the result of general legislation upon the subject, the 128th section of the East London Railway Act introduces other rates besides the poor rate, but it makes use of the words "until the railway or the works thereof are completed and assessed," so far following the words of the Lands Clauses Consolidation Act, but adding, "or liable to be assessed." Now, without dealing with the case referred to from the Court of Queen's Bench, I cannot help thinking that, upon the fair construction of this section, as soon as the railway is completed in a particular parish where the poor rate is made, the statute introduces the idea of parochiality. And as soon as the land taken in the parish is used, and therefore liable to be assessed as a railway, this section ceases to operate. I do not think it necessary to deal with the case of a large parish in which part of the railway is complete and part still incomplete. It is sufficient for the purposes of this *case to deal* with the deficiency in the rates of *the parish* as a whole, and with the liability to make it up as one undivided liability. With respect to the decision in the Court of Queen's Bench, in the first place taking the decision itself, it is not at all at variance with the conclusion at which I have arrived, because, in that case, the condition was not fulfilled of everything having been done in the parish so as to arrive at the deficiency in the poor rate. And with reference to the *rationes decidendi* in that case, which I should be sorry to call in question, they will be found on examination to be founded on the particular language of that Act of Parliament which is different from the language of this Act. In that Act the words made use of are, "until the railways are completed." There was an interpretation clause which expressly declared that "the railways" should mean "the railways and works connected therewith, by their Act authorised to be constructed." The decisions of the learned judges in that case are founded upon this—that you cannot give effect to these words, "the railways," and the interpretation clause, without holding them to mean "until the whole of the railways are completed." This being the construction upon which the decision in that case is founded, that decision is not applicable to the present case, because here we have the same interpretation clause; and when we come to the 128th section we find that it contemplates, not the system of railways, but "the railway" contemplated by this Act. I do not think, therefore, that my decision dissents from that of the Court of Queen's Bench, and the reasons for deciding are not the same. For these reasons it seems to me that the defendants are entitled to the judgment of the court.

BRAMWELL, B.—Independently of authority I am of the same opinion. In order to put a meaning upon these words or to construe them, as it is said they need construction, we must see what the probable object of the Legislature was. To my mind it was not to indemnify the parishes against loss. Certainly that was not the object for all time, because it is quite certain that when the railway is made and completed, although the parish may be losers by its making and completing, yet they are to bear that loss; and they ought to bear that loss, because the object of the Legislature only indemnifies those persons whose properties are taken and injuriously affected, and the Legislature does not indemnify any persons against indirect loss occasioned by the alteration in the occupation of other premises—as, for instance, by the railway being substituted for the former occupiers. No one could complain that his business had diminished, or that he had sustained an injury in any other way in consequence of this substitution. So, too, the inhabitants of a parish, who have the misfortune—if it is a misfortune—to have a railway going through that parish, where valuable property is taken down and less valuable property substituted for it, must bear the loss. They take it for better for worse. If the railway turns out a profitable thing for the parish they gain by its being rated. The railway company are liable to have a larger rate put upon them than the former rate was, or they are liable to a less rate, according as the rateable value of the railway is larger or not. Clearly the Legislature ought not, and they do not, attempt to indemnify the parish in respect of the making of the railway—at all

events not for all time. It may be that they intended to indemnify them during the construction of the railway, though I have considerable doubt about that. I incline to believe that what they intended to do for the sake of both parties (it may be principally for the sake of the parish) is, that while the railway is in the course of construction, and it would be difficult to put an assessable value upon the land which is being converted into a railway for the purpose of rating, the Legislature meant that, during that time, the promoters of the company—for it is not limited in this particular case—shall be liable to make good a deficiency; that is to say, the land shall not be rated while it is being converted into a railway, and the promoters shall make good the deficiency arising from its not being rated. Now I think that was the object of the Legislature, to preclude disputes as to the rateable value of the land which was diverted from its original purpose, and was of doubtful assessable value, and possibly to indemnify the parish during the time it could not be assessed as a railway. To my mind, as soon as one is satisfied of that, it follows that, as soon as they can assess the land which has been taken as a railway, the reason of the thing ceases, and the obligation to make up the deficiency no longer arises. There may be no deficiency then, because it may be that as soon as the land is assessable as a railway, it may be assessable at a larger rate than before. If houses are taken it will probably be assessable at a less rate. If agricultural land is taken it will probably be assessable at a greater rate. Now, that being to my mind the presumable intention of the Act of Parliament, let us see what are the actual words that are used. The words that are used say nothing, to my mind, about the parish, or ward, or county, or district, or what not; because the section is applicable to sewer rate, consolidated rate, church rate, or other parochial or ward rate. There are no ward rates in Rotherithe, but still the section is applicable to it. A ward rate is not a parochial rate, and a main drainage rate is not a parochial rate, although it is collected through the medium of parishes. The parish, but for this clause, possibly might have had a difficulty, or rather those who are entitled to make main drainage rates, would have the same difficulty as the parish would, but for some such provision as this. I do not understand that at common law the parish would be bound to make good a certain definite sum to a main drainage rate. It would be rather according to the value of the property in that parish, I imagine. I do not think, therefore, that there is any question of parochiality or district in the matter. But I do think, and with great confidence, that the meaning of the law is, that so soon as any parcel of land which would, before it was taken by the railway company, have been liable to assessment either as house and garden, or other ground, as soon as this is covered by a railway, or converted into a railway, and the railway is in such a state of completion with reference to that piece of land, that it is assessable, or liable to be assessed, then the liability of the company to make good the deficiency of the rate exists no longer Of course, I do not mean to say that if a railway were completed on a piece of land, but not so completed as that it could be worked, in that case the company would not be liable to make up the deficiency. I assume that in all probability they would. I am not quite sure about it, but I should think so, for this reason, that it would not be liable to be assessed as a railway. For instance, if it were completed only half way between two intended stations, I should say it would not be liable to be assessed within the meaning of the Act of Parliament. But there can be no doubt that as soon as the piece of land is converted into a railway, or covered by a railway which forms part of a railway capable of being worked, and consequently capable of assessment, then the obligation of the company to make good the deficiency in respect of that piece of land ceases. In other words, it seems to me that the meaning of the Act is this, the company will take several portions of land (using the term generally, land and houses); in respect of each of which portions they would have been subject, or the occupiers would have been subject, to a separate assessment before the company took them. When the company do take them they shall make good the deficiency in respect of the non-rateability, or rather the non-rating of each of those pieces of land, until such time as they are subject to be assessed in respect of the railway constructed upon it, that railway having become workable. I think this is manifest not only from the reason of the thing, but from a variety of small matters, for the expression used in the Act is "until the railway, or the works thereof, are completed," which I have no doubt, in the mind of the draftsman, meant this, "Until the railway constructed upon it, or if not the railway at all events some of the works of the company, are completed and subject to assessment." But another thing which supports this view of the case is this. The Act of Parliament, as I understand, is a little inaccurately drawn. It is not correct to say that a railway is liable to be assessed. It should be "the occupiers of the railway in respect thereof." Would not the section then come to this, that when a company has become possessed of land subject to assessment to any of these rates, they shall from time to time, until the works of the railway are completed, be liable to be assessed to make good the deficiency in the assessment of such rates by reason of the land being taken? That is to say, that as soon as they are liable to be assessed, their obligation ceases. The reason of the thing seems to me to be that way also. We must consider also what is the presumble object of the Legislature. The reason of the thing would seem to be this: Why should these defendants be liable to make good a deficiency because there remains some small piece of their works uncompleted which has nothing to do with the main work, or with the increase of traffic upon it, but which is a mere convenience, or something they were bound to do with reference to the requisitions of the neighbourhood? Take some small spur or some small piece of work that they have got to do, which may be in another parish, why should that make them in any way continue to be liable to make good the deficiency? Another consideration strikes me very strongly, which is this: that after they have made a portion of the works, and are working them, they surely are assessable in respect of them; for instance, they surely are assessable if they work this piece of line—I cannot see any dispute about that. There is no statement that they shall not be assessed: then what is the consequence? Are they to be assessed in respect

of that, and still to make up the deficiency?—that is to say, first to be assessed at a certain amount under the ordinary law, and, secondly, to make up the deficiency? That seems to me a very monstrous thing. Why, when the subject-matter is capable of assessment, should they be liable to make good a deficiency in respect of it? Then, on the other hand, if it should be said they are not liable to assessment at all, see what preposterous consequences would follow. It may be that this piece of railway, although not the whole that they are liable to make, is double the rateable value of the land they have taken: are they to be at liberty to say, "Nevertheless we are not liable to be assessed—we shall only make up such deficiency as would arise from non-payment of the old rates?" I cannot see that there is any reason at all for that; it seems to me that the reason of the thing, and the words of the statute are directed to this: that while they are constructing their railway upon it they shall make good the deficiency in respect of each parcel of land, but that so soon as they have a working railway upon it they are liable to be assessed, and consequently that this clause, about making up the deficiency in the rate, does not apply. That would be my judgment upon this matter if it had come before me independently of all authority; but I confess I am glad to think that my Lord and my brother Cleasby can distinguish this from the case in the Court of Queen's Bench. I should have had very great difficulty, certainly, in distinguishing the *rationes decidendi* in that case; but as my Lord and my brother Cleasby say it does not govern the case, I am content to abide by their judgment, and consequently I feel myself at liberty to express my own opinion upon this case, and that is in favour of the defendants.

MARTIN, B.—I am sorry to say that I differ from my learned brethren with respect to this case. I do it because I think they add words to the 128th section which are not in it, and that, instead of reading the words of the Act of Parliament, which are, "until the railway or the works thereof are completed and assessed, or liable to be assessed," they read it as if it were, "until the railway or the works thereof in *in the parish of Rotherhithe* are completed and assessed;" and, in my judgment, it is not competent so to read the Act. If the matter were new, it seems to me, without expressing a very confident opinion upon it, that I could not agree with my brother Bramwell upon this; but I am of opinion that this case in the Court of Queen's Bench is directly in point, and that the whole of the reasons upon it apply here. It seems impossible to read the judgment of my brother Keating and my brother Lush, and my brother Hannen, without seeing that that was their opinion. They state it exceedingly plainly, and I think very clearly. The Act of Parliament at present in question has reference only to a line of railway six or seven miles in length, and I cannot think that we ought to go upon arguments of hundreds of miles in considering the matter The case which came on before the Court of Queen's Bench was in regard to an Act which enacted the making of a number of railways, and that "while the company are possessed under this Act of any lands assessed to any poor rate and certain other rates, they shall, from time to time, until the railways or the works *thereof are* completed and assessed, or liable to *be assessed*, be liable to make good the deficiency in the assessments for such rates by reason of these lands being taken or used for the purpose of railways or other works by this Act authorised; and the deficiency shall be computed according to the rental at which those lands, with any buildings thereon, were rated at the time of the passing of the Act." And, so far as I see, the only difference between the present enactment and that is, that there the word "railways," is used, and not "railway." So far as I can see, in other respects the wording is identical, and that is the only difference between them. Then, the facts being that the railway was not completed, as I understand (although no great stress seems to be put upon it), entirely within a particular parish, the question was whether the company was bound to make up this deficiency. My brother Keating was in the court, and he gives his judgment, and his judgment is what I pointed out in the course of the argument as operating upon my mind. He says this: "There seems to me to be good reason for making the completion of the works the terminus at which the liability of the railway company shall cease; the reason is this—the rateability of any portion of the railway passing through any particular parish can never be accurately and fairly ascertained until the whole works have been completed; when the works have been completed, then the rates can be apportioned with justice to the parishes and with justice to the company, and they cannot, until the completion of the railway, be fairly apportioned." He then alludes to the argument of Sir John Karslake, which, he says, is defective. Then, Lush, J., delivers judgment, and he says: "The company shall, until the railways and works connected therewith by this Act authorised to be constructed are completed and assessed, or liable to be assessed, be liable to make good the deficiency, and that must mean the whole of the railways authorised by this Act; and this is clear from the very obvious reason mentioned by my learned brother, that until the whole scheme is completed, and its capacities for making profits fully developed, the parishes will not get the benefit which they ultimately will get when the scheme shall be developed, and these railways are liable to connect themselves with other railways, and thereby have a large traffic. I cannot doubt, therefore, that the completion of the railways is the event contemplated. That event has not happened. There is still a deficiency between what the railway, if it were rated now would yield, and the rates in respect of the houses which have been pulled down, and, therefore, there being that deficiency, and the event upon which the company are to be relieved not having happened, the company is still liable to make good the deficiency." Hannen, J., says the same: "The question is, what is that event? It is expressed thus—'Until the railways or the works thereof are completed.' The natural meaning of these words is until the whole of the railways are completed; and I can see no reason in the scheme of legislation for supposing that any other than than that which is the ordinary and proper meaning of these words should be put upon them. On the contrary, for the reasons given by my learned brothers, it seems to me to be highly reasonable that the company should be made liable to make up the deficiency until the whole scheme of the railways shall have been completed, and until the whole line of railway shall have been put to its greatest advantage for all parties concerned." And

I own I concur in what Mr. Prentice stated, that this case is an *à fortiori* case. In that case they put it that all the railways must be completed, but all that Mr. Prentice contends for here is that the deficiency must be made up till the line of railway No. 1 is completed. Therefore, it seems to me, we are overruling the case in the Queen's Bench, which I do not think we ought to do; and I have already stated I do not concur in the reasoning of my brother Bramwell. But, in my judgment, this case is direct on the point, and, as Mr. Prentice says, an *à fortiori* case. I think it right to give my opinion with regard to this particular matter, as I presume this case is likely to go up to the court of error.

KELLY, C.B.—It appears to me that the defendants are entitled to the judgment of the court. The question turns entirely upon the meaning of the words "until the railway or the works thereof are completed and assessed, or liable to be assessed," in the 128th section of the Act of Parliament. Now, in order to put a meaning on these words, and, indeed, upon any other words in the Act of Parliament, we must look to the mischief which was sought or intended to be remedied by the Act of Parliament in question. That mischief appears to me to have been this: Where the company have obtained an Act for the construction of a railway, a portion of which (or perhaps the whole of it) may run through a particular parish, so long as the railway itself is incomplete, and not in such a condition as to be worked, and to earn profits, and to obtain any returns from the working of the railway, the principle upon which the railway is to be assessed to the poor rates, and, indeed, to any other description of parochial rate, is full of difficulty and uncertainty. It has been doubted whether it is assessable at all in particular cases; as, for example, where, perhaps, a house or house property of considerable value may have been taken by the company and removed, in order to construct a railway upon the site, and the railway has been duly commenced and partially proceeded with, it is very difficult to say that the land is actually of any assessable value; and when you remember that the land is to be assessed to the rate at what it would fetch, if let under ordinary circumstances to a tenant from year to year, it is very difficult to say that land taken for the purpose of a railway, whatever may have been its value at the time it was taken, but where the railway itself is incomplete, that is, no portion of it is complete so as to be brought into a condition capable of being worked at a profit—it is very difficult to say that it is of any value at all. And, therefore, it may be and has been found that there was very considerable difficulty in determining the principle upon which land, which would not in its then condition let to a tenant from year to year at any rental at all, is liable under the poor laws to any assessment to the poor rate whatsoever. Under these circumstances the Legislature has sought to apply a remedy by provisions almost in the same words as are found in the Lands Clauses Consolidation Act, and in this particular Act of Parliament, providing a remedy by the enactment that where a railway shall be in such a condition, that is, where the company have taken possession of land which was liable to be assessed, and probably had been assessed before, to the poor rate or any of the parochial or other rates here mentioned, the company should be liable to make good the deficiency in the assessment; that is, to make good to the parish the amount which they would have been enabled to obtain from the land in question in its former or original condition, until the railway shall be complete and assessed to the poor rate or other rates in question, or shall be liable to be so assessed. How is that brought into actual practice—into practical effect so as to be a remedy for the grievance compained of? Why, so long as the railway is unworkable and cannot be applied to any profitable or remunerative purpose, it is really worth nothing; and some such provision as this is necessary in order to do justice to the parish. But as soon as a portion of the railway is complete, that is, from one station or from one terminus to another, and comprising the whole of the land which has been taken in the parish in question, then it has been brought into a condition which enables the parish in question to assess it in the ordinary way in which, by law, land or property is rateable to the poor rate or to the other rates in this or any other such Act mentioned, and consequently the mischief ceases; the necessity for the Act of Parliament is at an end, and the Act of Parliament, under which the company are forced to make up the deficiency, ought to be held inapplicable. There is, then, more than one ground upon which to put a reasonable construction upon this Act of Parliament, and one may consider, if the requisitions here found are complied with, that a railway may be taken to be complete whenever a portion of the railway comprised within the rateable land in the parish is complete, so as to enable the company to use it in order to obtain a remunerative return, and the parish are in a condition to assess it to the poor. That is the case here. Here is a line of railway, one of a great many lines, they are six in number; but without reference to the others let us take No. 1, which is the line of railway now in question, the object of this Act of Parliament, that is the railway from Bethnal-green *viâ* Wapping to Deptford or New Cross. That line of railway is, undoubtedly, not complete; but it is complete from Wapping, through the whole of this parish of Rotherhithe, to New Cross or Deptford; there is therefore what would satisfy the term "a railway is completed," and consequently it is in a condition to be assessed to the poor rate. But if it is held to be liable to assessment, and the railway is complete within the statute, the provision for making good the deficiency would be at an end, and this would affect the whole of the effect sought to be obtained by the Act of Parliament, that is, to remunerate the parish, to protect the parish against loss; and at the same time it would be a reasonable construction, as enabling the parish to assess the railway at its then true value as a railway; and, on the other hand, make the railway company liable only in respect of that as to which they ought to be rated; viz., that portion of the railway which they are working at a profit. But besides, when we look to the terms of the provisions of the Act of Parliament, and the moment we consider that, to put the extended construction upon this Act of Parliament, or rather upon the expressions to be found in it, "until the railway or the works thereof are completed," would, in the case which has been suggested of a railway of a great many miles in length (a railway such as that, for example, from London to Bristol), render the company liable to make

good the assessment at its original rate; and unless there was an option in the parish to assess those portions of the railway which were completed and in operation, in the ordinary way, or claim the deficiency under this provision in the Act of Parliament, would also disentitle the parish to recover the larger amount, whenever it might be a larger amount, which they would in the case of those portions of railway be entitled to. We see that the result of such a construction would be to keep up and continue a state of things which the Legislature cannot have contemplated; a state of things in which neither the railway company are assessed, nor the parish entitled to make an assessment upon the railway, according to the ordinary rules of law, that is upon the rateable value of the railway, and to substitute for those ordinary rules something intended to be only of a temporary character, and that long after the necessity for that mode of rating should have ceased. And again, this consideration occurs: supposing the railway between Wapping and Bethnal Green should never be completed at all, here is a complete railway from Wapping to Deptford, which is worked, and worked possibly at a profit, at all events it is worked with some remuneration to the company. And is the system of rating only at the difference or deficiency which exists between the original value of the land and the no-value of an incomplete railway to continue for ever? I see no end to it if so extended a construction is to be put upon the Act of Parliament. But then we have to consider undoubtedly the case decided in the Court of Queen's Bench. Now, it is impossible to deny that, when we look at some of the *rationes decidendi*, they apply entirely to this case; and that it is necessary, therefore, in pronouncing the opinion I am now delivering upon this case, that I should differ, as to some of the *rationes decidendi*, from the learned judges of the Queen's Bench. And I feel myself compelled to do so, first upon the ground that, if this deficiency is recoverable under a provision of this nature in the Act of Parliament, it would apply equally to the case of a railway from London to Carlisle or from London to Bristol, as to a small and short railway extending only from Deptford to Bethnal Green. But when we look at the case, there are two points of distinction between that case and the case now before the court which relieves me from the difficulty I should otherwise feel in differing from those learned judges; one has been pointed out by my Brother Cleasby, that in that case in the Queen's Bench the word "railways" is not in the singular number, but in the plural number. That was an Act of Parliament for five or six different railways in different places, and the condition was, "until the railways should be completed." I do not know whether there was an interpretation clause there or not, but there was certainly no such interpretation clause in that case as we find in this case; and, therefore, it is enough to distinguish the one case from the other, that here the word "railway" is in the singular number, and there it was in the plural number, and it is impossible to put a literal construction upon that Act of Parliament without applying the provision to the whole of the railways conjointly. And so it was *held that the* deficiency was recoverable in the way *pointed out in* the section in question, until the *whole number* of the railways was completed. But there is another distinction between this case and the cases before the Court of Queen's Bench, and that is a material distinction which goes the whole length of the principle involved in both cases, and that is this: That there the whole line of railway to be constructed under the Act from one end to the other of the parish or parishes in question was not complete, it was a portion only of the land to be taken in the parish, and to be occupied by the railway which had been completed. Here the whole line of railway from one boundary to the other of the parish of Rotherhithe is complete. The whole of the land taken in this parish liable to assessment in the parish has been taken, and the railway through the whole of that land is complete, and further, it is complete from Deptford, which, I think, is beyond the parish of Rotherhithe, to the station or terminus at Wapping, which is also beyond the parish of Rotherhithe, and, therefore, we have here one complete line of railway in actual operation, and returning a remuneration to the company, the proprietors of the line of railway, and comprising within it the whole of the land which is rateable within this parish. That is another distinction between the case now before the court and the case in the Queen's Bench. It appears to me, therefore, that the only reasonable construction we can put upon this expression is, that it means this deficiency shall be recoverable by the parish against the railway company, so long as the railway within that parish is in such a condition that it would be difficult to determine any reasonable principle upon which it can be rated at all, in which case the parish would find that they could only recover from the company, if assessed in the ordinary way, a much smaller sum of money than they had previously derived from the property as it formerly existed, or than they were likely afterwards to derive from the line of railway or any specific workable portion of it; but the moment there is a workable portion complete and actually worked, so as to make it the subject of assessment to the poor rate, or any other of these rates, according to the law by which railways are rated to the poor rates, it appears to me that the words of the Act are satisfied. There is then, and then only, a railway said to be complete and liable to be assessed; of course the parish cannot be entitled at once to assess it, and recover a poor rate in that way, and also to recover a deficiency under this section of the Act of Parliament, when a part of the railway is complete. And when that has been assessed there is an end of the application of this section of the statute. If the railway itself be complete and liable to assessment, although not actually assessed, so in like manner it comes within the words of this provision in the Act of Parliament, and the right to recover the deficiency is at an end. Under these circumstances, and regretting that I have to differ, as to the *rationes decidendi*, from the learned judges of the Court of Queen's Bench, I am bound to pronounce an opinion that in this case the action is not maintainable.

Judgment for the defendants.

Attorneys for the plaintiff, *Hawkes, Wilmott, and Stokes*, 101, High-street, Southwark, and 61, Paradise-row, Rotherhithe, E.C.

Attorneys for defendant, *Wilson, Bristows, and Carpmael*, 1, Copthall-buildings, E.C., and 22, Parliament-street, S.W.

Tuesday, May 7, 1872.

SECOND DIVISION OF THE COURT.

(Before MARTIN, BRAMWELL, and PIGOTT, BB.)

ANDREWS *v.* STYRAP.

The Medical Act (21 & 22 *Vict. c.* 90), *sect.* 40—*Title of "M.D."—"Wilfully and falsely" taking and using the same—Conviction for by justices under the above section—Evidence of the offence—Diploma of foreign university obtained by purchase only.*

A., a druggist, had attended a patient in the capacity of a medical man, and sent in to him a bill for such attendances, headed, "Mr. P. to Thomas Andrews, M.D." setting out a variety of charges for attendance and medicine, &c. He subsequently wrote a letter signed, "Thomas Andrews, M.D." threatening legal proceedings unless the bill were paid, and he gave a receipt for the bill when paid, signing it in the same way. There was a coloured lamp over his shop door, on three sides of which the words and letters "Thomas Andrews, M.D." were painted. It appeared that he had obtained by the payment of a sum of money a diploma of doctor of medicine from the University of Philadelphia in the United States, but that he had never been in America, or studied, or passed any examination, for such degree, and he was not registered under the Medical Act.

On appeal, from a conviction by justices under sect. 40 of the Medical Act (21 & 22 *Vict. c.* 90), *for having unlawfully, wilfully, and falsely taken and used the name, title, description and addition of "M.D.," and "thereby implying that he was then registered under the Medical Act, whereas he was not so registered," &c., it was*

Held by the Court of Exchequer (*Martin, Bramwell, and Pigott, BB.*) *that the conviction was right, and must be affirmed.*

THIS was an appeal from a decision of justices, convicting the defendant, upon an information laid before them under sect. 40 of the Medical Act (21 & 22 Vict. c. 90) for falsely, &c., taking and using the name and title of a physician and doctor of medicine, and it came before the court on a case stated by the justices under the 20 & 21 Vict. c. 43. It appeared from the case that at a petty sessions in and for the borough of Shrewsbury, on the 21st Dec. 1871, an information was laid by the respondent against the appellant, a druggist in the said borough, charging him with having, on the 25th Sept. 1871, within the said borough, *unlawfully, wilfully, and falsely* taken and used a name, title, addition, and description—to wit, "M.D.," meaning thereby "doctor of medicine," and thereby implying that he, the said appellant, was then registered under the Medical Act, whereas he was not so registered, he, the said appellant, not being a person who was actually practising in medicine in England before the 1st Aug. 1815, contrary, &c., and upon hearing the said parties, appellant and respondent respectively, by attorney and counsel, the matter was determined by the said justices, and the appellant was duly convicted before them of the said offence, and adjudged to pay the penalty of 20*l.*, including costs, to be levied in default of payment by distress and sale of his goods; and in default of sufficient distress he was to be imprisoned for two calendar months, unless the said penalty and costs were sooner paid.

The appellant being dissatisfied with the determination of the justices as erroneous in point of law, applied to them to state and sign the present case for the opinion of this court, from which it appeared that on the hearing it was proved and found as a fact that the appellant had attended a patient, the sister of one Thomas Parton, in the capacity of a medical man, and had, on the day named in the information, sent in to the said Thomas Parton a bill in the following terms:

Mr. Parton, Shrewsbury, 25th Sept. 1871.
To Thomas Andrews, M.D.
To professional attendance, medicines, &c., late Miss Parton £17 8 6

That on the 7th Nov. following, the appellant received 5*l.* on account of the said bill, and on the same day sent in to the said Thomas Parton another bill, headed in the same way.

Mr. Parton,
To Thomas Andrews, M.D.
To professional attendance, medicines, &c., as per items over £17 8 6

And then followed the several items of charge for medicines, attendance, journeys, &c., on the various days specified, from 26th April to 26th Aug. 1871. This bill was accompanied by the following letter from the appellant to Mr. Parton:

Sir,—Unless you settle balance of this account before Thursday week, I shall place it in the hands of my solicitor, without further notice. Yours, &c.,
T. ANDREWS, M.D.

The balance of the said account was paid on the following day by the said Thomas Parton, who received the following bill and receipt on the 9th Nov.:

Mr. Parton. Shrewsbury, 9th Nov. 1871.
To Thomas Andrews. M.D.
To professional attendance, medicines, &c., &c., Miss Parton.
Balance of account ... ... £12 8*s.* 6*d.*
9th Nov. 1871.
Settled, EDWYN ANDREWS.

It was further proved that the appellant had a lamp over the door of his shop at Shrewsbury, on three sides of which the words "Thos. Andrews, M.D.," were painted.

A book purporting to be the Medical Register for 1871, marked on the outside "By authority," was produced by the registrar of the County Court, and which he said had been issued to the court by authority for their guidance, and upon searching it the name of the appellant was not found there.

On the part of the appellant the above facts were not denied, except as to the words "unlawfully, wilfully, and falsely," and in support of the contention that the appellant did not "unlawfully, wilfully, and falsely," take and use the title of M.D., &c., (as charged in the information), a diploma of the American University of Philadelphia in the United States, dated 20th Feb. 1871, was put in. It was in Latin, and the following translation was handed in to the justices by the appellant.

To all to whom this present letter may reach.

The President Fellows and Professors of the American University of Philadelphia, founded by the laws of the Republic of Pennsylvania, give salutation. Inasmuch as in all universities, properly and legitimately constructed, either here or elsewhere in the world, it was a praiseworthy and ancient usage that men who have not less diligently than faithfully paid attention to literature, or to ingennous arts, or to any liberal studies whatever, meanwhile conducting themselves uprightly and honourably, should be adorned with some distinguished honour, and raised to merited dignity; and since by the laws of

our Republic we possess the fullest power of distinguishing and decorating with academical titles, and of advancing to degrees in sacred theology, in arts, and medicine, gentlemen well deserving of them, we therefore, furnished with this authority, and not unmindful of the ancient usage, have adjudged, and at a meeting of the Council have decreed, the eminent gentleman devoted to the highest pursuits, Thomas Andrews, about whose proficiency in medical science and honorable character we have sufficiently enquired and scrutinised, to be worthy and fitting to be honoured as a learned man in the highest degree of dignity; wherefore, with one accord, we have both elected and made him Doctor of Medicine, and have given and assigned to him all rights and privileges which belong to that degree. Now, all and singular these proceedings we in good faith notify unto you by the present letter fortified with our seal and the signature of the President of the University, this 20th day of the month of February, and in the year of our Lord 1871.

A seal, purporting to be the seal of the said university, was appended to this document, as were also several signatures, purporting to be the signatures of professors or officers thereof. A witness also proved that he held a similar diploma from the said university, and that he had been in America, and he testified to the authenticity and genuineness of the seal and the signatures appended to the appellant's diploma. He also said, on cross-examination, that a diploma could be obtained by an examination before examiners in England commissioned by the University of Philadelphia for that purpose. It was not alleged that the appellant had ever been in America, nor was any proof given that he had undergone any examination in order to obtain the diploma.

Upon these facts the justices came to the conclusion that the appellant had committed the offence charged in the information, and they duly convicted him thereof as aforesaid, and the question for this court is whether, upon the above facts, the justices were justified in coming to that conclusion, and so convicting the said appellant, or whether the fact of the appellant having obtained the above-mentioned diploma exonerated him from the charge made against him?

The following sections of the Medical Act (21 & 22 Vict. c. 90), which provides for the registration of duly qualified practitioners as therein specified, were referred to in the argument, and especially sect. 40, upon which the information is founded.

Sect. 31 empowers every person registered under the Act to practise medicine, or surgery, or medicine and surgery, as the case may be, according to his qualifications, in any part of the Queen's dominions, and to recover his reasonable charges with costs of suit, in any court of law; and by sect. 32, no person, after the 1st. Jan. 1859, shall be entitled to recover any charge in any court of law for medical or surgical advice, &c., or medicine prescribed and supplied, unless upon proof that he is registered under this Act.

Sect. 36 provides that, after 1st Jan. 1857, no person, unless registered under the Act, shall hold any appointment as physician, surgeon, or other medical officer, either in the military or naval service, or in emigrant or other vessels, or in any hospital, &c., not supported wholly by voluntary contributions, or in any lunatic asylum, &c., &c.

Sect. 40 enacts that any person who shall wilfully and falsely pretend to be, or take or use the name or title of, a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description, implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding 20*l.*

Huddleston, Q. C. (with him was *Bullen*), for the respondent, supported the conviction, and—following the course adopted in *Ellis* v. *Kelly* (3 L. T. Rep. N. S. 331; 30 L. J. 74, Ex., and 35, M. C.; 6 H. & N. 222) and *Jones* v. *Taylor* (28 L. J. 20, M. C.)—was called on by the court to begin.—He contended that the conviction was right, and that the justices, having found all the facts and come to a decision upon them, the court would not interfere with the conclusion at which they had arrived.

Ladd v. *Gould*, 1 L. T. Rep. N. S. 325.

R. Vaughan Williams, for the appellant, *contra*, urged that the diploma of the University of Philadelphia, which was an institution of high standing, and fully empowered to grant degrees, was a sufficient warrant for the appellant's use of the title of "M.D.," and saved him from coming within the operation of sect. 40 of the Medical Act. [PIGOTT, B.—The American University may be all that you say it is, but unfortunately this student has never been there.] It appears that the University is constantly in the habit of appointing examiners in other countries, and non *constat* that that was not done here. The fact of the Act of Parliament granting certain privileges to some persons, and imposing certain restrictions on others, by no means makes it unlawful to practise or to assume the title of "M.D." The Act only imposes certain liabilities or restrictions, as, for instance, by sect. 36, no unregistered person can hold certain medical offices there specified. If it be contended that the mere fact of practising as a "Doctor," without being registered, is an offence, the answer is in that section. The offence must be something more; a man must practise as a doctor with the object of obtaining the privilege conferred by the Act on registered individuals, or of avoiding or getting rid of the disabilities imposed upon non-registered persons. The mere fact of using the letters "M.D." after his name is no evidence of the offence, or of doing anything coming within the two last-mentioned heads. The case of *Ellis* v. *Kelly* (*ubi sup.*) is an authority that the merely appending "M.D." to one's name is no offence under the Act. In the present case it was done under a supposed right by virtue of the foreign diploma, and *Ellis* v. *Kelly* as well as *Pidgrift* v. *Chevalier* (20 L. J. 225, M. C; 8 C. B., N. S. 246), show that that is no offence. The evidence in the present case is very similar to that in *Ellis* v. *Kelly*, and the remarks of the court there, and particularly those of Bramwell, B., that it is the doing the thing "wilfully and falsely" that constitutes the offence under the Act, which doing is under a supposed, even if it be a mistaken, right cannot be held to be, are very applicable here. The appellant here had a foreign diploma. [MARTIN, B.—It is no diploma at all; it is a mere pretence. BRAMWELL, B.—The matter does not appear to me now as it appears to have appeared to me then.] It is submitted that there is no evidence here of the appellant having done anything more than incorrectly or

mistakenly used the title of "M. D." In this case it is an American degree, in *Ellis* v. *Kelly* it was a German one. *Pedgriff* v. *Chevallier* (*ubi sup.*), shows that the mere fact of a man's name not being in the medical register is not sufficient to warrant a conviction, for which purpose there must be evidence of wilful falsity, of which there is here an entire absence. To hold the appellant guilty of the offence would seriously affect hundreds of Scotch practitioners who are not registered under the Act.

Martin, B.—I believe we are all of opinion that the justices were perfectly right and thoroughly well warranted in the conclusion at which they arrived upon the facts before them in this case, and that, therefore, this conviction must be affirmed. It is plain to my mind that this is a question of fact. There was ample evidence that this appellant *wilfully* (for he did it on purpose) and *falsely* (because he pretended thereby to be on an equal footing with any regularly bred and registered physician or M.D. in England) took, assumed, and used the title of "M.D." under a diploma obtained by him from an American university, without any course of previous study or any examination, but simply on the payment of a sum of money, and which diploma, therefore, he must have known to be in fact utterly worthless and valueless as an indication of the possessor's merit, learning, and skill as a physician, or as giving him any of the privileges of a registered medical man. I am glad to hear from a learned gentleman now in court that the American Legislature have recently prohibited the granting of these degrees to persons on the payment of a sum of money only, and without a previous course of study and preliminary examination. The conviction must be affirmed.

Bramwell, B.—I entirely agree with all that has been said by my brother Martin.

Pigott, B.—I also concur in thinking that this conviction must be affirmed.

Judgment for the respondent, affirming the conviction, with costs.

Attorneys for the appellant, *Needham, Power,* and *Needham,* 1, New-inn, Strand, W.C., agents for *H. Morris,* Shrewsbury.

Attorney for the respondent, *E. F. Cooke,* 3, Serjeant's-inn, Chancery-lane, W.C., agent for *Chandler,* Shrewsbury.

CROWN CASES RESERVED.

Reported by John Thomson, Esq., Barrister-at-Law.

May 4 and 23, 1872.

(Before Cockburn, C. J., Bovill, C. J., Kelly, C.B., Martin, B., Willes, J., Bramwell, B., Byles, J., Channell, B., Blackburn, J., Mellor, J., Pigott, B., Lush, J., Hannen, J., Cleasby, B., Grove, J., and Quain, J.)

Reg. *v.* Allen.

Bigamy—Validity of second marriage—24 & 25 Vict. c. 100, s. 57.

A., while his second wife was alive, married a niece of his former deceased wife—the second marriage being within the prohibited degrees of affinity and void: (5 & 6 Will. 4, c. 54, s. 2.)

Held, that A. was guilty of bigamy.

Case reserved for the opinion of this Court by Martin, B.

The prisoner was indicted for bigamy.

On the 24th Feb. 1853, he married one Sarah Cunningham.

She died in Aug. 1866, leaving a niece named Harriet Crouch.

On the 30th Nov. 1867 he married one Ann Pearson Gutteridge, and on the 2nd Dec. 1871, and in the lifetime of Ann Pearson Gutteridge, he married the above named Harriet Crouch.

It was objected by the learned counsel for the prisoner that the marriage with Harriet Crouch, his first wife's niece, was void, and that the crime of bigamy was not committed. It was stated that the Court of Criminal Appeal in Ireland had so decided, and in deference to that decision, at the request of the prisoner's counsel, I state this case.

The question is, whether the prisoner was guilty of bigamy. Samuel Martin.

Bullen, for the prisoner.—The offence of bigamy was not committed in this case. The marriage with Harriet Crouch was absolutely null and void to all intents and purposes, being a marriage between persons within the prohibited degrees of affinity: (5 & 6 Will. 4, c. 54, s. 2.) No doubt the case of *R.* v. *Brawn* (1 Car. & K. 144) is a decision to the contrary, where Lord Denman said, "The validity or invalidity of the second marriage does not affect the question. It is the appearing to contract a second marriage and the going through the ceremony which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other." Since that case, however, a case has occurred in Ireland, where seven to four of the judges held that the crime of bigamy was not committed where the second marriage was a void one: (*Reg.* v. *Fanning,* 10 Cox Crim. Cas. 411.) In that case the facts were, that F., a Protestant, was legally married, and while his wife was living he was married by a Roman Catholic clergyman to a Roman Catholic woman, representing himself at the time as a Roman Catholic, but it transpired that he was a professed Protestant within twelve months prior to the time of the second marriage. The second marriage was *ipso facto* void by the 19 Geo. 2, c. 13, s. 1, which enacts that "every marriage between a Papist and any person who hath been or hath professed himself or herself to be a Protestant at any time within twelve months before such celebrating marriage or between two Protestants, if celebrated by a Popish priest, shall be null and void." It was therefore held by the majority of the judges in *Reg.* v. *Fanning,* that the second marriage, not being a marriage in the eye of the law, the offence of bigamy was not committed. So in *Burt* v. *Burt* (29 L. J. 133, Prob. & Div.), it is stated in the judgment of the court, which consisted of Cresswell, J. O., Martin, B., and Willes, J., that in order to establish bigamy you must prove such a marriage as but for the former marriage would have been in itself valid. Again, in *Reg.* v. *Millis* (10 Cl. & Fin. 689), Tindal, C. J., said, that the second marriage, to constitute bigamy, must mean a marriage of the same kind and obligation as the first.

Warry, for the prosecution.—Upon the true construction of the 24 & 25 Vict. c. 100, s. 57, "whosoever being married shall marry any other person

during the life of the former husband or wife shall be guilty of felony," the offence in this case was committed, though the second marriage was a void one. In *Reg.* v. *Fanning*, O'Hagan, J., in his judgment, said, "What meaning are we to ascribe to the words of the stat, 24 & 25 Vict. c. 100, s. 57? Are we at liberty to give to the same words in the two parts of the section different meanings? The first words, 'being married,' must mean a real legal marriage. Must the second words, 'shall marry,' be so likewise, and mean the same thing? It is impossible, for the second marriage was always null and void to all intents. I think the construction derived from the inherent invalidity of the second marriage is right. But I do not see why we should be bound in every case to attach to words the meaning which they first have, with the manifest result of giving impunity to a crime. The word 'marry,' in the second part of the section, must, in ordinary cases, be held to import not a real but a pretended marriage. Why should it not be held also in other cases to apply to a ceremony having all the outward marks of validity, but void from some other reason than the existence of the first marriage?" And Keogh, J., at p. 440, says, "There cannot be clearer or more coercive language than that used by Lord Denman in *Brawn's* case. That decision was made in 1843, and has never since been questioned. I think it proceeds on a true reading of the whole of those statutes, and I think that the mistake of those whose opinion leans to the other side arises from the idea that the word 'marry,' in relation to the second marriage, used in the statutes against bigamy, involves that the second marriage must be identical with the first, whereas that is an impossibility. The second must always be null if the first is good; and then we must conclude that what was in the mind of the Legislature was that the party should be guilty of felony who went through the form or ceremony, so far as he was concerned, constituting a marriage, but which differed from the first marriage in this—that while it was a real marriage, the second was a sham." [Blackburn, J.—Christian, J., at p. 437, says, "In *Brawn's* case the ceremony was perfect; in this case there is no ceremony at all; and I can quite understand the distinction taken, though I do not say it is so, that in *Brawn's* case a complete legal ceremony had been performed; that a state of marrying in that case within the definition of bigamy in the Act of Parliament, had been completed, and the offence so constituted, even although, by reason of some disability personal to the party, a valid marriage did not follow. But whenever any of the legal essentials to the ceremony itself are wanting, then the state of marrying within the meaning of the Act of Parliament has not been perfected. If there be that distinction *Brawn's case* would be strictly right—and the very language of Lord Denman, who says that it is the ceremony which constitutes the crime of bigamy, would be strictly right, and so also the case put during the argument, by which I confess I was more embarrassed than by any other; the case suggested by Hughes B., of a double bigamy. If it were shown that at the time of the second marriage both parties were already married, could the man defend *himself from* the prosecution of bigamy on the *ground that the* second marriage was void, by *reason of the* previous marriage of his wife? Can he defend himself by pleading that his wife was as guilty as himself, or, in other words, is neither of them to be held guilty because both are guilty? I confess I see no way out of it, unless there is the distinction I have been taking, on an apparent distinction taken by some members of the court, and which might be thought sufficient to sustain the conviction in the present case. I merely say that probably if the ceremony be complete as a ceremony, the act of marrying may be taken as complete, although it fails in its legitimate effect, by reason of some personal disability of the party. Upon that however I express no opinion."] In *Reg.* v. *Brawn* (1 Car. & K. 144), where the woman, in the lifetime of her first husband, married a widower who had been her sister's husband, which would have been a void marriage under the 5 & 6 Will. 4, c. 54 s. 2, it was held that the validity of the second marriage did not affect the question of bigamy. So it seems that the assumption of a fictitious name upon the second marriage will not prevent the offence from being complete.

Bullen in reply.

Cur. adv. vult.

May 23.—Cockburn, C.J., now delivered the judgment of the Court. This case came before us on a point reserved by Martin, B., at the last assizes for the county of Hants. The prisoner was indicted for having married one Harriet Crouch, he having a wife still living. The indictment was framed upon the statute, 24 & 25 Vict. c. 100, s. 57, which enacts that whosoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony. The facts of the case were clear,—the prisoner had first married one Sarah Cunningham; and she having died, he had married his present wife, Ann Parson Gutteridge. The second wife being still living, he, on the 2nd of Dec. 1871, married one Harriet Crouch. So far the case would appear to be clearly one of bigamy within the statute; but it appearing that Harriet Crouch was a niece of the prisoner's first wife, it was objected on his behalf that since the passing of 5 & 6 Will. 4, c. 54, s. 2, such a marriage was in itself void, and that to constitute an offence within the 24 & 25 Vict. c. 100, s. 57, the second marriage must be one which, independently of its bigamous character, would be valid, and consequently that the indictment could not be sustained. For the proposition that to support an indictment for bigamy, the second marriage must be one which would have been otherwise valid, the case of *Reg.* v. *Fanning* (Cox C. C. p. 411) decided in the Court of Criminal Appeal in Ireland, was cited, and in deference to the authority of the majority of the Judges in that court, Baron Martin has stated this case for our decision. It is clear but for the statutory inability of the parties to marry one another if free, the marriage of the prisoner with Harriet Crouch would have been within the 57th section of the Act. The question is whether that circumstance alters the effect of the prisoner's conduct in going through the ceremony of marriage with Harriet Crouch, while his former wife was still living. The same question arose in the case of *Reg.* v. *Brawn* (1 C. & K. 144), which was tried before Lord Denman on the earlier statute of 9 Geo. 4, c. 31, s. 22, the language of which was precisely the same as that of the present. In that case the prisoner, a married woman, had, during her husband's lifetime, married a man who had been the husband of her deceased

sister. The same point as is now raised being taken on behalf of the prisoner, Lord Denman overruled the objection. "I am of opinion," said his Lordship, "that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, or otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners (the male prisoner had been included in the indictment as an accessory), was or was not in itself prohibited, and therefore null and void, does not signify, for the woman having a husband then alive has committed the crime of bigamy by doing all that in her lay by entering into a marriage with another man." In the earlier and analogous case of *Reg.* v. *Penson* (5 Car. & P. 412), a similar objection had been taken on the ground that the second marriage was invalid by reason that the woman whom the prisoner was charged with having married while his first wife was alive, had, for the purpose of concealing her identity, been described as Eliza Thick, her true name being Eliza Brown. But Gurney, B., who tried the case, overruled the objection, being of opinion "that parties could not be allowed to evade the punishment for such an offence by concertedly contracting an invalid marriage." We should have acted without hesitation on these authorities, had it not been for the case already referred to, of *Reg* v. *Fanning*, decided in the Court of Criminal Appeal in Ireland, a case which, if not on all fours with the present, is still closely analogous to it, and which, from the high authority of the court by which it was decided, was entitled to our most attentive consideration. We therefore took time to consider our judgment. The facts in *Reg* v. *Fanning* were shortly these. The prisoner being a Protestant, and having within twelve months been a professing Protestant, was married, having a wife then living, to another woman who was a Roman Catholic, the marriage being solemnized by a Roman Catholic priest. Independently of the second marriage being bad as bigamous, it would have been void under the unrepealed statute of the 19 Geo. 2, c. 13, which prohibits the solemnization of marriage by a Roman Catholic priest where either of the parties is a Protestant, and declares such a marriage so solemnized null and void to all intents and purposes. On an indictment against the prisoner for bigamy, the invalidity of the second marriage was insisted on as fatal to the prosecution. The point having been reserved, seven Judges against four in the Court of Criminal Appeal held the objection to be fatal, and quashed the conviction. After giving our best consideration to the reasoning of the learned Judges who constituted the majority of that court, we find ourselves unable to concur with them, being unanimously of opinion that the view taken by the four dissentient judges was the right one. The reasoning of the majority of the court in *Reg.* v. *Fanning* is founded mainly on the verbal criticism of the language of the 24 & 25 Vict. c. 100, s. 57; and the words being that, if any person "being married" shall marry any other person, it was insisted that whatever sense is to be given to the term "being married," in the first part the same must be given to the term "marry" in the subsequent part of the sentence; and that consequently, it being admitted that the term "being married" implies a perfect and binding marriage, the second marriage must also be one which, but for the prohibition of the statute, would be, whether as regards the capacity to contract marriage, or the manner in which the marriage is solemnized, binding on the parties. Two authorities were relied on in support of this reading of the statute: First, the language of Tindal, C.J., in delivering the opinion of the judges in the House of Lords, in the well-known case of *Rex* v. *Millis* (10 Cl. & Fin. 669), and the decision of the Judge Ordinary of the Divorce Court in the case of *Burt* v. *Burt* (2 Sw. & Tr. 88). In the first of these cases, Tindal, C.J., undoubtedly says that "the words in the first clause, and the words 'marry any other person' in the second, must of necessity point at and denote marriage of the same kind and obligation." But it must be borne in mind that the question before the House of Lords was, whether the first marriage—not the second—was valid. The validity of the second marriage was not in question at all. In order to show that what had passed between the parties on the first marriage had not amounted to a valid marriage, the Chief Justice of the Common Pleas urges that a similar proceeding between the parties would have amounted to no more than a contract *per verba de præsenti*, and would not, therefore, have sufficed to constitute bigamy, had it happened in the second instance instead of in the first. The case put by the Chief Justice was not the point to be decided; it was only used for the purpose of argument and illustration. The question how far the incapacity of the parties to the second marriage to contract a binding marriage, independently of the bigamy, would take the case out of the statute, was not present to his mind, or involved in the decision of the case before the House. And the Chief Justice expressly states that though the conclusion he had arrived at was concurred in by the rest of the judges, the reasoning was entirely his own. The language of the learned Chief Justice must, therefore, be taken as extrajudicial, and cannot bind us in expounding the statute now under consideration. The case of *Burt* v. *Burt* in like manner falls altogether short of the question we have now to decide. It was a suit for divorce instituted by a married woman against her husband on the ground of bigamy, adultery, and desertion. To establish the bigamy, evidence was given that the husband had married a woman in Australia according to the form of the Kirk of Scotland, but there was no proof that the form in question was recognised as legal by the local law. Upon this latter ground the Judge Ordinary held that a second marriage was not proved so as to make good the allegation of bigamy. All, therefore, that this case shows is that a second marriage by a form not recognised by law, will not amount to bigamy under the Divorce Act. Admitting, as we are disposed to do, that the construction of the two statutes should be the same, the decision in *Burt* v. *Burt* will not, as will presently appear, be found to conflict with our judgment in the present case: the second marriage in the present instance having been celebrated according to a form fully recognised by the law. We may, therefore, proceed to consider what is the proper construction of the statutory enactment in question, unfettered by

these authorities. Before doing so, it should, however, be observed that there is this difference between the case of *Reg.* v. *Fanning* and the present, that the form of marriage there resorted to was one which, independently of the bigamous character of the marriage, was, by reason of the statutory prohibition, inapplicable to the special circumstances of the parties, and ineffectual to create a valid marriage. Whereas, in the case before us, independently of the incapacity, the form would have been good and binding in law. This distinction is expressly adverted to by Christian, J., in his judgment, as distinguishing the case before the Irish judges from that of *Rex* v. *Brawn*, and it may be doubted whether, but for this distinction, that learned judge would not have come to a different conclusion. The other judges constituting the majority do not, however, rest their judgment on this distinction, but plainly go the length of overruling the decision of Lord Denman in *Reg* v. *Brawn*. Their judgments proceed on the broad intelligible ground that to come within the statutes against bigamy the second marriage must be such as that but for its bigamous character it would have been in all respects, both as to the capacity of the parties and the ceremonial adopted, as binding as the first. Differing altogether from this view, and being prepared to hold that so long as a form of marriage has been used which the law recognises as binding, whether applicable to the particular parties or not, and further than this it is not necessary to go, the offence of bigamy is committed, we have only adverted to the distinction referred to in order to point out that our decision in no degree turns upon it, but rests on the broader ground taken by the dissentient judges in the Irish court. When it is said, in construing the statute in question, the same effect must be given to the term "marry" in both parts of the sentence, and that, consequently, as the first marriage must necessarily be a perfect and binding one, the second must be of equal efficacy in order to constitute bigamy, it is at once self-evident that the proposition, as there stated, cannot possibly hold good, for if the first marriage be good, the second, entered into while the first is subsisting, must of necessity be bad. It becomes necessary, therefore, to engraft a qualification on the proposition just stated, and to read the words "shall marry," in the latter part of the sentence, as meaning shall marry under such circumstances as that the second marriage would be good but for the existence of the first. But it is plain that those who so read the statute are introducing into it words which are not to be found in it, and are obviously departing from the sense in which the term "being married" must be construed in the earlier part of the sentence. But when once it becomes necessary to seek the meaning of a term occurring in a statute, the true rule of construction appears to us to be not to limit the latitude of departure so as to adhere to the nearest possible approximation to the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the Legislature intended to apply. Now we cannot agree with Fitzgerald, B. in his judgment in *Reg.* v. *Fanning* that the purpose of the statutes against bigamy was simply to make *polygamous marriages* penal, and that consequently it was only intended to constitute the offence of bigamy where the second marriage would, but for the existence of the first, be a valid one. Neither can we agree with those judges who, in *Reg.* v. *Fanning*, found their judgments on the assumption that, in applying the statute against bigamy, the second marriage must be one which, but for the first, would be binding. Polygamy, in the sense of having two wives or two husbands at one and the same time for the purpose of cohabitation is a thing altogether foreign to our ideas, and which may be said to be practically unknown, while bigamy in the modern acceptation of the term, namely, that of a second marriage consequent on an abandonment of the first while the latter still subsists, is unfortunately of too frequent occurrence. It takes place, as we all know, more frequently where one of the married parties has deserted the other, sometimes where both have voluntarily separated. It is always resorted to by one of the parties in fraud of the law, sometimes by both, in order to give the colour and pretence of marriage where the reality does not exist. Too often it is resorted to for the purpose of villanous fraud. The ground on which such a marriage is very properly made penal, is that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony which the law allows only to be applied to a legitimate union to a marriage at best but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception. It is obvious that the outrage and the scandal involved in such a proceeding will not be the less, because the parties to the second marriage may be under some special incapacity to contract marriage. The deception will not be the less atrocious, because the one party may have induced the other to go through a form of marriage known to be generally binding, but inapplicable to their particular case. Is the scandal or the villany the less because the man having represented to the woman who is his dupe, and to the priest that he is a Roman Catholic, turns out afterwards to be a Protestant? Such instances as these we have referred to, thus involving public scandal or deception, being plainly within the mischief which we may reasonably assume it must have been the purpose of the Legislature to prevent, we are of opinion that we ought not to frustrate the operation of a very salutary statute by putting so narrow a construction on it as would exclude such a case as the present, if the words are legitimately capable of such a construction as would embrace it. Now, the words "shall marry another person," may well be taken to mean shall "go through the form and ceremony of marriage with another person." The words are fully capable of being so construed without being forced or strained, and as a narrower construction would have the effect of leaving a portion of the mischief untouched, which it must have been the intention of the Legislature to provide against, and thereby, as is fully admitted by those who contend for it, of bringing a grave reproach on the law, we think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the Legislative intention by holding such a case as the present to be within their meaning. To assume that the words must have such a construction as would exclude it because the second marriage must be one which but for the bigamy would have been

as binding as the first, appears to us to be begging the entire question, and to be running directly counter to the wholesome canon of construction, which prescribes that, where the language will admit of it, a statutory enactment shall be so construed as to make the remedy coextensive with the mischief it is intended to prevent. In thus holding, it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt* v. *Burt*, would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorised person, or in an unauthorised place, would be a marrying within sect. 57 of 24 & 25 Vict. c. 101. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case. After giving the case of *Reg.* v. *Fanning* our best consideration, we are unanimous in holding that the conviction in the case before us was right, and that the verdict must stand good.

Conviction affirmed.

Saturday, June. 1, 1872.

(Before Bovill, C. J, Bramwell B., Byles Blackburn and Mellor, JJ.)

Reg *v.* Thompson and others.

Evidence—Husband and wife—Admissibility of wife as witness for a joint prisoner.

The wife of a prisoner jointly indicted and given in charge to the jury with other prisoners, cannot be called as a witness by one of the other prisoners for him whilst the husband is so in charge.

Case reserved for the opinion of this Court, at the Easter Quarter Sessions for the county of Essex.

This was a joint indictment against Thompson and Danzey for stealing 56lb. of onions, the property of their master, and against Hide for receiving the same, knowing them to be stolen.

The charge was that the two first, being sent with two carts of vegetables to Covent Garden, stopped on the road at Hide's house, and there disposed to him of this bag of onions stolen by the two conjointly from one of the carts.

The prisoners did not ask to be tried separately but the two first retained one counsel, and Hide retained another.

The case depended mainly on what had been done and said at the door of Hide's house, and in his kitchen, by Thompson, Danzey, Hide, and his wife Elizabeth, and a maid servant Eliza, sister of the prisoner Thompson.

After the speech of the counsel for Thompson and Danzey, he tendered as a witness for his client, Elizabeth, the wife of the prisoner Hide.

This was objected to by the counsel for the prosecution on the ground that her evidence must directly affect the case against her husband, inasmuch as the aquittal of the two would necessarily entail the acquittal of Hide, and moreover that anything tending to strengthen or weaken the evidence against them, must have a similar effect on the evidence as regarded Hide.

The following cases were referred to:

Rex v. *Smith*, 1 Moo. C. C. 281;
Reg. v. *Moore*, 1. Cox C. C. 59;
Reg. v. *Bartlett*, 1 Cox C. C. 105;
Reg. v. *Deeley*, 11. Cox C. C. 607;
Reg. v. *Payne*, 41 L. J. 65, M. C; 12. Cox C. C. 118;

Under these circumstances, and considering the general policy of the law, as rejecting the evidence of a wife for or against her husband in criminal cases, we refused to admit the evidence of the wife, subject to a case to be submitted to the Court for Crown Cases Reserved.

Thompson and Danzey were convicted and Hide was acquitted, and we passed on each of the two former a sentence of four months' imprisonment, and (no application being made to admit them to bail) execution was respited and they were committed to prison to await the decision of the court.

(Signed) T. C. Chisenhale Marsh,
Chairman.

No counsel appeared to argue on either side.

The Judges retired to consider their decision, and upon their return into court,

Bovill, C. J., said: We have considered the point reserved in this case and are all of opinion that the wife of one of the prisoners stands in the same position, as regards the admissibility of her evidence at the trial, as her husband. The three prisoners were jointly charged upon the same indictment at the trial, and were all in the charge of the jury upon it, when the wife was tendered as a witness. The case is therefore not distinguishable in principle from *Reg* v. *Payne*, and the conviction will be affirmed.

Conviction affirmed.

V.C. BACON'S COURT.

Reported by the Hon. Robert Butler and T. H. Carson, Esq., Barristers-at-Law.

April 19, 20, *and* 23, 1872.

Temple *v.* Flower.

Railway company—Public highway—Right to stop up—Special injury—Superfluous lands—Parties.

A railway company were empowered to stop up certain streets and passages, including L. C. Place, and to appropriate and use such streets and passages, or parts thereof, so stopped up, for the purposes of their railways and works. By another Act they were also empowered to stop up and appropriate any passage, place, &c., on any part of their railway and works if and when they should have purchased all the land and houses to which it formed an access, and through which any public right of way to any place beyond the same lands and houses did not exist. They were also empowered to grant building leases of any superfluous lands.

The company took the whole of L. C. Place, and pulled down the houses thereon, and on the northern part thereof built a station, and at the southern side erected a hoarding, and the super-

fluous land thereby enclosed they leased to F., who commenced to build thereon in such a way as to stop up the southern end of L. C. Place, and deprive T. and the public of all access over the old roadway.

T., whose premises were immediately opposite the southern entrance to L. C. Place, had, since 1850, *made use of the facilities thereby afforded to bring in and out of his premises long building materials, and this right he claimed as "a part of and incident to the right which, in common with the rest of the public, he had of using L. C. Place as a public highway."*

Upon a motion for an injunction to restrain F. from building so as to stop up that portion of L. C. Place not actually used for the purposes of the railway:

Held, that the whole of L. C. Place had by the exercise of the powers conferred by their Acts become vested in the company, and that L. C. Place ceased to be a highway by the construction of the railway and the erection of the hoarding, and the motion was refused.

Held also that L. C. Place was not an "access" to T.'s premises within the meaning of the Act.

Semble, that the railway company should have been parties to the suit, and that the court would not make a final decree in their absence.

THIS was a motion for an injunction to restrain the defendants, who were the lessees of the Metropolitan Railway Company, from building their premises in such a manner as to interfere with plaintiff's access to, and right of user over part of the land.

The plaintiffs were builders, carrying on business in premises situated on the south side of Conduit-place, Paddington, which had been erected in 1850, and which were immediately opposite the southern end of Little Conduit-place. Conduit-place was only 18ft. 7in. wide, and the plaintiffs alleged that they and their predecessors in title had, since 1850, availed themselves of the facility afforded by the opening into Little Conduit-place for the purpose of turning their waggons and bringing in and out of their premises ladders and poles, and other long materials used in their business, and they claimed this right as "a part of and incident to the right, which in common with the rest of the public, the plaintiffs had of using Little Conduit-place as a public way." The bill also charged that if the defendants were allowed to stop up Little Conduit-place as they threatened to do, the plaintiffs would sustain special injury and damage beyond that which would be occasioned to the public at large, as they would thereby be prevented from carrying on the business as theretofore, or would at least be subject to great loss and inconvenience in so doing.

The Metropolitan Railway Company were incorporated in 1854, and, by their Act of 1860, in which was incorporated the Lands and Railways Clauses Consolidation Acts 1845, the company were empowered (sect. 7) to purchase and take for the providing of stations and works certain lands delineated in the deposited plans, and described in the Book of Reference lying on the east and west of Little Conduit-place, but not including any part of Little Conduit-place, which was, however, within the limits of deviation, as shown on the deposited plans.

By a subsequent Act, passed in 1861, the company were empowered (sect. 8) to stop up any of the streets or passages shown within the limits of the deposited plans and named in the Act, including Little Conduit-place, and to appropriate and use such streets and passages, or parts thereof so stopped up for the purposes of their railways and works.

By an Act passed in 1862 (sect. 14), after reciting that the company had, in the construction of their railway, been compelled to purchase and pull down various houses and buildings, and that the sites thereof had not been wholly used or would not be required for the purposes of the railway, and that, inasmuch as the railway was wholly within the metropolis, it was expedient that the company should be at liberty to grant building leases of lands which they had purchased but not used for the purposes of their railway, but without prejudice to the provisions of the Lands Clauses Consolidation Act 1845, requiring within the prescribed period the sale of the superfluous lands, it was enacted that the company might grant leases of any superfluous lands for such terms of years, at such rents, and subject to such covenants and conditions, as the company should deem expedient, but every such lease should be granted within the period prescribed by the Lands Clauses Consolidation Act 1845, for the sale of superfluous lands, and any lands comprised in such lease should (subject to such lease) be sold within the period prescribed, and in default of sale should vest as provided by the Lands Clauses Consolidation Act with reference to superfluous lands.

By an Act passed in 1865 (sect. 31), after reciting that the company were the owners of certain lands adjacent to the railway, and houses and buildings erected over the railway, or immediately adjoining thereto, or otherwise connected with the structure of the railway, and that other lands and houses, and buildings similarly placed, might thereafter belong to the company, and that it was expedient to reserve to the company the power and control over such lands, houses, and buildings, it was enacted that any lands on, or immediately adjoining to, or houses, buildings, or tenements then or thereafter acquired, erected, or built over, or immediately adjoining to the railway or works of company, or any part thereof, in any way connected with the structure of the railway or works, and the site thereof, and any yards, gardens, or premises attached thereto, should not be deemed superfluous lands within the meaning of the Lands Clauses Consolidation Act 1845, and it should be lawful for the company to hold and let any such lands, houses, or buildings, and to grant leases of the same for any term or number of years as they might think proper.

By another Act passed in 1866 (sect. 11), the company were, in addition to the powers conferred on them by any previous Acts, empowered to stop up and appropriate any court, alley, square, way, passage, or place on any part of the railway and works, if, and when they should have purchased all the lands and houses to which it formed an access, and through which any public right of way to any place beyond the same land and houses did not exist.

In 1867 the company used the northern portion of Little Conduit-place for the purposes of their station and works, thereby stopping up that end of the street, and they inclosed the land on the north of Conduit-place, including the site of Little Conduit-place, with a hoarding, in which

at the south end of Little Conduit-place they put a gate; but the plaintiffs allege that the company did not thereby attempt to exclude them from using the street as theretofore, as the gate was always left unlocked, and they were in the habit of opening it whenever they required so to do in the exercise of their rights.

The plaintiff further charged that the Southern portion of the street, and the lands adjoining thereto were not, and never had been, required or used for the purposes of the company's works, and therefore that the company never acquired the power to stop up the southern portion of the street, and that the rights of the public over the same as a street, including the aforesaid right of the plaintiffs, remained undisturbed.

By an agreement, dated the 13th Feb. 1872, the company agreed to grant to the defendants, who were brewers at Stratford-on-Avon, a building lease of the land on the north side of Conduit-place, including the site of Little Conduit-place. The agreement contained a proviso that the company should be at liberty at any time to retake the land if it should be required for the purposes of their works. The defendants shortly after commenced erecting warehouses on the said piece of land. The plaintiffs objected to the defendants building in such a way as to interfere with their alleged rights. The defendants, in a correspondence that ensued, offered, upon payment to them by the plaintiffs of a nominal rent, to alter a gateway in their premises so as to allow to the plaintiffs the same access to their premises which they had previously enjoyed.

The plaintiffs, however, refused the offer, and instituted the present suit to restrain the defendants from interfering with their alleged right.

Neither the railway company nor the Attorney-General were made parties to the suit.

Amphlett, Q. C. and *Bagshawe*, for the plaintiffs.—The railway company have only a right to stop up Little Conduit-place so far as it is required for their works. Compulsory powers enabling them so to do are not to be created or extended by doubtful implication: (*Lamb* v. *The North London Railway Company*, L. Rep. 4 Ch. 522, 526; 21 L. T. Rep. N. S. 98.) Although by building their station the company stopped up one end of Little Conduit-place, it did not thereby cease to be a highway, although in reality a mere *cul-de-sac*: (*Gwyn* v. *Hardwicke*, 25 L. J. 97, M. C.; 27 L. T. Rep. 72.) The company never purchased or acquired any right in the soil of the street.

Beckett v. *The Corporation of Leeds*, 26 L. T. Rep. N. S. 375; 20 W. R. 454.

Kay, Q. C. and *Osler*, for the defendants.—The soil of the street was acquired by the company when they took the houses on either side of it.

Doe d. Pring v. *Pearsey*, 7 B. & C. 304;
Holmes v. *Bellingham*, 7 C. B., N. S., 329;
Marquis of Salisbury v. *The Great Northern Railway Company*, 5 C. B., N. S., 174; 32 L. T. Rep. 175.

In *Beckett* v. *The Corporation of Leeds* (26 L. T. Rep. N. S. 375), there was evidence to rebut the presumption of law that the owners of the houses were entitled to the soil of the street, but here there is no such evidence. In the 8th section of the Act of 1861, the word "appropriate" is contrasted with the word "use." The company by taking, appropriates the land, and it is not necessary that they should use it. Whatever lands their engineers may consider necessary, the company may acquire, either to be used for their own purposes, or to be disposed of as superfluous lands:

Stockton and Darlington Railway Company v. *Brown*, 9 H. L. Cas. 246; 3 L. T. Rep. N. S. 131;
The City of Glasgow Union Railway Company v. *The Caledonian Railway Company*, L. Rep. 2 Sc. App. H. L. 160, 164.

The company have complied with all the requirements of the several Acts, and have acted strictly within the powers thereby conferred on them.

Amphlett, Q. C., in reply, referred to

Flower v. *The London, Brighton, and South Coast Railway Company*, 2 Dr. & Sm. 330, 333; 12 L. T. Rep. N. S. 10.

The VICE-CHANCELLOR said:—This case depends wholly upon the Acts of Parliament. The plaintiff's claim is that he is entitled to use a highway; it is that and nothing else;—that there exists a highway to which, with the rest of the Queen's subjects, he is entitled to have access, to make such use of it as the public can make of a highway; and that the company or the defendants on this record, are seeking to interfere with his right in that respect. That there was a highway once is beyond all question. Whether that has ceased to exist is the question which is raised upon this application. Now I think that the railway company ought to be parties to this suit. I said the other day, when we were considering it, that for the purpose of this injunction I would not raise such an objection. The defendants do not raise any such objection as appears by the correspondence which is set out in the bill, and for the present purpose the case may be disposed of upon the materials as they now exist, but it seems to me to be impossible that a decree can be made in this cause until the railway company are here. That I observe now, not for the purpose of postponing the decision which I have to pronounce, or of putting any impediment in the way of the parties. Now at the time when the first of the Acts of Parliament which have been mentioned was passed, the railway company were contemplating the making of a railway across the lands in question, and the other lands which are described in the Act of Parliament and book of reference, and which consist of a sort of parallelogram closely covered with buildings, bounded on the north by what was then called Conduit-street East, on the west by Spring-street, on the east by London-street, and on the south by Conduit-place, and through that parallelogram there ran what was unquestionably a highway called Little Conduit-place. The plaintiff's house, or the entrance to the house, is directly opposite the mouth of that Little Conduit-place. The Act of Parliament clearly does give, and meant to give, the railway company the power to acquire the whole of the land contained in that parallelogram, including of course Little Conduit-place. That is described in the deposited plan, and the books of reference, and the owners of the soil of Little Conduit-place are therein described as being the Metropolitan Board of Works, and the vestry of Paddington. Houses were built on either side of Little Conduit-place. The company, in the exercise of their powers under the Act of Parliament, have purchased and acquired the whole of the land comprised within the parallelogram. They have, as the Act of Parliament authorised them to do, taken and appropriated it for the purposes of their railway and works. That right is not at all confined by the

mere site of the railway that they have constructed. They were empowered, as in all such Acts of Parliament the undertakers are empowered, to take more land than appears to be absolutely necessary for the construction of the railway itself. The railway and works comprehend all that they consider necessary for the execution of the objects of their undertaking, and unless it is disputed by some person who has an interest adverse to them, the taking and using by the railway company, for the purpose of their railway and works, is an act accomplished and done, and the effect of it is to vest in the railway company the whole of the lands so taken. Now I find here, as a fact undisputed, that they did take the whole of the lands, that they did erect a hoarding on the south side of those lands—the only facts necessary for me to consider—they did pull down all the houses on these lands existing before the Act of Parliament was passed, and having erected the hoarding, they inserted into it what is called a gate, which would be more properly called a door, the effect of which was to secure in a sense the possession of that which the railway company had acquired. The evidence is uncontradicted upon the facts which I have mentioned. Whether the gate or the door which they put in was locked or not cannot in the slightest degree signify, if as a fact they did take possession of the land, nor can it, in my opinion, signify at all whether they did purchase, or on what terms they purchased, because the owners of the soil in the highway either could or could not claim a right to it, either could or could not sell it; whether they did or did not is a matter unimportant for the present purpose to consider. No claim appears ever to have been made on the part of those persons who are said to be the owners of the soil, and the highway has been stopped up, and has ceased to be a highway, as well by the construction of the railway over the northern half, as by their having erected that hoarding over the whole extent of the southern boundary of the lands so taken. Then it is said that the railway company have no power to do this, and for this purpose Mr. Amphlett has referred to the Act of Parliament, and I quite agree that all must depend on the terms of the Act, because it is unnecessary, I think, to refer to that which has not been said very strongly by the plaintiff, that he was entitled to an easement, and it could only be said in the sense that he had gained such a right over the highway before it was stopped up. Nor does any question arise in respect of the soil, because, whether the soil belonged to the parish vestry or to the Metropolitan Board of Works, or to the owners of the adjoining land, seems to be quite immaterial for the present purpose. If it belonged to the owners of the adjoining land, it was bought and paid for; if it belonged to the officers of the parish, they are no parties, and any interest of theirs I cannot regard. The question depends only upon the provisions of the Act of Parliament, and the first Act of Parliament referred to is that of 1860, by which, in sect. 5, the company are authorised to enter upon, take, and use such of the lands delineated on the plans, and described in the book of reference, as may be necessary for the construction of the railway, stations, and works. I do not think it necessary to refer more particularly to the question which has been raised, for which the case of *The Stockton and Darlington Railway Company v. Brown* (9 *H. of L.* Cas. 246; 3 L. T. Rep. N. S. 131), has been referred to, because, undoubtedly, it was there decided that the company are to be the judges of what land they want for their railway, stations, and works; and, although it happened in the case of *Flower* v. *The London and Brighton Railway Company* (2 Dr. & Sm. 330, 333; 12 L. T. Rep. N. S. 10), the question was raised whether they had fairly and properly exercised the powers given them by the Act of Parliament, in other words, whether they had not, under pretence of the Act of Parliament, sought to possess themselves of lands not required for the purposes of their railway and works, yet in the absence of any such question being raised—and here no such question has been raised—I am not at liberty to hesitate in saying that the company by building that hoarding upon the south side, and by making the railway upon the north side of the parallelogram, did no more than the Act of Parliament perfectly authorised and justified them in doing. The 8th section of the Act of Parliament of 1861 seems to me to be one of the most important features in this case. At this time, the matter having been in contemplation from the year 1854, the Act of Parliament of 1860 having passed, in the Act of 1861 the 8th section provides that the company may stop up any of the streets or passages shown within the limits of the deposited plans of 1861. Then it enumerates them, and among them is a street called Little Conduit-place, and the clause ends with these words, "and may appropriate and use such streets and passages or parts thereof so stopped up for the purposes of their railway and works." Whatever criticism be applied to the last words of that clause, the part so stopped up may, I confess, as a matter of construction, be open to some doubt, not a very serious one, but giving it the construction that has been suggested that the clause only applied in this case to such part of Little Conduit-place as has been actually stopped up. I say, here the facts proved are that the entirety of Little Conduit-place was, in fact, stopped up, and has remained stopped up for years, and that it was so stopped up for the purposes of the railway and works. That, in my opinion, disposes of the question. The company are authorised to take possession of such lands described in the deposited plan as they think necessary. Nobody has ever suggested that it was not necessary for them at the time when they exercised these Acts to take and use and to stop up, as in fact they did stop up, this Little Conduit-place, in the construction of the railway. Of course a much larger area was necessary than was ultimately occupied by the railway itself. The quantity of houses, they are very numerous, that had to be taken down, proves, that in the estimation of the company, they were obliged to incur a very considerable expense, buying the houses and the interests of all persons concerned in them, because they thought it necessary for the purposes of their railway and works; and in the course of so doing Little Conduit Place, in my opinion, ceased to be a highway. It was stopped up by the authority of Parliament, an authority which this court could not question, and neither the owners of the soil nor any other person interested in the land did at any time raise any objection to the stopping up of Little Conduit Place, nor was there any reason in the nature of things, except the plaintiff's interest which I will advert to presently, why Little Conduit Place, the

houses of which had been destroyed, should not have ceased to be a highway, because there was no purpose for which the highway could be resorted to or used by any person, excepting only, and I now repeat the exception, what the plaintiff says as to the use made of it by him. Under these circumstances, in my opinion, there is not the least doubt that the powers of the Act of Parliament have been rightly exercised, and the consequence of the exercise of those powers is to vest in the railway company the whole of Little Conduit Place. The other Acts of Parliament do not seem to me to carry the thing further. I do not think that the 11th section of the Act of 1866 applies to the case at all, because, whatever may be the construction of that clause, it is contained in an Act of Parliament later in date to the Act to which I have been referring, and does not repeal the former Act; and when this Act of 1866 was passed the company had the right to acquire the very thing in question. The Act of Parliament was passed in the year 1866, and it is said that these works I am referring to of the company were erected in 1867. Now there may be some difficulty about the construction of that clause if it has, as I think it has not, any application to the case before us, because the company has purchased all the lands and houses to which that passage formed an access, "and through which any public right of way to any place beyond the same lands and houses does not exist." It has no access, excepting only the access which might formerly have been from the north side of the plaintiff's house, which has long since ceased to exist, and I think that clause has no application whatever to the case before us. Then what have the company done? It appears by the evidence that the company stopped up and appropriated Little Conduit Place. A gate was erected at the southern end for the use of the contractors, and a hoarding and gate were erected, and intended to, and did, preclude all ingress to the passage or place by the public, who were thereby in fact excluded therefrom, and no persons have since used, or claimed to use the passage. Then the case of the plaintiff is, that being one of the public, and having a right to use and to resort to this highway, he has done so ever since he became the tenant, and his predecessor, for many years before that, had resorted to the highway for the purposes which he has mentioned. It is quite clear, therefore, that that is purely an accident not at all necessary to the enjoyment of his property. That he has, in fact, turned his waggons, cannot, of course, give him a right against the persons who were the owners of the soil enclosed by the gate, nor that he cannot take in ladders and scaffolding poles as long as he could when there was the opportunity of turning the further ends into this highway. I cannot say I am greatly impressed by that, because I have no doubt that, with very simple contrivances, scaffolding poles of any size might be got into his premises. It would require some alteration, no doubt; they could not be got in vertically or horizontally, but they might, by putting them at a different angle, easily be taken into his premises. The inconvenience which he complains of in that respect, does not seem to me to be very great, but even if it were greater, it would not influence my judgment, and I do not think it ought to be attended to on this occasion, because if the railway company have only done what they had a right to do, though the consequences of it may be inconvenient to the plaintiff, that is no reason why he should assert a right over that which I regard as their property. Then the railway company have done this, resorting to the powers which the Act of Parliament contains, which enable them to lease such part of the land as—when the railway is constructed, and experience has satisfied them what land they presently want for the purposes of their undertaking—they have no present occasion for. Having regard, as the Act of Parliament says, to the populous nature of the neighbourhood, it was obviously convenient that they should have the power to lease and make a profit by that means of the land they had taken, and which they did not presently want. That is what they have done, but, as the evidence shows, they have done that contemplating the possibility that at some future day they may have occasion for purposes of necessity for the land which they now demise on lease. They reserve to themselves the power of revoking those leases, and upon terms which are contemplated in the reservation, getting back again the land, which for the present they lease to the lessee. In my opinion the court has no right in the world to interefere with the use which the railway company have made of this land. To call this a highway, which, since the year 1867 has ceased to be a highway, is to abuse the language which is to be applied to it. To say that it can form an access to the plaintiff's premises is directly at variance with the plain facts of the case, for there can be no access unless you can penetrate through the railway. The northern end has been entirely blocked up and destroyed, and there can be no access to that part which remained, if anything did remain, as a highway. But, as I have said, in my opinion the Act of Parliament authorised the railway company to acquire and take possession of the highway called Little Conduit-place; they did most effectually acquire and take possession of it, and they are the rightful owners of it. It is unnecessary for me to express that which I very sincerely feel, a regret that the parties should be engaged in a litigation of this sort, which, from what I have said, I think is unfounded on the part of the plaintiff, and which is wholly useless, as appears by the correspondence. A certain portion of good sense which does not seem to have have prevailed in this case, would have prevented the raising of this question between neighbours and persons engaged in the same kind of business. I think the offer that was made to arrange the contemplated building so as to give to the plaintiff all the convenience he required, upon his consenting to pay a nominal rent, it is greatly to be regretted was not accepted; but with that I have nothing to do, except that I am bound to express, which I cannot help doing, my regret that there should be such a question; but upon the construction of the Act of Parliament, upon the right of the railway company to acquire, possess, and retain that which was once a highway, and which has by law ceased to be a highway and become the property of the company, I have no doubt. I have no doubt that in the year 1867, when they put up that door or gate, they might, if they had thought fit, have built a solid wall along it, and that they have just the same right to do so now. I think, therefore, that there is

no foundation whatever upon which the plaintiff's application for an injunction can be sustained, and I must, therefore, refuse it.

Solicitors for the plaintiffs, *Lee, Pemberton*, and *Reeves*.

Solicitors for the defendants, *Field* and *Co.*

V. C. WICKENS' COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Monday, May 27, 1872.

HARRIS *v.* DU PASQUIER.

Will—Charitable legacies—Uncertainty—Life estate by implication.

A testator, after making certain dispositions of part of his property, proceeded as follows: "On the death or marriage of my wife, which shall first happen, I direct my trustees to pay the following legacies free of duty: To the Cancer Hospital, 100l.; to the Brompton Hospital for Diseases of the Chest, 100l.; to the Right Hon. the Lord Mayor of Dublin for the time being, 100l., for such objects as he shall deem most deserving; to the Blind Asylum, New Kent-road, London, 100l.; to Mrs. Gladstone, of No. 11, *Carlton House-terrace, to be applied as she thinks proper in charity, 200l., to be considered as coming to her from her correspondent 'Nemo'; and the residue I bequeath to my trustees for such objects as they consider deserving, whether in increase of the before-mentioned ones, or otherwise."*

Held, that the gift of residue and the legacy to the Lord Mayor of Dublin failed, the first for uncertainty, the second as not being a good charitable gift; that the other legacies were good charitable gifts, and were to take effect after the death or marriage of the testator's widow, and that she was not entitled to a life estate by implication in them.

THIS suit which was instituted for the administration of the estate of Thomas Hyland, now came on for further consideration upon a question as to the validity of certain charitable legacies.

The will was dated the 18th March, 1868, and by it the testator, after appointing trustees and making provision for his wife, directed his trustees, on the death or marriage of his wife, to pay the following legacies free of duty.

To the Cancer Hospital 100*l.*, to the Brompton Hospital for Diseases of the Chest, 100*l.*; to the Right Hon. the Lord Mayor of Dublin for the time being, 100*l.*, for such objects as he shall deem most deserving; to the Blind Asylum, New Kent-road, 100*l.*; to Mrs. Gladstone, of No. 11, Carlton-house-terrace, to be applied as she thinks proper in charity, 200*l.*, to be considered as coming from her correspondent "Nemo," and the residue of my estate I bequeath to my trustees for such objects as they consider deserving, whether in increase of the before-mentioned ones or otherwise, and I empower my trustees to make arrangements with the tenants as to the repair of certain houses.

The testator died possessed of considerable pure and some impure personal estate.

Greene, Q.C. and *Graham Hastings*, for the plaintiffs, the trustees, submitted the question to the court.

Karslake, Q.C. and *Tremlett*, for the testator's widow, contended that the gift to the Lord Mayor of Dublin and the residuary gift were void, the first as not being given for charitable objects, and the second for uncertainty. They further contended that the widow was entitled, by implication, to a life estate in all the charitable gifts which were postponed until after her death. They cited—

Humphreys v. *Humphreys*, L. Rep. 4 Eq. 475; 15 L. T. Rep. N. S. 557;
Roe v. *Bendale*, 5 Burr. 2608;
Re Blake's Trusts, L. Rep. 3 Eq. 799; 16 L. T. Rep. N. S. 279;
Re Thomson's Trusts, L. Rep. 11 Eq. 146; 23 L. T. Rep. N. S. 693;
Buckle v. *Bristow*, 11 L. T. Rep. N. S. 265; 10 Jur. N. S. 1095;
Wood v. *Corporation of Gloucester*, 1 H. L. Cas. 272.

Hemming, for the Crown, argued upon the provisions in the will against the implied life estate to the widow.

Karslake, Q.C. in reply.

THE VICE-CHANCELLOR.—I consider that the gift to the Lord Mayor of Dublin fails, as it appears to me too strong an implication of intention to say that the legacy is given for charitable objects. The other charitable legacies are good, and must be paid at the time specified, but not before. As to the contention that the testator's widow takes by implication a life estate in the gift to the charities, I do not think it can be sustained. The authorities on the subject are to be found in a case before the late Master of the Rolls for Ireland (*James* v. *Shannon*, L. Rep. 2 Ir. Eq. 118), where the question was very fully and carefully discussed, and they all appear to bear me out in the view I have taken. The residuary gift fails altogether, on the ground of uncertainty.

Solicitors: *Du Pasquier, Tremlett*, and *Earle Holt*; *Raven* and *Bradley*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

SECOND COURT.

Wednesday, April 24, 1872.

CULLEN (app.) *v.* TRIMBLE (resp.).

*Summary jurisdiction by implication—Provisions in respect of such jurisdiction—*32 *&* 33 *Vict. c.* 70.

The Contagious Diseases (Animals) Act 1869 (32 *&* 33 *Vict. c.* 70) *contains no express words giving summary jurisdiction to justices to convict for the offences created thereby; but, by sect.* 57, *a person doing a certain thing is to be deemed guilty of an offence, "unless he shows, to the satisfaction of the justices before whom he is charged, that he did not know," &c.; and, "in case of a conviction for an offence under this section, no compensation shall be payable," &c.; by sect.* 103, *"if any person acts in contravention of or is guilty of an offence against this Act . . . he shall for every such offence be liable . . . to a penalty not exceeding* 20*l.," by sect.* 107, *"in proceedings before justices under this Act, any railway company or other body corporate may appear by any member;" and by sect.* 108, *an appeal to quarter sessions is given to any party who "feels aggrieved by the dismissal of his complaint by justices, or by any determination or adjudication of justices with respect to any penalty or forfeiture under this Act," upon certain conditions mentioned:*

Held, that these provisions impliedly gave to justices summary jurisdiction to convict for offences under the Act.

THIS was a case stated under the 12 and 13 Vict. c. 45, s. 11, on appeal to the quarter sessions.

An information was laid against the appellant, charging him with having exposed in a certain market, the same being a public place where animals are commonly exposed for sale, four bullocks affected with a certain contagious and infectious disease, to wit, the foot-and-mouth disease, contrary to the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), s. 57.

On the hearing at petty sessions, it was objected on behalf of the appellant that the justices had no jurisdiction under the Act to convict in a summary manner for the offence charged.

The justices overruled the objection, and convicted the appellant of the offence, and adjudged him to pay £20 penalty and costs, the conviction being drawn in the form I. given in the schedule to 11 & 12 Vict. c. 43. Against this conviction an appeal was lodged at the quarter sessions under sect. 108 of the Act of 1869, but the hearing was respited from time to time until the opinion of this court could be taken upon the case.

The question for the court was whether the justices had jurisdiction within the Act; if the court was of opinion in the affirmative, the appeal was to be remitted to the quarter sessions to be heard on the merits.

By section 57 of the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. cap. 70).

If any person exposes in a market or fair, or other public place where horses or animals are commonly exposed for sale, or exposes for sale in any sale-yard, whether public or private, or places in a fair or other place adjacent to or connected with a market or fair, or where horses or animals are commonly placed before exposure for sale, or sends or causes to be carried on a railway, or on a canal, river, or other inland navigation, or on a coasting vessel, or carries, leads, or drives, or causes to be carried, led, or driven, on a highway or thoroughfare, any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shows to the satisfaction of the justices before whom he is charged that he did not know of the same being so affected, and that he could not with reasonable diligence, have obtained such knowledge. . . . In case of a conviction for an offence under this section, no compensation shall be payable in respect of any animal slaughtered under this section.

By sect. 103:

If any person acts in contravention of, or is guilty of any offence against this Act, or any order or regulation made by the Privy Council, or a local authority in pursuance of this Act, he shall for every such offence (except as otherwise provided in this Act, and except where a less penalty is provided in any such order or regulation) be liable to a penalty not exceeding twenty pounds.

By sect. 107:

In proceedings before justices under this Act, any railway company or other body corporate may appear by any member of their board of directors or council, or by any officer authorised in writing under the hand of any director or member of the council of the company or body.

By sect. 108:

If any party feels aggrieved by the dismissal of his complaint by justices, or by any determination or adjudication of justices with respect to any penalty or forfeiture under this Act, he may appeal therefrom, subject to the conditions and regulations following:

1. The appeal shall be made to some court of general or quarter sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days, and not more than four months, after the decision of the justices.

2. The appellant shall, within three days after the cause of appeal has arisen, give notice to the clerk of the petty sessional division for which the justices act, whose decision is appealed from, of his intention to appeal, and of the grounds thereof.

3. The appellant shall, immediately after such notice, enter into a recognisance before a justice of the peace, with two sufficient sureties, conditioned personally to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court.

4. The court may adjourn the appeal, and may make such order thereon as they think just.

But nothing in this section respecting appeals shall affect any enactment relative to appeals in cases of summary convictions or adjudications in the city of London, or the metropolitan police district.

By sect. 109:

For the purposes of proceedings under this Act, or any order of the Privy Council or order or regulation of a local authority thereunder, every offence against this Act or any such order or regulation shall be deemed to have been committed, and every cause of complaint under this Act or any such order or regulation, shall be deemed to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the person who charged or complained against happens to be.

Aspinall, Q.C., for the appellant, contended that inasmuch as no summary jurisdiction was expressly given to justices by the Act, it could not be implied from its provisions. The remedy against a breach of the Act was therefore only by indictment or by action for the penalties imposed.

Torr, Q.C., for the respondent, argued that the sections above set out could apply only to a summary jurisdiction; that it was sufficient if by obvious implication the Legislature intended to provide such a mode of procedure; and that it was the conclusion so to grant jurisdiction was irresistible from the whole tenour of the Act.

The COURT (Blackburn, Hannen, and Quain, JJ.), considered that the statute, by its various sections, impliedly gave summary jurisdiction to the justices against offences mentioned therein, although the Act was imperfectly drawn, and its language was obscure.

Judgment for respondent.

Attorneys for appellant, *Gregory, Rowcliffe, and Co.*

Attorneys for respondent, *R. M.* and *F. Lowe.*

Saturday, April 27, 1872.

SECOND COURT.

BARNES (app.) *v.* ACKROYD (resp.)

Nuisance—Black smoke — Occupiers — Nuisances Removal Acts 1855 *and* 1860—*Sanitary Act* 1866.

The respondents, who were occupiers of mills which were used as a manufactory, and not as a private dwelling house, were summoned before justices under the Sanitary Act 1866, *and the Nuisances Removal Acts incorporated therewith, for sending forth from one of their chimneys black smoke in such quantity as to be a nuisance. It was proved that during one hour the smoke from this chimney was a nuisance; but, no evidence being given as to the persons who were in charge of the furnaces which sent the smoke up the chimney, the justices discharged the summons:*

Held, that the respondents were the proper persons against whom proceedings should be taken, but that the justices should inquire whether the nuisance was likely to recur, or to be repeated, *before they made an order of abatement.*

THE following case was stated for the opinion of the Court of Queen's Bench under the provisions of 20 & 21 Vict. c. 43, by two of Her Majesty's justices of the peace acting in and for the West Riding of the county of York.

By the 14th section of the Sanitary Act 1866 (29 & 30 Vict. c. 90, part 2nd), it is amongst other things enacted that the expression "Nuisances Removal Act" shall mean the Acts passed in the reign of Her present Majesty in the years following, that is to say, one in the session of the 18 & 19 Vict. c. 121; the other in the session of the 23 & 24 Vict. c. 77, as amended by the second part of this Act, and this part shall be considered as one with the said Acts.

By the 19th section of the said Act it is enacted that the word "nuisances," under the "Nuisances Removal Acts," shall include *inter alia*, "any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible used in such fireplace or furnace, and is used within the district of a nuisance authority for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gasworks, or in any manufactory or trade process whatsoever; any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance."

A summons was issued under the hand and seal of John Waterhouse, Esq., a justice of the peace acting in and for the West Riding of the county of York, by the appellant, who is an inhabitant of Sowerby Bridge, in the parish of Halifax, in the West Riding of the county of York, which was duly served upon the respondents; and which said summons was in the words and figures following —"To Messrs. James Ackroyd and Son, Limited, of Skircoat, in the said riding, manufacturers. Whereas information has this day been made before the undersigned, one of Her Majesty's justices of the peace in and for the said West Riding of the county of York, by one John Barnes, an inhabitant of the parish of Halifax in the said riding, for that you on the 16th Dec. inst., at the township of Skircoat, in the said parish, in the riding aforesaid, unlawfully did send forth black smoke from a certain chimney belonging to certain premises there, called Copley Mills, belonging to you (not being the chimney of a private dwelling-house), in such quantity as to be a nuisance, contrary to the statute in such case made and provided: These are therefore to command you in Her Majesty's name to be and appear on Saturday, the 30th Dec. inst., at eleven o'clock in the forenoon, at the West Riding Court House, in Halifax, in the said riding, before such justices of the peace for the said riding as may then be there, to answer to the said information, and to be further dealt with according to law. Given under our hand and seal this 26th Dec. 1871, at Halifax, in the said Riding."

The summons came on for hearing on the 30th Dec. last, when it was proved on the behalf of the appellant that he was an inhabitant of Sowerby Bridge, in the said parish of Halifax, being the parish within which the said mills called Copley Mills are situate; that black smoke did issue from the chimney of the said mills on the day in question, at different intervals, for periods of time amounting together to seventeen minutes of the one hour during which it was watched, in such *quantity as to* be a nuisance; that Copley Mills *were in the* occupation of the respondents; and that the said premises were used as a manufactory, and not as a private dwelling-house. No inquiry had been made as to who had charge of the furnaces at the time the smoke was emitted, or as to the description of furnaces in use at the time, nor had any order been theretofore made prohibiting the use of the said chimney.

Upon such hearing of the summons no attempt was made to disprove the quantity of black smoke said to have been issuing from the mill chimney, but on the part of the respondents it was contended that the charge could not be maintained against the respondents upon the evidence, and that it was the justices' duty, under the 12th section of the statute 18 & 19 Vict. c. 121, to have issued a summons requiring the person by whose act, default, permission, or sufferance, the nuisance arose or continued, or, if such person could not be found or ascertained, the owner or occupier of the premises on which the nuisance arose to appear before them in petty sessions assembled at their usual place of meeting, and that they should then proceed to inquire into the said complaint; and that, as there was no evidence before them to prove who was in charge of the furnaces which sent the black smoke up the chimney, they had summoned the wrong person, and that the occupier could not be charged with the offence of committing such a nuisance, unless it had been first shown that the stoker, engineer, or other person employed at the respondents' fireplaces or furnaces could not be found; and having doubts in their own minds as to the construction of the said sect. 12 of the said Act 18 & 19 Vict. c. 121, the justices determined to discharge the information against the defendants, but decided to grant a case for the opinion of this honourable court.

On the part of the appellant it was contended that if the act or default was not the positive act or default of the respondents, yet it was undoubtedly with their (the respondents') permission or sufferance that the nuisance arose and continued; for, they being the occupiers of the premises, no person, as long as they continued in such occupation, could do such acts without their permission or sufferance. And it was further argued that the respondents were responsible for the acts and defaults of their servants in this respect, and more particularly so as the proceeding was not for the recovery of penalties, but merely a civil proceeding against the respondents for an order for abatement of the nuisance referred to.

The justices, therefore, respectfully asked the opinion of this honourable court whether they ought, upon the evidence laid before them by the respondents, to have made the order for abatement applied for. If the court be of opinion in the affirmative, they would be ready to issue a fresh summons, and hear the complaint *de novo*.

M'Intyre, Q.C., for appellant.—This was evidence upon which the justices ought to have made the order applied for. By sect. 12 of the Nuisances Removal Act 1855, upon complaint to a justice by a local authority concerning a nuisance, "such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or, if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices in petty

sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or, if removed or discontinued since the notice was given, that it is likely to recur or to be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned, and shall also make an order for the payment of all costs incurred up to the time of hearing or making the order for abatement or discontinuance or prohibition of the nuisance." By sect. 13 of the Nuisances Removal Act 1860, "upon complaint before a justice of the peace by any inhabitant of any parish or place of the existence of any nuisance on any private premises in the same parish or place, such justice shall issue a summons requiring the person by whose act, default, permission or sufferance the nuisance arises, or, if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before two justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint, and act in relation thereto as in cases where complaint is made by a local authority under sect. 12 of the said Nuisances Removal Act, 1855, and as if the person making the complaint were such local authority." [Stopped by the court.]

F. M. White for respondents.—The nuisances enumerated in sect. 19 of the Act of 1866 are merely an extension of those mentioned in sect. 8 of the Act of 1855, and must be subject to the provisions of the earlier Acts. The person by whose act or default this chimney was a nuisance must have been either the builder of the chimney or the person who lighted the fire. They ought both to have been summoned before the justices' jurisdiction to make an order against the respondents' arose.

BLACKBURN, J.—I think there can be no doubt that the magistrates have here made a mistake in the application of the law. The masters who authorised and directed their servants to light the fires which caused the smoke are the persons properly liable to these proceedings; but the justices should have inquired, under sect. 12 of the Act of 1855, whether the nuisance was likely to recur or to be repeated; and if satisfied that it was, they should have made an order for the abatement on the respondents. They had better now hear a fresh complaint.

MELLOR, J., concurred.

Judgment for appellants.

Attorneys for appellant, *Chester* and *Urquhart*.
Attorneys for respondent, *Bower* and *Cotton*.

Saturday, April 27, 1872.

SECOND COURT.

DANN (app.) *v.* MANBY (resp.)

Metropolitan police—County justices—District not assigned to police court—21 & 22 Vict. c. 73, s. 6.

The respondent was charged before justices of the county of Kent, sitting at Dartford, out of the metropolitan police district, with committing an offence under 2 & 3 Vict. c. 47, s. 54, at Bexley, which is a place within the metropolitan police district, not assigned to any of the police courts of the metropolis.

Held, affirming the opinion of the justices, that they had no jurisdiction to try the offence.

AT a petty session holden at Dartford, in and for the upper petty sessional division of the Lathe of Sutton-at-Hone, in the county of Kent, on the 4th Nov. 1871, before four of Her Majesty's justices of the peace in and for the said county, the information and complaint hereinafter particularly specified of Thomas Dann, of Bexley, Kent (hereinafter called the appellant), against Robert Manby, then residing at 20, Manor-gardens, Chelsea (hereinafter called the respondent), came on to be heard at such petty session holden at Dartford aforesaid, pursuant to a summons which had been issued upon such information, which charged the respondent with having, on the 25th Oct. then last past, used threatening, abusive, or insulting words or behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace might be occasioned.

The offence charged is one of many offences created by the 54th section of 2 & 3 Vict. c. 47, clause 13, and is limited to the commission of such offence in any thoroughfare within the limits of the metropolitan police district; and the evidence of the appellant and his witnesses proved, to the satisfaction of the justices, that the respondent had committed the offence so created and charged against him.

They nevertheless doubted whether they had jurisdiction to convict, and therefore declined to do so, and dismissed the complaint.

The appellant being dissatisfied with such determination, as being erroneous in law, applied to the justices in writing, within three days after such determination, to state and sign a case for the opinion of the Court of Queen's Bench, and they, being of opinion that such application was reasonable, stated and signed the following case accordingly.

As before stated, they were perfectly satisfied upon the facts that the respondent had committed the offence charged by such information; but they thought they had no jurisdiction to convict, and they came to this conclusion upon the following grounds:

The place where the offence was proved to have been committed was at Bexley; but Bexley, although within the Metropolitan Police District, is not within any division of such district assigned to any of the police-courts of the metropolis.

The county justices for the petty sessional division within which Bexley is situated do not hold any petty session at any place within the Metropolitan Police District, but only at Dartford, which, although an adjoining parish to Bexley, is not within the limits of the Metropolitan Police District; and upon the best consideration the justices could give to the subject, they were of opinion that the county justices had no power, while sitting beyond the limits of the Metropolitan District, to convict for any of the offences which are specially created by the statute 2 & 3 Vict. c. 47, and for that reason they declined to convict.

The 75th section of 2 & 3 Vict. c. 47 defined the word "magistrate" to include, not only a police magistrate, but also every justice acting for any part of the Metropolitan District for which no court had been established; and the

on the grounds, amongst others, that it was contrary to law to lay on the same day and time nineteen separate informations, and to issue nineteen separate summonses, and make nineteen separate orders with nineteen separate sets of costs for an accumulated penalty upon the one order.

The magistrates overruled the objections, and a case for the opinion of the Court of Queen's Bench on the question of law was demanded, but refused; and on the magistrates being asked to give their refusal in writing, they declined.

The justices imposed a penalty of 10*s.* and 15*s.* costs upon the first summons, and upon each of the remaining eighteen summonses a penalty of 10*s.* and 16*s.* costs, which have not been paid.

R. G. Williams showed cause, and contended that these were convictions for separate offences, and that the costs were in the discretion of the justices.

Maule, Q.C. (with him *F. M. White*) supported the rule, and argued that one conviction only could be sustained, that there was one continuous act of disobedience, for which one information only could be laid. Further, that the chimney itself, by the words of the Act, was the nuisance, and that a special provision for abating such a nuisance was given in the Act.

BLACKBURN, J.—I think this rule must be discharged. The Legislature, in passing the 18 & 19 Vict. c. 121, provided for cases of continuous nuisances, and by sect. 14, "any person not obeying the said order for abatement shall, if he fail to satisfy the justices that he has used all due diligence to carry out such order, be liable for every such offence to a penalty of not more than 10*s.* per day during his default, and any person knowingly and wilfully acting contrary to the said order of prohibition shall be liable for every such offence to a penalty not exceeding 20*s.* per day during such contrary action; and the local authority may, under the powers of entry given by this Act, enter the premises to which this order relates, and remove or abate the nuisance condemned or prohibited, and do whatever may be necessary in execution of such order, and charge the cost to the person on whom the order is made as hereinafter provided." By the Sanitary Act 1866 (29 & 30 Vict. c. 90), s. 19, the subject of this complaint is made a nuisance within the application of the previous Act of 1855. The justices here have properly said that the order means to prohibit the sending forth black smoke. Then by the 14th section, above referred to, if a person who has not obeyed such order has failed to show that he has used due diligence to carry out such order, he has disobeyed the order, and so *toties quoties*. Summonses have been taken out in respect of each of a number of days on which such order was disobeyed, and the justices have convicted and imposed penalties on each summons. This is said to have been offensive, and to have multiplied costs. It appears that in each of the cases the justices had a discretion to allow costs. The defendants seem to have been obstinate, and the justices seem to have thought that it would not be oppressive to give costs in each case. It is said the effect, is to increase the penalty imposed, and that may be so. The justices would, I think, have done better in their discretion if they had left it for the Legislature to increase the penalty.

HANNEN, J.—I am of the same opinion. I think it is a repetition of the offence every time the chimney is allowed to send forth black smoke. The effect is that, on each occasion they let forth black smoke after the order for abating was made, a distinct offence was committed, to which the penalty was attached.

Rule discharged with costs.

Attorneys for the applicants, *Bower* and *Cotton*, for *F. Jubb*, Halifax.

Attorneys for the justices and the informer, *Chester* and *Urquhart*.

Monday, June 10, 1872.

REG. *v.* ROWELL (app.).

*Licence for sale of excisable liquors—Jurisdiction of justices—Discretion of justices to refuse licence—Change of tenant after general sessions—*9 *Geo.* 4, *c.* 61, *s.* 14.

The tenant of a house, who in Sept. 1870 *had obtained a licence for the sale of excisable liquors, under* 9 *Geo.* 4, *c.* 61, *was compelled by the landlord (after due notice given) to quit possession of the house in May* 1871, *and another tenant was let into possession, to whom the justices in petty sessions refused, on the* 5*th June* 1871, *to indorse the former tenant's licence, under* 5 *&* 6 *Vict. c.* 44, *s.* 5. *The new tenant then gave up possession, and no application for a licence was made to the general annual licensing meeting, held on the* 4*th Sept.* 1871, *the house being at that time unoccupied. Appellant, the next tenant of the house, applied for a licence, under sect.* 14 *of* 9 *Geo.* 4, *c.* 61, *at a special sessions held under that Act, but the application was refused by the justices, whose decision was affirmed on appeal by the quarter sessions, who found, however, that the appellant was a proper person:*

Held, that the justices clearly had a discretion to refuse the licence.

Quære, whether the justices had any jurisdiction to deal with the matter at the special sessions?

THIS was an appeal against the refusal of four justices of the peace of the county of Norfolk, acting in and for the hundred of Freebridge Marshland, to grant an alehouse licence to William Rowell, the tenant of a house called the Marshland Inn, situate at Walsoken, in the said hundred, under the 14th sect. of 9 Geo. 4, c. 61.

The appeal came on for hearing at the Epiphany Quarter Sessions for the county of Norfolk, holden at Norwich, when that court dismissed the appeal, subject to the opinion of the Court of Queen's Bench on the following case:

1. All formal notices were admitted to have been given.

2. The Marshland Inn is a house let for a term of years to Messrs. Eyre and Co., brewers, of King's Lynn. In Sept. 1870, William Joseph Gregory was tenant of the house under Messrs. Eyre and Co., and at the annual general licencing meeting held in that month, he obtained a magistrate's licence for the sale of exciseable liquors in such house, under 9 Geo. 4, c. 61.

3. In April 1871, Gregory was fined by the magistrates for an offence against the tenor of his licence.

4. On the 15th May following, Messrs. Eyre having given Gregory notice to quit the said house, Gregory's interest therein was fully determined thereby; but Gregory, notwithstanding, having

refused to deliver up possession thereof the lessors obtained from the magistrates a warrant in ejectment, under 1 & 2 Vict. c. 74, s. 1, for the redelivery of the house to them.

5. On the 17th May, Gregory went out of the house under threat of eviction, under the above-mentioned warrant, which was not therefore put in force, and Messrs. Eyre thereupon resumed possession of the house.

6. At the beginning of June, 1871, a man named Huckle was let into possession of the house by Messrs. Eyre, as their tenant, and on the 5th of that month he applied to the magistrates in petty sessions, under 5 & 6 Vict. c. 44, to indorse Gregory's licence to him; but the magistrates refused to do so.

7. Huckle soon after this gave up the house to Messrs. Eyre, and at the general annual licensing meeting held on the 4th Sept. 1871, the house was unoccupied, and no application was made for a licence in respect of it.

8. On the 20th Nov. 1871, a special session was held, under 9 Geo. 4, c. 61, s. 4, and the appellant, who had become tenant of the house to Messrs. Eyre since the said licensing meeting of the 4th Sept., applied to the magistrates at such special sessions for a new licence, under the 14th section of 9 Geo. 4, c. 61, but the magistrates, after hearing the appellant's counsel, and considering the application on its merits, refused to grant a new licence to the appellant in respect of such house.

9. Against this refusal the present appeal was made to the quarter sessions.

10. It was contended on the part of the appellant, and denied on the part of the respondents, that the magistrates at such special sessions had no discretion, but were bound, under 9 Geo. 4, c. 61, s. 14, and 34 & 35 Vict. c. 88, s. 1, to grant the appellant the licence that he asked for.

11. The court of quarter sessions thereupon held that although Gregory was a person duly licensed under the Act 9 Geo. 4, c. 61, and removed from or yielded up possession of the house specified in his licence, at a period before the general annual licensing meeting, and though it would have been lawful for the justices at a petty session to grant a licence to a new tenant or occupier of such house, under sect. 14 of that statute, yet that such licence so granted would have been a new licence, and that the granting or refusing of such new licence was within the discretion of the magistrates' special session, and therefore the appeal was dismissed.

If the Court of Queen's Bench should be of opinion that it was discretionary with the magistrates assembled at the special session above-mentioned to grant or refuse the new licence to the appellant (a proper person), under the above circumstances, then the judgment of the said court of quarter sessions should stand confirmed; but if the Court of Queen's Bench should be of a contrary opinion, then it is to give such relief in the premises as may be necessary.

9 Geo. 4, c. 61, enacts:—"That if any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, &c., or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail, to be drunk or consumed in such house, &c., it shall be lawful for the justices assembled as aforesaid, at a special session holden under the authority of this Act, for the division or place in which the house so kept, or having been kept, shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, administrators, or assigns of the person so dying, &c., or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall by sale or otherwise have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell excisable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging, &c."

34 & 35 Vict. c. 88, s. 1, provides that:—"The justices, at the general annual licensing meeting, or any special sessions, shall not grant, otherwise than by way of renewal, or in pursuance of the provisions of sect. 14 of the Intoxicating Liquors (Licensing) Act 1828, any new licence under that Act, or any new certificate under the Wine and Beerhouse Act 1869, and the Acts amending the same respectively, except in accordance with the provisions of this Act. . . . If it appears to the justices that the refusal to grant any such new licence or certificate will cause inconvenience to the locality or to the public, or injury to any person or body corporate, such justices may grant provisionally such licence or certificate, and shall forthwith send to a secretary of state a report in writing of such provisional grant, specifying the circumstances on account of which such grant is made. . . . Where, on an application to a court of quarter sessions, or one of the Superior Courts of law at Westminster, with reference to the refusal of any justices, before the passing of this Act, to grant a licence or certificate, it is decided (either before or after the passing of this Act) that such licence or certificate ought to have been granted, such licence or certificate shall, for the purposes of this section, be deemed to have been granted at the date of such refusal."

Philbrick, for the appellant.

Blofield, for the respondents, referred to the cases of *Simpkin* v. *The Justices of Birmingham* (36 Justice of the Peace, 279); and *Reg.* v. *The Justices of Lancashire* (L. Rep. 6 Q. B. 97; 23 L. T. Rep. N. S. 461), in the latter of which cases, Lush, J., delivering the considered judgment of the court, said:—"The 1st section of 9 Geo. 4, c. 61, after directing the justices to hold annual general licensing meetings, enacts that 'it shall be lawful for the justices, acting in and for such county or place, assembled at such meeting . . . to grant licences for the purposes aforesaid, to such persons as they the said justices shall, in execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper.' Here the personal fitness of the applicant is put as one of the several elements; the fitness of the house is assumed to be another; and, over and above these, two other considerations, not specified or defined, are supposed to exist and to influence the decision. There is nothing in any part of the Act which suggests what

these other considerations may or may not be; nothing which gives the applicant a right to demand a licence, nor any words importing an objection on the part of the justices to grant it under any given state of things. It is therefore obvious that the words relied on by the appellant refer, not to the merits of the applicant, but to the fitness and propriety of the application, as one affecting the interest and well-being of the neighbourhood."

BLACKBURN, J.—I think, as far as we can see, that there is nothing whatever in this Act of Parliament to make it obligatory on the justices to grant a licence in such a case as the present. It is quite enough for us to decide whether they had the power to refuse to grant a licence under the circumstances, without determining whether they were bound to do so or not. I think that they had the power to do so, and that it was not obligatory on them to grant the licence.

MELLOR, J.—I am of the same opinion.

LUSH, J.—I am also of the same opinion. I will only add, that I have not the least doubt that the magistrates had a right to refuse the licence, whether they had the power to grant it or not.

Judgment for respondents.

Attorneys for appellant, *Purkis* and *Perry*.
Attorney for respondents, *Wilkin*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, H. F. POOLEY, and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

Friday, May 31, 1872.

MACARTHY *v.* THE METROPOLITAN BOARD OF WORKS.

Compensation—Injury to land—Thames Embankment Act 1862 — *Lands Clauses Consolidation Act* 1845 (8 *Vict. c.* 18), *s.* 68.

The plaintiff resided close to a draw dock at Whitefriars, in the City of London, which he was constantly making use of in the way of his trade.

Under the authority of the Thames Embankment Act 1862, *the Metropolitan Board of Works filled in and permanently stopped up the draw dock.*

The premises, which the plaintiff held under a lease for eighty years from Michaelmas 1854, *were less valuable either to sell or to occupy in consequence of the removal of the draw dock.*

The defendants denied that the plaintiff's interest was injuriously affected within the meaning of the Lands Clauses Consolidation Act 1845 *so as to entitle him to compensation, on the ground that his interest in the draw dock was no more than that of the general public:*

Held, that there was such a permanent injury to the plaintiff's premises as to entitle him to compensation under the Lands Clauses Consolidation Act 1845.

Ricket *v.* Metropolitan Railway Company (16 *L. T. Rep. N. S.* 542; *L. Rep.* 2 *H. of L. Cas.* 175) *discussed.*

THIS is an action brought by the plaintiff against the defendants to recover the sum of 1900*l.*, being the amount, less 430*l.*, the claim to which has been given up by the plaintiff, assessed by a jury summoned in accordance with the provisions of the Lands Clauses Act 1845, as compensation for the alleged injurious affecting of the plaintiff's estate and interest in a house and premises in manner and under the circumstances hereinafter stated, and by consent of the parties and by order of the Honourable Mr. Justice Grove, the following case has been stated for the opinion of the court without pleadings.

CASE.

1. The plaintiff, at the time of the stopping up of the Whitefriars Dock, hereinafter mentioned, resided in and carried on business as a carman and contractor for supplying builders with lime, bricks, and other materials, and as a large dealer in sand and ballast at the premises in the next paragraph described, which he held under a lease for 80 years from Michaelmas 1854.

2. The said premises consisted of a house with warehouse, stables, and business premises, and are situate in Whitefriars, in the City of London, and a draw dock, known under the name of the Whitefriars Dock, leading into the river Thames, which was very largely used by the plaintiff in the way of his business.

3. The said draw dock was a free and open public dock, but was principally used by the plaintiff, the City Gas Company, the Commissioners of Sewers for the City of London, and the other persons whose respective premises were in proximity to it.

4. The plaintiff had no right or easement in or to the said draw dock other than his right as one of the public, nor was there appurtenant or otherwise belonging to the plaintiff's said premises any easement, right, or privilege in or to the said dock.

5. The said dock at the time of its being stopped up as hereinafter mentioned was of the length of 352ft., of the width of 46ft. at the outlet upon the river Thames, and of 30ft. at its head. It originally and before the plaintiff became possessed of the premises, extended to Tudor-street, but about twenty years ago it was shortened to its present length by the Commissioners of Sewers for the City of London, who filled in the end, and converted it into a roadway and paved the space so obtained, and have down to the present time kept the said roadway in repair; prior to such filling in, the roadway between the plaintiff's premises and the edge of the dock was about ft. wide.

6. This paragraph referred to a plan annexed to the case for the purpose of more clearly denoting the *locus in quo* to the court.

7. By reason of the proximity of the dock to the plaintiff's premises, and the access given by the dock to and from the river Thames, the said premises were rendered more valuable, as premises either to sell or to occupy, with reference to the uses to which any owner might put them.

8. In the execution of the works authorised by the Thames Embankment Act 1862, and the Thames Embankment (North and South) Act 1868, in the month of Oct. 1868, a solid embankment was carried along the foreshore of the Thames, and thus permanently stopped up and destroyed the said Whitefriars dock.

9. By reason of the stopping up and destruction of the said dock as aforesaid, and the destruction thereby of the access to and from the river Thames, the plaintiff's premises became and were as premises either to sell or to occupy, in their then state and condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value, and the plaintiff alleged that consequently he became entitled to compensation.

10. The defendants denied that he was so entitled, and issued their warrant to the sheriffs to summon a jury, without prejudice to their right to dispute the question, and the jury assessed the amount of damage and injury at 1900*l.*

11. The question for the opinion of the court is whether, under the circumstances set forth in this case, the plaintiff's interest in his premises was injuriously affected within the meaning of the Lands Clauses Consolidation Act 1845, so as to entitle him to compensation.

If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff for 1900*l.*, with costs of suit from the 27th April 1871.

If the court shall be of opinion in the negative, then judgment of *nolle pros.* shall be entered for the defendants, with costs of defence from the last mentioned date.

Hon. *A. Thesiger* (*Prentice*, Q.C. with him) argued on behalf of the plaintiff.—The Board of Works have diminished a public use, which added to the desirability and market value of the plaintiff's premises. The property, *quâ* property, is rendered more valuable by the convenience of the dock. The property is injuriously affected under the provisions of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 68). There is here an injury to the land, and it is so found in the case. He cited:

Chamberlain v. *West End of London and Crystal Palace Railway Company*, 2 B. & S. 605; 8 L. T. Rep. N. S. 149;
Ricket v. *The Metropolitan Railway Company*, L. Rep. 2 H. L. Cas. 175; 16 L. T. Rep. N. S. 542;
Beckett v. *The Midland Railway Company*, L. Rep. 3 C. P. 82; 17 L. T. Rep. N. S. 499;
Reg. v. *The Metropolitan Board of Works*, L. Rep. 2 Q. B. 358.

Hawkins (with whom was *Philbrick*) for the defendants. The mere fact that a man's premises are injured by a public work is not enough to give him compensation. All the cases go to show that there must be interference with the property itself, or to a private right connected with the land. *Beckett* v. *The Midland Railway* (*sup.*) is clearly distinguishable, for the road was narrowed by the company, and as it passed by, and was immediately contiguous to the plaintiff's house, he sustained a particular injury to his separate premises, which he and the public did not suffer. But in the present case Macarthy had access to a public street, and to the public draw dock only as all the Queen's subjects have a right to use it, and although he used it oftener than others, from the accident of his situation, the character of his right was the same as that of every one of the public. This is not the subject of a civil action, as it is a public right, and if the board were not acting by virtue of a statute, it would be the subject of indictment. Although I do not deny he was injuriously affected, his injury is not the subject of compensation. The case of *Reg.* v. *The Metropolitan Board of Works* (L. Rep. 3 C. P. 358), is in our favour; there the occupier of premises near the Thames had been used to bring barges to a draw dock as a public right, and on the dock being stopped up, it was held that he was not entitled to compensation. [KEATING, J.—There was no statement there that the plaintiff's premises were diminished in value.]

Thesiger in reply.—In *Reg.* v. *Metropolitan Board of Works*, the claim was only for compensation and not for injury to the premises as premises.

WILLES, J.—It appears to me that this case can be brought within the principle of the decision in *Beckett* v. *The Midland Railway*, and which case distinguished *Ricket* v. *The Metropolitan Board of Works*, and that we can arrive at such a decision without being at variance with the other decisions. Although we must be governed by the construction put upon the Lands Clauses Consolidation Act 1845 by the House of Lords, and the dicta of the noble lords who decided *Ricket* v. *The Metropolitan Board of Works*, yet the cases are distinguishable. The distinction between the *Caledonian Railway Company* v. *Ogilvy* (2 Macq. H. of L. Cas. 229), and *Ricket's case*, and the case we are now considering, consists in this, that the plaintiff's estate here has sustained damage, and it is stated the property would sell for less in the market, attract fewer tenants, or let for less rent, while in those cases there was no injury done to the land or to any interest in land, so that the property was not diminished in value. In *Reg.* v. *The Metropolitan Board of Works* (L. Rep. 2 Q. B. 358), the case which has been so pressed upon us, there was no interest in the land which was affected, the plaintiff only suffering from the loss of public rights, and a mere personal injury, for which he could obtain no redress, and though the property might be more valuable to him carrying on a particular trade, yet the value in the market to persons who might have wished to build warehouses was not diminished. When, however, you have the case where land is damaged to the extent of being worth less to anyone, and where it sells for less, and lets for less by reason of a permanent work, you have a case distinguishable from those to which I have referred. It is found in the special case that the premises were, in consequence of the stopping up and destruction of the dock and the destruction of the access to and from the Thames, permanently damaged and diminished in value, either to sell or occupy. The only road by which the plaintiff could reach the Thames was stopped up, and the access given to him to and from the Thames rendered the premises more valuable to sell or occupy. This state of things brings us to consider the facts in *Beckett* v. *Midland Railway Company*. There there was a house with a road outside which was narrowed; the market value of the land fell; but it was said it might be turned into a garden. The court laid down that property was to be taken as it stood at the time, and that owners are not supposed to alter their property to make t as profitable in any other way because the enjoyment is injuriously affected. This case is thus brought within the doctrine of the decision in *Beckett* v. *The Midland Railway Company*. To constitute a claim for compensation there must be an injury to land or to an interest in land as distinct from personal injury. An injury to trade or to any individual will not be sufficient. What makes the value of land is its desirability to the individual, and we have it here found that the land was injured. If it was, then the premises becoming less accessible, are less desirable, and the decisions shew that damage to land by reason of inaccessibility renders the owner entitled to compensation. There was an actionable wrong here if it had not been for the Act of Parliament, but

it is not necessary to refer to a series of authorities to show there would have been a cause of action; for I have no doubt this is such an injurious effect to land for which an action could have been maintained. Looking to the recent decision in the case of the *Duke of Buccleugh* v. *The Metropolitan Board of Works* (L. Rep. 5 Ex. 221; 23 L. T. Rep. N. S. 255), where large compensation was recovered for a loss—which I was almost going to term a speculative loss—looking, I say, to that decision, I am grounded in the opinion that it makes no difference whether you cut off a portion of the land. or whether you take away an immediate lateral advantage which diminishes the market value to the owner.

KEATING, J.—I am of the same opinion, and think the plaintiff entitled to the judgment of the court. This case is governed by the rule laid down in *Beckett* v. *The Midland Railway Company*, and I am not aware of any case that interferes with that decision. *Ricket's* case is clearly distinguishable; the cause of injury there was a temporary injury caused to the trade of the person who carried on business on the premises. The injury here is a permanent one, not to a personal right, but to the house itself, which is injuriously affected and depreciated in value to the amount of 1900*l*. It is not a fictitious injury, but it is found in the case that into whoever's hand the house may come, it is permanently depreciated.

Judgment for the plaintiff.

Attorney for the plaintiff, *Edmunds.*

Attorney for the defendant, *The Solicitor to the Metropolitan Board of Works.*

Monday, June 3, 1872.

STARR *v.* TRINDER.

*Weights and measures—Stamp worn out—Necessity for re-stamping—*5 *&* 6 *Will.* 4, *c.* 63, *s.* 21.

It is not necessary where a weight has been once stamped in accordance with 5 *&* 6 *Will.* 4, *c.* 63, *s.* 21, *but from use the mark has become erased, that it should be re-stamped.*

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Tunbridge Wells on the 3rd July 1871, an information preferred by John Tringer (respondent) against Stephen Starr (appellant), under section 21 of the 5 & 6 Will. 4, c. 63, charging that the appellant on the 22nd June 1871, at the parish of Tunbridge, in the county of Kent, did unlawfully use a certain weight, to wit, 2lb. weight, the same not having been stamped according to the statute on that behalf, was heard and determined by the justices, and upon such hearing the appellant was duly convicted before us, and we adjudged him to pay a penalty of 1*s.* and the costs.

Upon the hearing of the said information, the respondent proved that he was the inspector of weights and measures in the district where the appellant carried on his business, and on the 22nd June 1871 he made an examination of the weights, scales, and measures at the shop occupied by the appellant, who is a fruiterer and greengrocer, and found a 2lb. weight which had no visible stamp, but was otherwise correct. It was an iron weight with a copper plug, and appeared as if it had been *in use some time.* He had examined appellant's *weights three times,* but could not say he had ever *seen this 2lb.* weight before, and he told the appellant it had never been before him. The respondent's assistant stated that he could find no mark of a stamp on the weight, but that he had several times seen a 2lb. weight in appellant's shop.

It was contended for the appellant that the only issue was, whether or not the weight had ever been stamped. The appellant's son was called, who stated that in July 1869 he took four iron weights to the respondent, and saw him stamp all four, including the 2lb. weight in question, and that the respondent had several times examined the 2lb. weight, but had never before complained of the want of a stamp, and that the copper plug on which the stamp was impressed, being higher than the surface of the weight itself, had been worn away. It was proved by an assistant that the weight had been in use for the past two years, that there never had ever been any other 2lb. weight in the shop. The witness corroborated plaintiff's son as to the wearing away of plaintiff's plug, and as to the respondent having several times examined the weight without making any complaint.

The justices having heard the evidence and examined the weight, decided that as the weight itself bore no appearance of a stamp, the appellant must be convicted.

The question for the opinion of the court is, whether, taking into consideration the precise words of the Act of Parliament, the evidence given to prove that the weight had been stamped in 1869, and the fact that the weight itself, on examination by the respondent, bore no trace of a stamp, the appellant was legally convicted?

C. Baldock Stone for the appellant.—The 21st section of the 5 & 6 Will. 4, c. 63 provides that the justices of the peace shall provide for the use of the inspectors good and sufficient stamps for the stamping or sealing of weights and measures to be used in every county, and these stamps are to be taken to be the stamps for such county; and all weights and measures which shall be used for buying and selling shall be examined with a copy of the imperial standard weight, and the inspectors are also to stamp such weights, but the Act does not say that the weights are to be re-stamped if the mark becomes worn out by time.

No counsel appeared on the other side.

WILLES, J.—There is clearly nothing to take the case out of the 21st section. The conviction cannot be supported, for there is strong evidence for the magistrate to come to the conclusion that this is a stamped weight. The information must be quashed, and the magistrates must say whether they believe the evidence.

KEATING, J.—The magistrates probably convicted the appellant on a wrong reading of the statute, the mark not being visible on the weight. The justices must say whether the evidence is true.

Stone having applied for costs against the inspector of weights and measures,

WILLES, J.—The weight is a just one; we should therefore dismiss the information if we could decide the question of fact. The appeal must be dismissed with costs against the inspector unless the magistrates still convict.

Judgment for the appellant, subject to the decision of fact by the magistrates.

Attorney for appellant, *P. Wood,* for *W. Spratt,* Tunbridge Wells.

Nov. 21, 1871, *and June* 5, 1872.

REGISTRATION APPEALS.

CULL v. AUSTIN AND AUSTIN v. CULL.

Parliament—Borough-vote—Payment of all poor-rates payable up to preceding 5th of January—Representation of the People Act 1867 (30 *&* 31 *Vict., c.* 102) *sect.* 3, *sub.-sect.* 4.

The general words in sect. 27 *of the Reform Act of* 1832 (2 *Will.* 4, *c.* 45), *that no occupier shall be entitled to be registered as a voter, unless (among other things) he shall have paid, on or before the 20th July in the year in which he makes his claim, all the poor-rates which shall have become payable from him in respect of the qualifying premises previous to the 6th April then next preceding, have been by sect.* 75 *of* 6 *Vict., c.* 18, *and* 11 *&* 12 *Vict., c.* 90, *restricted to this, that he must have paid on or before the 20th July all the rates made and allowed after the 5th Jan. of the preceding year, and which have become payable up to the 5th Jan. of the qualifying year.*

The enactments which thus limited the large words of that section are, by virtue of sect. 56 *of* 30 *&* 31 *Vict. c.* 102, *made a context to the latter Act, by which the large words of sect.* 3, *sub.-sect.* 4 *of that Act (corresponding to the words above quoted from sect.* 27 *of* 2 *Will.* 4. *c.* 45) *are also limited.*

The words, therefore, of sect. 3, *sub.-sect.* 4 *of* 30 *&* 31 *Vict. c.* 102, "*all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of Jan.*," *must be taken as limited to* "*all rates made and allowed after the 5th day of Jan. of the year preceding the qualifying year, and payable up to the 5th Jan. of the qualifying year.*"

No excusal of such rates, whether made before or after the commencement of the qualifying year, can be pleaded in lieu of a disqualification arising from their not having been in fact paid or tendered before the 20th July in the qualifying year.

At the registration in 1871 *A. applied to have his name inserted in the register as a voter for the borough. He claimed, as an occupying householder, under sect.* 3 *of* 30 *&* 31 *Vict. c.* 102, *and was in every respect entitled to be registered, unless he was disqualified by reason of his not having paid two rates, which had been made respectively on 30th April and 30th Oct.* 1869, *and to which he was duly rated in respect of the qualifying premises.*

Held, that A. was not thereby disqualified.

Abel *v.* **Lee** (23 *L. T. Rep. N. S.* 844; *L. Rep.* 6 *C. P.* 365) *distinguished.*

THESE were two registration appeals, and, as they both involved the same question, they were taken and argued together.

CULL v. AUSTIN.

At a court held on the 9th Oct. 1871, at Cheltenham, in the county of Gloucester, for the revision of the list of persons entitled to vote for the Borough of Cheltenham for the ensuing year, Thomas Cull, on the said list, duly objected to the name of Samuel Best being retained on the list of voters for the parish of Cheltenham within the said borough. The name of the said Samuel Best appeared on the said list of persons so as aforesaid entitled to vote for the said borough in respect of property within the parish of Cheltenham as follows:

Name.	Place of Abode.	Nature of Qualification.	Street where property is situated.
Best, Samuel	Duke-street	House	12, Duke-street.

1. It was proved before me that the said Samuel Best was duly qualified under the Representation of the People Act 1867 to be retained in the said list unless he failed to be qualified for the following reason.

2. On 2nd Feb. 1867 (before the passing of the Representation of the People Act 1867) a poor rate was duly made and allowed (by the justices) for the parish of Cheltenham within the said borough, to which rate the said Samuel Best was duly rated in respect of the qualifying premises, and the amount of which rate did on the making and allowance thereof become payable from him in respect of the said premises; yet the said Samuel Best had not, either before or since the 20th July last past, paid the amount of the said rate, or any part thereof.

3. It further appeared on inspection of the said rate-book of the said 2nd Feb. 1867 that the said Samuel Best had been excused by order of the justices from the payment of the said rate, but it did not appear that the said Samuel Best had ever made personal or other application to be so excused.

4. And it was proved before me that the custom of the parish was for the assistant overseer, shortly before the close of each rate, to enter into the columns of the rate-book headed "legally excused," the rates of all such persons as, in his opinion, were by reason of their poverty unable to pay the same, and the rate-book was then taken before the justices of the peace at their next petty sessions, held at Cheltenham, and the said justices, on the application of the said assistant overseer, then entered at the end of the rate book the following minute, and duly signed the same: "We, the undersigned, being two of her Majesty's justices of the peace, acting in and for the county of Gloucester, do hereby, with the consent of the churchwardens and overseers of the poor of the parish of Cheltenham, order and direct that the persons whose amount of rate appears in column No. 7, shall be excused from the payment of the rate." In this way only was the said Samuel Best excused his said rate of the 2nd Feb. 1867.

5. The next following rate was made on the 25th July 1867, also before the passing of the said Representation of the People Act 1867, and before the commencement of the first qualifying year in the said Act defined, and the said Samuel Best had duly paid that rate, and also all rates subsequently made in respect of the qualifying premises.

6. And it was further proved that the said rate of the 2nd Feb. 1867 was, shortly after it became payable, duly demanded of and from the said Samuel Best, by a demand note duly served upon him.

6a. And it was further proved that the said Samuel Best had continuously occupied the same qualifying premises from before the said 2nd day of Feb. 1867, up to the present time.

7. It was contended before me in support of the said objection that, it having been proved that the

said Samuel Best had not, on or before the 20th day of July last, paid the amount rated on him as aforesaid by the said rate of the 2nd day of Feb. 1867, he had not *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that had become payable by him up to the 5th day of January last, in respect of the premises which formed his qualification, and that accordingly the said Samuel Best ought not to be retained on the list of occupiers within the parish of Cheltenham, entitled to vote for the said borough. But inasmuch as the said rate was so as aforesaid made and allowed before the passing of the Representation of the People Act, 1867, under the provisions of which Act the said Samuel Best proved his qualification to be registered as a voter, I overruled the objection, and retained the name of the said Samuel Best in the list of such voters so under revision by me as aforesaid, subject to this case for the opinion of the court.

The questions for the opinion of the court are—

1. Whether by such non-payment of the poor rate of the 2nd Feb. 1867 as above stated (a poor rate which had ceased to be in force before the passing of the Representation of the People Act 1867, and before the commencement of the first or qualifying year in the said Act defined), the said Samuel Best (who had proved his qualification under the provisions of the said Act) would be disqualified from being retained on the said list of voters; and if so,

2. Whether such excuse by the justices as hereinbefore described would prevent that non-payment from operating to his disqualification. The same facts, *mutatis mutandis*, as are hereinfore stated respecting the said Samuel Best, relate also to the persons whose names are set forth in schedules hereunder written; and on the same ground as that relied on as aforesaid, I retained in the same list the names of such persons, and, as the questions for the opinion of the court are the same, I directed the appeals to be consolidated.

AUSTIN *v.* CULL.

At a court held at Cheltenham, in the county of Gloucester, on the 9th Oct. 1871, for the revision of the list of persons entitled to vote for the borough of Cheltenham for the ensuing year, such court being held before me, the revising barrister duly appointed to revise the list of voters for the said borough, Thomas Cull, on the said list, duly objected to the name of Henry Compton being retained on the list of voters for the parish of Cheltenham, within the said borough.

1. The name of the said Henry Compton appeared on the said list of persons so as aforesaid entitled to vote for the said borough in respect of property within the said parish of Cheltenham, as follows:

Name.	Place of abode.	Nature of qualification.	Street, &c., where property is situate.
Compton, Henry.	Grosvenor Cottages.	House.	4, Grosvenor Cottages.

and his qualification was duly proved in all other respects, except as hereinafter set forth.

2. But it was proved before me that, although *the said* Henry Compton had duly paid within *the qualifying* time all the poor rates that had *become payable* by him during the qualifying year in respect of the qualifying premises, that is to say, the rate of April 30th, 1870, and the two instalments thereof, yet he had not paid, either before or since the said 20th July last past, the two previous rates of the 30th April 1869 and the 30th Oct. 1869, to each of which rates the said Henry Compton was duly rated in respect of the qualifying premises, and the amount of each of which rates had on the making and allowance thereof respectively become payable from him in respect of the same premises.

3. And it further appeared on inspection of the rate book of April 1869 and Oct. 1869 that the said Henry Compton had been excused by order of the justices from the payment of such last-mentioned rates respectively, but it did not appear that the said Henry Compton had ever in either case made any personal or other application to be so excused.

4. And it was proved before me that the custom of the parish was for the assistant overseer shortly before each rate closed to enter in the column of the rate book headed "legally excused" the rates of all such persons as, in his opinion, were by reason of their poverty unable to pay the same, and the rate book was thereupon taken before the justices of the peace at their next petty sessions held at Cheltenham, and the said justices, on the application of the said assistant overseer, then entered at the end of the rate book the following minute, and duly signed the same:—"We the undersigned being two of Her Majesty's justices of the peace acting in and for the county of Gloucester, do hereby, with the consent of the churchwardens and overseers of the poor of the parish of Cheltenham, order and direct that the persons whose amount of rates appear in column No. 17 shall be excused from the payment of the rate." In this way only was the said Henry Compton excused his said rate of April 1869 and Oct. 1869.

5. And it was further proved that each of the said two rates of 30th April 1869 and 30th Oct. 1869 was, shortly after the making and allowance thereof respectively, duly demanded by a demand note served upon the said Henry Compton.

6. And it was further proved that the said Henry Compton had continuously occupied the same qualifying premises from before the 30th April 1869 up to the present time, and each of the three above-mentioned poor rates was duly made and allowed by the justices for the parish of Cheltenham within the said borough on the days by which each rate is hereinbefore respectively designated.

7. It was contended on behalf of the objector that, it having been so proved as aforesaid that the said Henry Compton had not, on or before the 20th July last, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates that had become payable by him up to the 5th Jan. last in respect of the premises which formed his qualification, and that in fact two of such rates as aforesaid had been wholly unpaid, so that the said Henry Compton was not entitled to be retained on the list of occupiers within the parish of Cheltenham entitled to vote for the said borough.

8. I accordingly struck his name out of the list of such voters so under revision by me as aforesaid, subject to this case for the opinion of the court.

The questions for the opinion of the court are—first, whether by such non-payment of poor rates as above stated the said Henry Compton was dis-

qualified from being registered as a voter as aforesaid? and, secondly, if so, whether such excuse by the justices as hereinbefore described would prevent that non-payment from operating to his disqualification?

The same facts, *mutatis mutandis*, as are hereinbefore stated respecting the said Henry Compton, relate also to the persons whose names are set forth in the schedule hereunder written, and on the same ground as that relied on as aforesaid I struck out from the said list the names of such persons; and, as the questions for the opinion of the court are the same, I directed their appeal to be consolidated.

Anstie (*Armstrong* with him) for Cull in each case.

Bosanquet for Austin.

The arguments sufficiently appear in the judgment.

Cur adv. vult.

June 5, 1872.—BRETT, J., delivered the judgment of the Court (Willes, Keating and Brett, JJ.). In these cases the name of the proposed voter appeared on the list of voters to be revised in Oct. 1871, as being entitled to vote for the borough of Cheltenham, and was duly objected to. The qualification was admitted to be duly proved in all other respects; but it was proved that, although the voter had duly paid all the poor's rates which had become payable by him during the qualifying year in respect of the qualifying premises, he had not paid two previous rates of April and Oct. of the year 1869, to each of which rates he was duly rated in respect of the qualifying premises, and the amount of which rates had become payable by him in respect of such premises. On inspection of the rate books for 1869, it appeared that the voter had been excused by order of justices from payment of the rates for 1869; but it did not appear that he had made personal or other application to be so excused. It was proved that the custom of the parish was for the assistant-overseer to enter into the column of the rate book headed "legally excused" the rates of all such persons as, in his opinion, were by reason of their poverty unable to pay the rates, and the rate books were then taken before the justices in petty sessions, who, on the application of the asssistant-overseer, entered in the rate book a minute purporting to excuse the payment of the rates with the consent of the churchwardens and overseers. In this way the proposed voter was excused the rates of 1869. The revising barrister in the one case retained the name on the list, and in the other struck it out. It was contended on the one side that the vote ought not to be allowed; that upon the facts stated it appeared that there had been no legal excusal of payment of the rates of 1869; and, if there had, yet that the voter had not paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates which had become payable by him in respect of the qualifying premises, and therefore was not entitled to be registered; and that it made no difference that the rates in question were rates imposed and payable before the qualifying year, nor that they were upon the hypothesis legally excused before the qualifying year. It was contended on the other side that, upon the facts stated, the court ought to assume that the excusal by the justices was accompanied by the required formalities and was valid; that, if it was, no part of the rates of 1869 were now payable by the voter; that no part had been payable by him during the qualifying year; that, consequently, this case was to be distinguished from the case of *Abell* v. *Lee* (23 L. T. Rep. N. S. 844; L. Rep. 6 C. P. 365); and that, inasmuch as the voter had paid all rates payable by him in respect of the qualifying premises during the qualifying year, his name was to be retained on the list. The decision depends upon what is the correct construction of sect. 3 of the statute 30 & 31 Vict. c. 102. The first question appears to be what is the rule of construction to be applied. The governing rule with regard to the construction of all statutes by a court of law administering the law is, that the court is bound to construe them as nearly as possible according to the ordinary received meaning of the words and ordinary grammatical construction of the phrases and sentences used in them. The court ought not in any case to depart from such ordinary sense and ordinary grammatical construction, unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the Legislature. It would seem that this rule should, if possible, be more strictly adhered to with regard to the varying clauses of the statute under discussion than with regard to any other; because it must be manifest to any court in this country that a statute dealing with the matter with which this statute deals must have been discussed and settled in almost every clause by persons having different views of the most earnest kind; and that the best way for the court to hold a strictly even balance is to follow as nearly as possible the words used in each clause of every section of the Act. Now, by sect. 3, the first condition to be fulfilled is, occupation as an inhabitant occupier of a dwelling-house within the borough during the whole of the twelve calendar months preceding the 31st July. The second condition is that the proposed voter has, "during the time of such occupation," been rated in respect of the premises so occupied by him to all rates made for the relief of the poor in respect of such premises; that is to say, that he has been rated in respect of the premises so occupied by him to all poor rates made during the twelve months preceding the 31st July. The next condition is, that he has paid, on or before the 20th July, an equal amount in the pound to that payable by other ordinary occupiers in respect of "all poor rates that have become payable by him in respect of the said premises up to the preceding 5th Jan." It cannot fail to be seen that there is a grave difference in the wording of the last condition. The words confining the application of the condition to the twelve preceding months are omitted. According to the ordinary sense and grammatical construction of the phrase which describes the last condition, it is applicable not merely to all rates that have become payable by the proposed voter during or in respect of the twelve calendar months preceding the last 31st July, but to all poor rates that have become payable by him in respect of the qualifying premises at any time preceding the last 5th Jan. The question is, whether there is anything in the context of the 3rd section, or of other parts of the statute, or of the statutes which are to be read as part of this statute, which can authorise the court to depart from the ordinary sense and

grammatical construction of the 4th sub-section as thus stated. The other parts of this statute which refer to the point in question are sect. 28, and the form in schedule E, referred to in that section and sect. 29. The form of words used in sect. 28 and in the form in schedule E, so far from being inconsistent with the suggested interpretation of sect. 3, are as large as the form of words used in it. They do not, in terms, describe a poor rate or rates payable within the preceding twelve months, but any, *i.e.*, every poor rate due on the 5th Jan. preceding. The list ordained to be made by sect. 29 is in terms of a still larger description: it is a list containing the name and abode of every person who shall not have paid, not merely the poor rates payable in respect of the preceding year, but all poor rates, and not merely those which shall have become payable from him in respect of the qualifying premises, but of any premises within the parish which he has occupied before the 5th Jan. then last past. There is so far nothing in the context of the statute 30 & 31 Vict. c. 102 itself to modify the ordinary construction of the 3rd section of the statute. There are, however, some other provisions of the statute which, with reference to the questions now before the court, are of great importance. By sect. 56, "subject to the provisions of this Act, all laws, customs, and enactments now in force conferring any right to vote, or otherwise relating to the representation," &c., "shall remain in full force, and shall apply as nearly as circumstances admit to any person hereby authorised to vote." And by sect. 59, "This Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people, and with the Registration Acts." And there is a provision relating to this statute contained in 31 & 32 Vict. c. 58 which must also be noticed. By sect. 30 it is enacted that "the 30th section of 2 Will. 4, c. 45, and the 75th section of the principal Act, *i.e.*, of 6 Vict. c. 18, shall apply to all occupiers of premises capable of conferring the franchise for a county under the Representation of the People Act, 1867." The importance of these enactments is, that by incorporating the former statutes with the present they make them part of the context of the present, and make it necessary to consider whether the larger ordinary meaning of the latter statute may not after all require some modification by reason of the context thus introduced. This makes it necessary to consider whether there was in the former statutes any limitation of the number of rates which it was necessary that the proposed voter should have paid. Now, by sect. 27 of 2 Will. 4, c. 45, the rates which it was necessary that the proposed voter should have paid were "all the poor rates and assessed taxes which shall have become payable from him in respect of such premises previously to the 6th April then next preceding," *i.e.*, the 6th April in the qualifying year. The wording is practically quite identical with that used in sect. 3 of the Representation of the People Act 1867. If, then, by the context of the former statutes some modification is to be made of the words used in sect. 27, it seems fair and right to say that such context must be used to modify to the same extent the words of sect. 3 of the later Act. There is nothing in the subsequent parts of 2 Will. 4, c. 45, itself to indicate any modification; for in sect. 30 the same language is used as in sect. 27. But by the Registration Act (6 Vict. c. 18, s. 11) "Overseers on or before the 20th June shall publish a notice that no person will be entitled to have his name inserted in any list of voters for," &c., "unless he shall pay on or before the 20th July then next ensuing all the poor rates and assessed taxes which shall then have become payable from him in respect of such premises during the twelve calendar months next before the 6th April then last past," *i.e.*, which shall have become payable from the 6th April of the year preceding the 6th April of the qualifying year. That certainly would mislead, unless it be taken that the poor rates which it is necessary according to such notice to pay are those which have become payable after the 6th April of the year preceding the qualifying year. The inference which anyone would be entitled to draw is, that if he pay those poor rates which become payable on or after the 6th April of the preceding year, and has been rated to the poor rates made after the 31st July, commencing the qualifying year, he will be entitled to be registered. The notice in form E is only slightly different from the section. It differs by using the phrase "which have become due" instead of "which have become payable." By sect. 12, the same limitation in the same terms as to the commencement of the time to be considered is made with regard to the assessed taxes. It is necesary to determine the meaning of those phrases. Do they mean all rates and taxes which are payable or due after the 6th April, though made before it, or do they mean the rates and taxes which are made and have become due or payable after the 6th April? By sect. 35, the overseers attending the revising barrister's court shall produce at the said court all rates made for the relief of the poor of their respective parishes or townships between the 6th April in the year then last past and the last day of July in the then present year. This apparently reduces the rates which are to be brought to the notice of the revising barrister, to those which had been made and allowed after the 6th April of the year preceding the qualifying year. And, as to the question whether the proposed voter had been rated to the proper rates, inasmuch as the revising barrister would require to see only rates made on or after the 31st July commencing the qualifying year, it seems to follow that the rates made after the preceding 6th April, and before the 31st July, are laid before him in order that he may see whether they have been paid. Sect. 75 is not so direct, and yet it contains a strong intimation. It gives a description of those persons who shall not be disqualified by being misdescribed in any rate — in other words, of those persons who, but for the misdescription, would be entitled to vote. Those persons are described to be such as, being liable to be rated, have been *bonâ fide* called upon to pay all rates made for the relief of the poor in such parish or township, during the time of such his occupation (*i.e.* for twelve months next previous to the last day of July), and such person shall have *bonâ fide* paid, on or before the 20th July in such year, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th April then next preceding. This again confines the rates which it is necessary that the proposed voter should have paid to those commencing within the 6th April of the year preceding the qualifying year. One of the dates of the 6th April,

mentioned in all these sections, viz., the 6th April of the qualifying year, has been clearly altered to the 5th Jan. by 11 & 12 Vict. c. 90, but the other date of the 6th April, viz., that of the year preceding the qualifying year, would at first sight seem not to have been altered. The enactment is that no person shall be required, in order to entitle him to have his name inserted, &c., to have paid any poor rates or assessed taxes except such as shall have become payable from him previously to the 5th Jan. in the same year. That would seem to alter the last-mentioned 6th April, but not the former one. But by sect. 28 of 31 & 32 Vict. c. 58, the overseers of every parish shall produce to the barrister appointed to revise the lists of voters of any county all rates made between the 5th Jan. in the year then last past and the last day of July in the then present year. That seems to imply that both dates of the 6th April are changed to the 5th Jan. The various sections may well be said to indicate that the large words used in sect. 27 as to the payment of bygone rates are to be modified and limited. And, after much consideration and with much hesitation, we have come to the conclusion that they do indicate that the rates which it is necessary that a proposed voter, under sect. 27 of the Reform Act, must have paid, were all those which have been made and allowed after the 6th April of the year preceding the qualifying year, and, since the 11 & 12 Vict. c. 90, after the 5th Jan. of the year preceding the qualifying year. If this be the true construction of sect. 27 of the Reform Act, it is so by reason of the context found in the sections which have been alluded to. By sect. 30 of 31 & 32 Vict. c. 58, the 75th section of 6 Vict. c. 18 is expressly made applicable to the 12*l.* qualification in counties given by sect. 8 of the Representation of the People Act 1867. If that section as a context limits the large words used in sect. 27 of the Reform Act, it may well be held to limit the same words used with regard to a similar subject matter in the later Act. If that be so, and if the words in sect. 3 be not limited in the same manner, there will be a difference as to the payment of bygone rates between the new and the old franchises in boroughs, and the new occupation franchises in boroughs and counties. This incongruity can be avoided by holding that, by virtue of sect. 56 of the new Act the sections in the older Acts which limited the large words of sect. 27 of the Reform Act are made a context to the new Act, by which the large words of sect. 3 are limited. We have finally come to the conclusion that these words may not improperly be, and ought to be limited, and that the rates which it is necessary that a proposed voter should have paid before the 20th July of the qualifying year, are all rates made and allowed after the 5th Jan. of the year preceding the qualifying year, and payable up to the 5th. Jan. of the qualifying year. As to all such rates he must have paid them according to the terms of sub-sect. 4, that is to say, he must have paid an equal amount in the pound to that payable by other occupiers in respect of such rates. And no excusal of such rates, whether made before or after the commencement of the qualifying year, can be pleaded in bar of a disqualification arising from their not having in fact been paid or tendered before the 20th July of the qualifying year. It was argued that such a decision as that to which we have now arrived would be inconsistent with the decision in *Abel* v. *Lee* (L. Rep. 6 C. P. 365.) In that case, Abel, the appellant, claimed in 1870 to be placed on the register under sect. 3 of the Representation of the People Act 1867. It was conceded that he was duly qualified in all other respects, but it was objected that he was disqualified by reason of not having paid a rate made in respect of the qualifying premises on the 18th June 1869—made, therefore, before the commencement of the qualifying year. The answer relied on to this objection was, that after Oct. 1869, that is to say, during the qualifying year, the payment of this rate was duly excused. The revising barrister disallowed the vote. It was argued on the appeal that the only rates which it was necessary that the proposed voter should have paid, were those made and allowed within the qualifying year, and that the excusal by magistrates whenever made, from payment of any rate, relieved the proposed voter from the obligation, as matter of qualification, of having paid such rate. Both of these arguments were overruled by the court, on the ground of the difference of the words used in the sub-sections of sect. 3, and on the largeness of the words used in sub-sect. 4. Inasmuch as the rate in question, viz., that of June, 1869, was made after the 6th April of the year preceding the qualifying year, the question under discussion in the present case was not raised in that case. The expressions of the judges were pointed to the argument that payment was only required of the rates made within the qualifying year. In that case it was necessary to point out the largeness of the words used in sect. 3 of the Representation of the People Act, 1867. In this case it has been necessary to consider how far that largeness required limitation. Inasmuch as we hold that the only rates which it is necessary that a proposed voter should have paid are those made after the 5th Jan. of the year preceding the qualifying year, it is unnecessary to consider whether there was a valid excusal by justices in this case of the rates made in 1869. We are of opinion that the decisions of the revising barrister must respectively be affirmed and reversed, in accordance with this judgment. *Cull* v. *Austin:* decision affirmed. *Austin* v. *Cull:* decision reversed.

Attorney for Cull, *J. C. Selby*, for *Stroud*, Cheltenham.

Attorney for Austin, *F. W. Burr*, for *C. J. Chesshyre*, Cheltenham.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PEAT, Esqrs., Barristers-at-Law.

Monday, April 22, 1872.

(Before the LORDS JUSTICES.)

THE ATTORNEY-GENERAL *v.* THE GREAT EASTERN RAILWAY COMPANY.

Railway company—Special Act—Power to stop up streets—Deposited plans and sections—Incorporation with special Act—Railways Clauses Consolidation Act 1845, *ss.* 13 *&* 14.

By the 8th section of their special Act, with which the Railways Clauses Consolidation Act 1845 *was incorporated, a railway company were empowered to stop up and cause to be discontinued as public highways all streets and highways within the area*

thereinbefore described as the site of an intended station, and to appropriate the site of such streets and highways to the purposes of the station. The plans and sections deposited by the company upon the application for their Act showed that S. street (which was within the area described in the Act) was to be crossed by the railway upon an arch sixteen feet high, but did not state that the street was to be stopped up. The 6th section of the Act enacted that the railway should be made in the line or within the limits of deviation, and upon the lands delineated on the deposited plans, and according to the levels defined on the deposited sections:

Held, that the company were not bound by the deposited plans and sections except so far as they were incorporated with the special Act, and that the plans and sections were not incorporated with the special Act so as to prevent the company from stopping up S. street.

Decision of Bacon, V.C. reversed.

THIS was a bill and information at the relation of the Commissioners of Sewers of the City of London, who were also plaintiffs in the suit, for the purpose of restraining the Great Eastern Railway Company from stopping up or interfering with the public traffic through Sun-street, which is one of the great thoroughfares from east to west in the City of London.

The case came before Bacon, V.C., in last Hilary Term, on a motion for an interlocutory injunction, and his Honour granted an injunction restraining the company from permanently stopping up Sun-street, or interfering with the public traffic thereof, until the hearing of the cause.

From this order the company appealed, and on the appeal coming on to be heard it was arranged that, as the Vice-Chancellor had based his decision on the merits of the case, the hearing of the cause should take place before the Lords Justices in the first instance, and the injunction was continued till the hearing.

The hearing on the motion for an injunction in the court below is reported in 25 L. T. Rep. N. S., 867, where the facts of the case are stated.

It is only necessary to add that although the plans and sections deposited with the clerk of the peace by the company upon application for their special Act, did not state that Sun-street was to be stopped up, they did state that Half Moon-street, another street within the area described in the Act, was to be stopped up.

The cause now came on for hearing.

The *Solicitor-General* (Sir G. Jessel, Q.C.), *Amphlett*, Q.C., and *Pontifex* for the relators.—We contend that the deposited plans which stated that it was not intended to stop up Sun-street were incorporated with the special Act, so as to preclude the company from stopping up Sun-street. The 6th section of the Act of 1864, after reciting that the plans had been deposited, expressly provides that the railway shall be made in the line or within the limits of deviation, and upon the lands delineated on the plans and according to the levels defined on the sections. Then the 13th and 14th sections of the Railways Clauses Consolidation Act 1845, which is incorporated with the special Act, preclude the company from deviating from the deposited plans, and we contend that there is nothing in the special Acts to vary the provisions of these sections, or to prevent them from applying to this case. In *Parker* v. *The Great Western Railway Company* (7 Scott N. Rep. 870), Tindal, C.J., speaking of Acts obtained by railway companies, says: "It is to be observed that the language of these Acts of Parliament is to be treated as the language of the promoters of them. They ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public." They also referred to—

The Attorney-General v. *Tewkesbury and Malvern Railway Company*, 8 L. T. Rep. N. S. 662; 1 De G. J. & Sm. 423;

The Attorney-General v. *The Corporation of Leeds*, L. Rep. 5 Ch. 583;

The North British Railway Company v. *Tod*, 12 Cl. & Fin. 722;

Ware v. *The Regent's Canal Company*, 3 De G. & J. 212;

Lamb v. *The North London Railway Company*, 2 L. T. Rep, N. S. 98; L. Rep. 4 Ch. 522.

Sir *Roundell Palmer*, Q.C., *Kay*, Q.C., and *Smart* for the defendants.—*The North British Railway Company* v. *Tod* (12 Cl. & Fin. 722) shows that deposited plans and sections are not binding upon a railway company, unless they are so referred to in the company's Act as to be incorporated therewith. And that case was followed in *Beardmer* v. *The London and North-Western Railway Company* (1 Mac. & G. 112). There is nothing in this case to incorporate the deposited plans and sections in the special Act. In *Reg.* v. *The Wycombe Railway Company* (15 L. T. Rep. N. S. 610; L. Rep. 2 Q. B. 310) Mellor, J. says: "It seems to me that the memorandum on the deposited plan amounted to nothing more than an indication of what the defendants proposed to obtain power to do. It neither became obligatory on the defendants to follow the plan, nor was it the foundation of any authority conferred upon them." The 8th section of the Act of 1864 gave the company express power to stop up all streets within an area therein described, and Sun-street is within that area. Therefore that section varies and prevails over the provisions of the Railways Clauses Consolidation Act. And the 38th section of the Act of 1870 expressly re-enacts the 8th section of the Act of 1864. Therefore, we submit that it is perfectly clear that the company, not being bound by their deposited plans, have full power to stop up Sun-street. They also referred to

Reg. v. *The Caledonian Railway Company*, 16 Q. B. 19;

The Attorney-General v. *The Great Northern Railway Company*, 4 De G. & Sm. 75;

Ware v. *The Regent's Canal Company*, 3 De G. & J. 212;

The Attorney-General v. *The Tewkesbury and Malvern Railway Company*, 8 L. T. Rep. N. S. 198, 662; 1 De G. J. & S. 423;

Little v. *The Newport, Abergavenny, and Hereford Railway Company*, 12 C. B. 752.

Amphlett, Q.C. in reply.

Lord Justice MELLISH.—This is an information brought in the name of the Attorney-General by the Commissioners of Sewers of the City of London to restrain the Great Eastern Railway Company from stopping up a street called Sun-street. The sole question to be determined is, whether, according to the true construction of the Acts of Parliament which the Great Eastern Railway Company obtained for the purpose of making their station, they have obtained power to stop up Sun-street. The general Railway Act (the Railways

es Consolidation Act) gives no power to stop reets, and therefore they clearly cannot have to stop up Sun-street unless we can find an express power is given by special Acts. ertainly the Act of 1864, if we look at that —which I shall do in the first instance— ut considering the deposited plans and the ays Clauses Consolidation Act, appears to confer upon the company power to stop up treet in the plainest possible terms. In the l it is stated: "Whereas it is expedient that mpany should be authorised to purchase all nds and buildings in the City of London ised within an area"—and then it sets out rea, which, beyond all question, included a portion of Sun-street, and proceeds—"and p up all streets and highways within the rea, and to appropriate the site of such area purposes of a railway station." The Act that it is expedient that the company be authorised to purchase lands including t portion of Sun-street, and to stop up all eets and highways within that area, and to priate the site of the area, which includes a n of Sun-street, for the purpose of a railway n. That being the recital, it is enacted by section that the company may stop up, and to be discontinued as public highways, all and highways within the area hereinbefore ed as the site of the intended station, and ppropriate the site of such streets and high- o the purposes of such station." It is very lt to conceive words which could more say, first, that they may stop up the within the area, and secondly, that nay appropriate the site of the streets for rposes of the station. Then it goes on: the western moiety, or half part of the site er-street, shall, from the time of such stop- p, be vested in, and belong to, the North n Railway Company, and nothing herein ed shall authorise the stopping up of the treet or public place known as Broad-street- gs, and numbered 57, in the parish of St. h, Bishopsgate, on the said deposited plans." ot think it is necessary to consider whether ng turns upon that express exception of street-buildings. Looking at the recitals this 8th section, it is difficult to say how words could have been used for the pur- of showing that the company were to be d to stop up the streets, and were to be d to appropriate the site of the streets for rposes of the station. All you can say is ey did not think it necessary to enumerate e all the streets which are within the area. ars to me that if it were intended that they be allowed to stop up all the streets that ithin the area, it would be wholly useless necessary, and might possibly have led to ty if they had professed to set them all out e, because, if they had happened accidentally e one out the consequence would be that uld not stop up that street. But specifying ct boundaries of the area, it appears to me was quite sufficient to say that they were l to stop up all the streets within that area. simply how the case stands on the Act of Now let us see what there is on the other It appears that in the deposited plans they ecify what streets were intended to be l up, and what streets were not intended to be stopped up. It is said in the deposited plans: "Liverpool-street—level unaltered; Half-moon-street to be stopped; Sun-street—level unaltered." Therefore, no doubt there was a representation made that Half-moon-street was to be stopped, and that Sun-street was not to be stopped. Besides that, it is stated that there was to be an arch over Sun-street of 35 feet span and 16 feet high. That is what was stated upon the deposited plans. Now it is perfectly settled law since the case of *Tod* v. *The North British Railway Company*, in the House of Lords (*ubi sup.*), that the mere fact of a representation having been made in the deposited plans, although, no doubt, the fact of such a representation having been made may have the effect of preventing the persons interested in the matter from opposing the railway company in Parliament—for people may go and look at deposited plans and may say, "Oh! it appears that this street is not to be stopped up," and, therefore, persons interested in the street may not appear in Parliament, and may take no trouble about the matter—nevertheless, it is perfectly settled law that such a representation as that does not in any way bind the company unless the plans are incorporated in the Act. The railway companies are obliged by the standing orders of the Houses of Parliament to deposit plans showing what they propose to do. It does not follow that they make misrepresentations in these plans for the purpose of deceiving the public; but the companies are obliged to deposit plans, and it is settled law, which cannot be altered now, that representations made on such deposited plans do not bind them or give any equity against them, except so far as the plans are incorporated in the Act of Parliament. The question, therefore, is how far the representation that Sun-street would not be stopped, and that it would be crossed by an arch of a certain height, is incorporated in the Act. In the special Act itself the only section which was cited as having reference to the deposited plans and sections was the 6th. That section says, "And whereas plans and sections of the proposed railway showing the lines and levels thereof respectively, and the lands required for the purposes thereof, and of the said intended station in the City of London," that clearly means only plans and sections required for the railway, and for the intended station, "and of the enlargement of Bishopsgate station, and of the other purposes of the undertaking, and also books of reference to such plans, have been deposited with the clerks of the peace of the City of London and the counties of Middlesex and Essex respectively. Therefore, subject to the provisions and powers of deviation in this Act and the Acts incorporated therewith contained, the said railways shall be made in the line or within the limits of deviation, and upon the lands delineated on the said plans, and described in the said books of reference and according to the levels defined on the said sections." That section simply by itself appears to me not to be sufficient to incorporate the statement that Sun-street was not to be stopped, or even that the railway was to pass on an arch. It simply states that the railway is to be made upon the line, and within the limits of deviation, and upon the lands delineated in the plan. Indeed, reliance was not placed to any considerable extent on that section, but reliance was placed, and in fact the whole case

against the company depends upon, the 13th and 14th sections of the Railways Clauses Consolidation Act 1845. Now the Railways Clauses Consolidation Act is incorporated by the first section of the special Act. First of all it is enacted by the first section of the Railways Clauses Consolidation Act: "That this Act shall apply to every railway which shall by any Act which shall hereafter be passed, be authorised to be constructed, and this Act shall be incorporated with such Act, and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby so far as the same shall be applicable to such undertaking, and shall as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act." It was argued by Mr. Amphlett that because there is a section in the special Act incorporating the Railways Clauses Consolidation Act, therefore the limitation in the first section, namely, that the clauses and provisions of the Act shall apply save so far as they shall be expressly varied or excepted by the special Act, ought not to be construed as applying to the present case. But I am not of that opinion. It appears to me very improbable indeed that Parliament should have intended to incorporate the general provisions of the Railways Clauses Consolidation Act, but not subject to that limitation, and that if you find something expressly different contained in the special Act that should not overrule the general Act. Indeed, in all cases where one Act of Parliament is incorporated with another, it is the general, and, as far as I know, the universal, rule, that if you find a contradiction between the general Act and the special Act the special Act is the Act which is to prevail. What then is the effect of the 13th section of the Railways Clauses Consolidation Act? The 13th section does not come within that class of sections which relate to the crossing of roads by railways, but it is in the class of sections which simply relate to the construction of the railway and the works connected therewith. It enacts that "Where in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly." I agree that that does so far incorporate the plans and sections that it does, unless there is something in the special Act which expressly varies it, enact that the railway (which I think means in this case the line of railway, and does not refer to the station) shall cross Sun-street by an arch. I think the company could not make it cross Sun-street in any other way than by that arch, if there be nothing in the special Act to vary that provision. Then the 14th section says: "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section," with certain exceptions which, I think, are not applicable to this case. It may be assumed that this arch would be an engineering work within the meaning of that section. If it would, then it amounts to a repetition. It would not appear to me to carry the matter any further than what is contained in the 13th section. Unless there is something which expressly varies that provision in the special Act, that arch is to be constructed over Sun-street. Now what appears to me to be the real question which has to be decided in this case is this—Do the recital and the 8th section of the special Act amount to an express varying of this 13th clause, which says that the arch is to be constructed as delineated on the sections? I am very clearly of opinion that they do. If Sun-street had been mentioned by name, if in the 8th section of the special Act they had taken the trouble to enumerate all the streets which are within the area, and Sun-street had been one of those enumerated, it could hardly have been contended, and, as I understand the argument, it is not contended, that that would not have overruled the provisions in the Railways Clauses Consolidation Act respecting the construction of arches where they are shown on the deposited section. I cannot see that it makes any difference that the special Act does not enumerate all the streets within the area, but says that the company may stop up all the streets within the area and may appropriate the site of the streets (which makes the matter still stronger) for the purposes of the station. It appears to me that that does expressly vary the provisions of the 13th and 14th sections of the Railways Clauses Consolidation Act. It does expressly vary them and does enable the company to stop up the street and appropriate the site of the street for a station. Some other sections of the special Act were referred to. The 7th section was referred to, but it really appears to me to have little or no bearing on the question. It simply provides for the benefit of landowners that the company are to construct one portion of the line before the other. I am, therefore, of opinion that upon the proper construction of the first Act, the company have power to stop up Sun-street and to appropriate the site of it for a station. Then it can hardly be contended, and indeed, I do not think it was seriously contended, that, if that is the true construction of the first Act, the right to stop up Sun-street is not continued by the second Act. In fact the 38th section of the second Act does expressly and in terms preserve the 8th section of the first Act. It provides that "Except as by this Act otherwise expressly provided, nothing in this Act contained shall repeal, alter, prejudice, or affect any of the provisions of the Station Act 1864, contained in the 8th and following sections of the said Act to the 73rd section inclusive, so far as such provisions are applicable and capable of being carried into effect consistently with the alterations by this Act authorised to be made in the railway, and authorised by that Act, and where by this Act any such alterations or any new railway or works are authorised to be made, such provisions shall apply to the alteration or to the new railway or works if applicable or capable of being carried into effect with reference thereto in like manner in all respects as the same respectively would have applied to the authorised railway or works, and as if such provisions had been specially re-enacted in this Act with reference to such alterations or new railway or works." Now, this new Act of 1870 entirely did away with the arch over Sun-street; that is not disputed. It altered the level by which the railway was to cross Sun-street, and if Sun-street was not to be blocked up it would make the railway go under Sun-street instead of going over it. That alteration having been made, you are then to read the 8th section of the old Act that

they may stop up Sun-street and may appropriate the site of it for their station, as incorporated in the Act of 1870. Therefore it appears to me that the true construction of the first Act being that they may stop it up, so far from that view being altered, it is really strongly confirmed by the second Act. Upon the whole, therefore, I am of opinion that the company have power to stop up Sun-street, and to appropriate the site of it, provided, of course, that they make their station there, because they would not have the power if they did not make the station there, but only took their line of railway over it. Provided they include Sun-street in their station, I am of opinion that they have power to block it up and to appropriate that portion of it which is within the area described in the first Act. The consequence is that the information must be dismissed with costs.

Lord Justice JAMES.—I am of the same opinion. I could have wished that we had power to hold the company to be bound by what they represented on their deposited plans; but it appears to me for the reasons that have been stated by the Lord Justice, that it is impossible to limit the plain words of the Act by that which appears to have been put into the plans solely for the purpose of indicating how, at that particular date, it was intended that the line should be constructed.

Information accordingly dismissed with costs.

Solicitor for the relators, *A. J. Baylis.*

Solicitor for the railway company, *W. H. Shaw.*

V.C. MALINS' COURT.

Reported by G. I. F. COOKE and T. H. CARSON, Esqrs., Barristers-at-Law.

Friday, June 21, 1872.

Re ALCHIN'S TRUSTS; *Ex parte* FURLEY; *Ex parte* THE EARL OF ROMNEY AND OTHERS.

Charitable gift—Insufficient description—Latent ambiguity.

Testator bequeathed 500*l.* *to "The Kent County Hospital." There was no institution strictly answering this description, and the legacy was claimed by* (1) *the Kent and Canterbury Hospital, situate at Canterbury;* (2) *the West Kent General Hospital situate at Maidstone;* (3) *The Royal Kent Dispensary, situate at Greenwich; and* (4) *the Kent County Ophthalmic Hospital, situate at Maidstone. It appeared that the testator had some landed property situate at Greenwich, but there was no further evidence connecting him with any of the above institutions:*

Held, that the legacy must be divided equally between the Kent and Canterbury Hospital and the West Kent General Hospital.

RICHARD THOMAS ALCHIN, of 10, Grand Parade, Brighton, by his will dated the 25th Oct. 1869, bequeathed (amongst other charitable legacies) a legacy of 500*l.* "to the treasurer for the time being of the Kent County Hospital in aid of that institution," and he directed that the receipts of the treasurer for the time being should be a sufficient discharge for the legacy so bequeathed to him as aforesaid.

The testator died on the 1st June 1871. The executors paid the above legacy into court under the provisions of the Trustee Relief Act, stating in their affidavit that, as far as they were able to ascertain, there was no hospital so designated, and that the only institutions with any similarity of name, were the Kent and Canterbury Hospital, situate at Canterbury; the Royal Kent Dispensary, situate at Greenwich; the West Kent General Hospital, and the Kent County Ophthalmic Hospital, both situate at Maidstone; and that to the best of their knowledge and belief, there was no other hospital which could claim to be interested in the said legacy.

Petitions claiming the legacy were presented by George Furley, the treasurer of the Kent and Canterbury Hospital; and by the Earl of Romney and others, the treasurers of the West Kent General Hospital.

It appeared from an affidavit filed on behalf of the Kent County Ophthalmic Hospital, that in a former suit before Stuart, V.C., a question was raised as to the meaning of a bequest in another will "to the Kent County Hospital," and his Honour decided that the Kent County Ophthalmic Hospital was entitled. In that case, however, the testatrix had suffered from diseased eyes, and had been attended by a surgeon who was one of the honorary surgeons of the Kent County Ophthalmic Hospital.

From an affidavit filed on behalf of the Royal Kent Dispensary, it appeared that Richard Thomas Alchin possessed some landed property in the neighbourhood of Greenwich.

Freeman for the Kent and Canterbury Hospital.

Cutler, for the West Kent General Hospital, claimed the legacy on the ground that in cases of misdescription, locality was the important thing (*Wilson* v. *Squire*, 1 Y. & C. C. C. 654), and in point of locality, the West Kent General Hospital corresponded more closely to the "Kent County Hospital," than an institution confined to one particular district, such as the Kent and Canterbury Hospital. Further, a hospital which only treated patients suffering from ophthalmia could not take a legacy which was intended for a general hospital (*Bradshaw* v. *Thompson*, 2 Y. & C. C. C. 295.)

Waller, for the Kent County Ophthalmic Hospital, contended that the case was concluded in his favour by the decision of Stuart. V.C.

Oswald, for the Royal Kent Dispensary, contended that, there being a latent ambiguity, the court would listen to parol evidence to show what the intention of the testator really was: (*Re Briscoe's Trusts*, 26 L. T. Rep. N. S. 149.) In the present case there was evidence to show that the testator possessed property at Greenwich, and was interested in that neighbourhood. He was, therefore, probably well acquainted with the Royal Kent Dispensary, which was situate at Greenwich, whereas there was no evidence to show that he was even aware of the existence of the other three claimants. He cited:

Waller v. *Childs*, Ambler 524.
Simon v. *Barber*, 5 Russ. 112.
Re Kilvert's Trusts, L. Rep. 7 Ch. 170; 24 L. T. Rep. N. S. 823; 26 L. T. Rep. N. S. 221.

Batten for the executors.

The VICE-CHANCELLOR said, that in the present case, a testator had left 500*l.* to the Kent County Hospital. If there had been a hospital of that name, then for the reason stated in *Kilvert's Trusts* there would have been no further inquiry. But there was no hospital called the Kent County Hospital, and the legacy was claimed by three different hospitals and by one dispensary. Now it was quite clear that the testator intended this

money to go to a hospital. In his opinion a hospital was a place were patients were received, while a dispensary was a place where medicines were dispensed. He could not therefore give this money to the dispensary. There remained the claims of the three hospitals. The Kent and Canterbury Hospital was a hospital for the whole county of Kent. The addition of the word Canterbury made the name look better, but did not prevent the hospital from being one for the general benefit of the county. The West Kent General Hospital was also a general hospital for the county of Kent. No doubt the testator did not intend this legacy to be divided. He intended the whole legacy to go to one institution. But, inasmuch as the testator had not accurately described any one hospital, his Honour should follow the principle laid down in *Kilvert's Trusts* (24 L. T. Rep. N. S. 823), and divide the legacy amongst those whom he thought entitled. The Kent County Ophthalmic Hospital was also a Kent County hospital, but it was a hospital which dealt only with patients suffering from eye diseases. He understood by a hospital an institution which was open to diseases of all kinds, not an institution which was open to small pox only, or to ophthalmia only. The case of *Bradshaw* v. *Thompson*, which had been cited in the argument, showed that a hospital for particular diseases could not take legacy which was given to a general hospital. In that case a testator had left a legacy to the Westminster Hospital, Charing-cross; and the legacy was claimed by the Charing-cross Hospital, and the Royal Westminster Ophthalmic Hospital, which were both situate at Charing-cross. Knight Bruce, V.C., decided that the former was entitled. He said. "There are, in a sense in which the term may in this case be properly understood, two hospitals at Charing-cross—hospitals which may, under this will, be correctly described in their local situation by the term 'Charing-cross.' One of these is a general hospital, the other only intended for the reception of persons labouring under a particular complaint. In every instance, whether from necessity or not, where the testator has meant to describe an institution for complaints of a particular nature, he has so said; where, on the other hand, he has intended to describe a general hospital, he has used the term 'hospital' generally. By the term Westminster Hospital, I think he meant a general hospital at Westminster. There is, it appears, an hospital, which may be described as a Westminster hospital, though not the Westminster Hospital, which is at Charing-cross and in the city of Westminster. But for the claim of the Ophthalmic Hospital I should feel little or no difficulty. When I consider, however, that that hospital is intended for a particular and not a general purpose; when I consider that the word 'ophthalmic' is a most important part of its designation; and when I find that in the testator's will limited are designated as limited institutions, and general only by general words—having to elect which of the two institutions is intended, I think that the testator intended that hospital at or near Charing-cross, which is called 'Charing-cross,' and is in the city of Westminster." He could not, therefore, give the legacy to a hospital instituted for a particular purpose. It was said that Stuart, V.C., had decided the same question when raised in a former suit in favour of the Kent County Ophthalmic hospital. But there was no evidence that Stuart, V.C., had had before him in that case claims by the Kent and Canterbury Hospital, or by the West Kent General Hospital. If all these claims had been before Stuart, V.C., then his decision might have been held binding in the present case. Besides, it was clear that the decision of Stuart, V.C., depended upon the particular circumstances of that case. The testatrix there had suffered from weak eyes, and had been attended by one of the surgeons of the Kent County Ophthalmic Hospital. On these grounds he must conclude that the Kent County Ophthalmic Hospital was not entitled to share in the benefit of the legacy, and that the whole fund must be divided between the Kent and Canterbury Hospital and the Kent County General Hospital. The costs of all parties would be paid out of the fund.

Solicitors, *Bristow*; *Evans*.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and T. H. CARSON, Esq., Barristers-at-Law.

Wednesday, May 8, 1872.

PRYOR v. PRYOR.

Dedication of way to the public.

A. and B. being owners of freehold property, by agreement in 1808 *undertook, after a certain part thereof should have been let on building leases, to demise the remainder to trustees for C. for sixty-one years, upon trust to lease the same upon the like plan as should have been adopted with respect to the other part, or in such manner as C. should think fit. In pursuance of the agreement, a lease was accordingly granted in* 1813 *to C.'s trustees, the lease reciting the agreement and showing by a plan the manner in which the other part of the property had been dealt with. Upon this plan there appeared a street, part of the land comprised in the lease adjoining one end of the street. C. and his trustees leased this land for building purposes for the whole term, less ten days, to D., who erected houses in such a manner as to continue the street. The street was used by the public for upwards of twenty years.*

Held, that there had been a direction by the freeholders to continue the street, and that it had become a public road.

THIS was a motion that the receiver of the court might be directed to place a bar across a portion of Frances-street, Lambeth, in order to prevent the public from exercising an alleged right of way.

The street in question leads at the south end, into Westminster-road. At the north end it leads up to premises belonging to Messrs. Mandsley and Co., where it forms a *cul de sac*.

In the year 1808 Ann Peacock and Jane Ann Peacock were the owners of some freehold property adjoining the Westminster-road. By an agreement in July 1808, made between A. Peacock and J. A. Peacock of the one part and Thomas Capreol of the other part, after reciting that Capreol had undertaken the management and letting of the premises and had already let part thereof on building leases, and proposed to let the remainder in a similar manner, it was agreed that, as soon as Capreol should have let so much of the premises on building leases as would produce 400*l.* per annum, then A. and J. A. Peacock would

demise the residue of the premises to two trustees from Midsummer then last for sixty-one years, at a nominal rent upon trust for demising such residue together or in parcels upon the same or the like plan as should have been adopted with regard to the land which was to produce 400*l.* per annum, or in such other manner as Capreol, who was to be left at full liberty to direct the letting and managing thereof, should think fit, the beneficial interest in such lease to be in trust for Capreol and his family; and by the same agreement Capreol took upon himself to continue the entire management and letting of the land.

By an indenture dated the 11th May 1813, after reciting the above agreement, and that leases had been granted of parts of the premises at rents amounting in the whole to 404*l.* per annum, a lease was, according to the agreement above stated, granted at the request of Capreol to two trustees of all the said premises, except such parts thereof as had been already leased, for fifty-six and a quarter years from Lady-day 1813, the trusts being declared to be for the purpose of granting and demising the same premises in such manner and for the benefit of such person and persons with respect to the rents to be reserved in such leases as were in and by the said agreement of the 15th July 1806, expressed and declared.

A plan was annexed to this deed showing what portions of the property had been already let to produce the annual rent of 404*l.*, and showing also what buildings were then upon the land. Upon this plan appeared a street called Frances-street, and part of the land which was by this deed granted to Capreol's trustees was garden ground adjoining the north end of Frances-street. By an indenture of lease, dated the 4th June 1813, the trustees, at Capreol's request, granted a building lease to Ford for the whole term, less ten days, of the piece of garden ground above mentioned, which adjoined the north end of Frances-street, as then in existence. A plan showed Frances-street as then existing. Ford thereupon erected houses on each side of the piece of land, thus forming a continuation of Frances-street towards the north end.

It appeared that the street had been paved and lighted by the parish of Lambeth, and used by the public for upwards of twenty years. A partition suit having been instituted with regard to the property, and a receiver having been appointed, the question arose whether on the expiration of the lease in 1869 the public could be prevented from using the additional part of the street as a public way, and accordingly the plaintiff, who was entitled through the reversioners to part of the property, moved that the receiver might be directed to place a bar across that part of the street in order to stop the public from using it. Messrs. Mandalay and Co., who were also owners of a part of the property, opposed the motion.

Little, Q.C. and *Macnaghten* in support of the motion.—There has been no dedication to the public of this part of the street. If the reversioners are to be bound by Ford's act as lessee, specific authority must be proved, and there is no such authority. If the lessee affects to dedicate his leasehold to the public it is not binding: (*Rugby Charity* v. *Merrywcather*, 11 East, 376.) The Vestry of Lambeth claim to be the owners of the street, but there cannot be a dedication to a part of the public as a vestry of a parish. To constitute a dedication to the public there must be an intention to dedicate by the owner and user by the public:

Poole v. *Huskisson*, 11 M. & W. 827;
Vestry of the Parish of Bermondsey v. *Brown*, 33 Beav. 226; Law Rep. 1 Eq. 204; 13 L. T. Rep. N. S. 574.

The case of *Wood* v. *Veal* (5 B. & A. 454) shows that there cannot be a dedication to the public by the tenant, but only by the owner in fee. Ford or his assigns or underlessees could not between 1813 and 1869 dedicate the street to the public, and since 1869 the property has been in the hands of the receiver, and there was no one to make the dedication. A presumption will arise from the fact of the street being paved and lighted by the parish, but this may be rebutted. The lease to Ford was granted by those to whom the freeholders had leased. It may have been to the interest of Ford to allow the street to be used by the public, but not to the interest of the freeholders. They also cited *Reg.* v. *East Mark Tything* (11 Q. B. 877).

Eddis, Q.C. and *W. W. Karslake*, for persons in the same interest.—There is hardly a single element in this case which was not in *Wood* v. *Veal*. If the street was dedicated to the public it must have been during the lease, and there is no evidence of the consent of the reversioners. Our proceedings are taken in time. *Baxter* v. *Taylor* (4 B. & A. 72), shows that the reversioners cannot maintain an action on the case for injury to the reversion against a stranger for entry upon the land during the tenancy under an alleged right of way which causes no injury to the reversion.

Kay, Q.C., and *Whitehorne* for Messrs. Mandalay and Co.—We do not dispute that the lessee cannot dedicate to the public without the consent of the freeholder, but the question is whether the owners in fee simple did not join with the lessee in the dedication. It is said that the lease to Ford was not from the freeholder, but it was made under the provisions of the prior deed. The residue of the property was to be let upon the same plan as that on which the first part had been let, and the largest possible powers were given to Capreol to underlet the land as he liked, and he had power given him by the owners of the fee to let on building leases, upon the plan therein referred to, which plan showed Frances-street. The reversioners having looked on, the public having used the street, can it be said that the reversioners have not acquiesced? The lessors have never attempted to restrict the powers given by the freeholders. Even where a lease is not a building lease, it may be presumed that there is liberty to make public streets. User alone is sufficient to raise a presumption of dedication to the public: (*Rex* v. *Barr*, 4 Ld. Camp. N. P. C. 16.) The user of a way does not bind the landlord while the tenant is in occupation, but after a long time acquiescence may be presumed (*Davies* v. *Stephens*, 7 Car. & Pay. 570), and a dedication by the landlord may be presumed during a tenancy: (*Winterbottom* v. *Lord Derby*, L. Rep. 2 Ex. 316, 16 L. T. Rep. N. S. 771.) But here the inference is not left to be drawn, for we show power given by the landlord to the lessee to make the dedication. Very little user is sufficient to establish dedication: (Shelf. Real. Prop. 7th edit. p. 65, citing *Rugby Charity* v. *Merrywcather*.) The case would have been stronger if Capreol had been bound to carry out the plan and scheme of building as it was at that time, but according to the plan

he was bound to complete Frances-street. The cases cited on the other side do not apply to this case. In the case of *Rugby Charity* v. *Merryweather*, the lease was not a building lease, and there was no power to lay out streets. In *Poole* v. *Huskisson*, it is laid down that in order to constitute a dedication to the public by the owner of the soil, there must be an intention so to dedicate. Here the owners did intend the street to be laid out. It is a question in each case whether the lessor's concurrence is established, and it is established here. In *Wood* v. *Veal* there was no building lease at all, nor was there any act, as there is here, of lighting and paving the street by the parish; in that case, also, no street had been laid out with buildings on each side, but it was only proved that the *locus in quo* had been paved and lighted, and that watchmen had been placed there by the Commissioners under an Act of Parliament; there was also a doubt then among the judges whether a street which was not a thoroughfare could be a highway, but it is now decided that a *cul de sac* can be a highway. There cannot be more plain and overt acts than there are in this case. The houses are to be restored in good condition to the reversioners at the end of the lease, but the houses would be useless without the street. They were built, not under a power only, but under an obligation, the only way in which the land was to be used was by granting building leases, and the building scheme under which the houses were built included the street to be dedicated. The case of *Baxter* v. *Taylor* was quoted to show that the reversioners could not in a case like this raise an objection to the dedication, which was, so to speak, in progress, it not being injurious to the reversion; but that case does not apply here, for there the action was against a stranger, here it is the lessee. There is no evidence to rebut the presumption of dedication arising from the circumstances; the case simply rests upon the presumption that must arise from the long occupation by the public.

Hemming, for the Attorney-General.—It cannot be put so high that nothing done during a lease can be good against the reversioner; the onus is on the reversioners to show that the user is not a dedication to the public. Adverse user during the lease is not an absolute nullity against the lessor.

Little, Q. C., in reply.—The effect of *Winterbottom* v. *Lord Derby*, is that if you show occupation for seventy years by the public, the jury may presume the dedication took place before the lease. It applies merely to presumption.

The VICE-CHANCELLOR.—Nothing can be clearer than the right with which Mr. Little opened. Nothing can be more indisputable than the authorities which he relied on for the principle that a reversioner is entitled to have back his land and everything he has demised at the expiration of the term, but unless there has been some authority or assent given by the reversioner, for example to make the road in this case, he is not bound by anything that the tenant did. Of that law there can be no doubt whatever. Now when this is looked into, to take it up at the time of the lease, there is a demise of a piece of ground. The demise is to Ford, the lessee, for the purpose of being built upon by him. He is to make the best he can of the land for the very purpose for which it was demised, to build upon. He is to build upon the ground beyond all question. There is nothing to restrict him from that. If he builds on the garden in the same line as the line of the houses on either side, then of necessity the piece in front is a continuation of Frances-street. It would not answer his purpose to build in any other way, but whether it would or not, it was competent to him so to deal with it. That is apparent upon the lease itself. [The Vice-Chancellor then stated the agreement entered into with Ford, of the 15th July 1808, and the deed of 11th May 1813 which showed the building plan, and continued:] The plan, therefore, is made a part of the instrument. The plan shows plainly that a street called Frances-street had been begun; that the plan which had been entered upon was to be continued, and the lease or leases to be granted to Capreol should be in continuance of the plan which had been so begun. I find that part of the plan had consisted in dedicating a street called Frances-street to the public, and for erecting the buildings on either side, and I find that that plan is according to the intention of the parties, their intention expressed to be continued as to the future buildings and the future leases relating to that property. If that be the true state of things, could any jury hesitate to presume that with the full assent of the owners of the land, whatever else was to be made afterwards in carrying out the plan which had been begun, it would be necessary to leave a public roadway? It is the only advantageous manner in which the property could be dealt with, the only way in which it has been dealt with, and it has been dealt with, as (I conceive, according to the full assent, more than the assent), with the actual direction of the owners of the land. Then the dedication to the public is a fact which is proved very distinctly. The evidence of user—I say nothing about the parish having repaired and lighted it, although that is not unimportant—but that it has been so used from the time the houses have been so built to the present time, is very clear in evidence. Then, am I at liberty to presume anything about that? There is the plain assent, by the owners of the land, to that state of things which I now find to exist. In my opinion I cannot, admitting all the authorities on which Mr. Little relied. Indeed the case is open to that observation which Mr. Kay addressed to it, that in no one of these cases is a building lease mentioned. We all know in the demise of land for building purposes provision must be made, whether it is expressed or not, for road-access to different parts of the property demised. If any case had been found, and I should have been surprised if any could have been found, where the owner of land demising for building purposes at the end of the term had said he had a right to take back his houses and stop up all the access to them, it would have deserved attention, and it would have required consideration. I have said what I have to say about the purposes and intention of the owners who were parties to the agreement of 1808, and carried that intention out by the lease of 1813. I read the instrument as meaning that Frances-street had been begun in the Westminster-road, and was to be carried on if the parties thought fit to the extremity of the owner's land, and as far as the houses were built in Frances-street, it would be Frances-street, and as far as houses were added to it in the same line in continuation of the same plan it would still be Frances-street. The user is

clear beyond the possibility of doubt. The right of the public has been acquired to it, and it would be in my opinion a most unreasonable thing if, in this suit, which is for partition, and means of course for the preservation of property, I were now to authorise the receiver to set up a bar to shut up this which has become and is a public street. The presumption which I draw is from the conduct of the parties, from the instruments which they have executed and the evidence in the cause. It would be wrong on my part that I should express the slightest doubt that this is as much a public road as Holborn; although it leads in one sense to no place but Messrs. Maudslay's manufactory, it leads to every house on either side of the street, and if it did not it would be no less a public road. *Motion refused with costs.*

Solicitors for plaintiffs, *M'Leod* and *Watney*.

For Messrs. Maudslay and Co. and other defendants, *W.* and *J. Gibson*.

For other parties, *Raven* and *Bradley*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Thursday, May 23, 1872.

REG. *v.* MORGAN.

*Quo warranto—Local board of health—*9 *Ann. c.* 20 *—*23 *&* 24 *Vict. c.* 90.

Upon the trial of an information in the nature of a quo warranto for exercising the office of a member of a local board of health, the defendant did not appear, and a verdict passed for the relator.

9 *Ann. c.* 20, *gives costs upon informations concerning the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and other places.*

Held that, notwithstanding the incorporation of local boards by the Sanitary Act 1866, *s.* 46, *the relator was not entitled to costs.*

THIS was a *quo warranto* for which a writ had been granted by this court in order to try the validity of the election of a member of the local board of health of Sheerness. The matter came on for trial at the Maidstone assizes, when the defendant failed to appear. A master had refused to tax the relator's costs on the authority of *Reg.* v. *Backhouse* (7 B. & S. 911).

Crump moved for a rule *nisi* on behalf of the relator calling upon the defendant to show cause why the master should not proceed to tax the costs. *Reg.* v. *Backhouse* was an information for exercising an office similar to this, and the court refused the costs of the relator, on the ground that it was not an office of the same kind as those mentioned in 9 Ann. c. 20. That is "An Act for rendering the proceedings upon writs of *mandamus*, and informations in the nature of a *quo warranto* more speedy and effectual; and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs." The preamble commences, "Whereas divers persons have of late illegally intruded themselves into and have taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and other offices, within cities, towns corporate, boroughs and places," &c. By sect. 5, "It shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators in such information named shall recover his or their costs of such prosecution." In giving judgment Cockburn, C.J. said, p. 921, "The statute has indeed been extended to offices of a corporate character though not in a municipal corporation, but it does not extend to offices of a *quasi* corporate character where there is no municipal corporation; at all events, I feel myself bound by the rule which the cases have laid down on the construction of this statute. It seems, however, desirable that the Legislature should interfere and make provision for costs in cases not within it." Since that case was decided it has been enacted by the Sanitary Act 1866 (29 & 30 Vict. c. 90), sect. 46, that "The following bodies, that is to say, local boards, sewer authorities, and nuisance authorities, if not already incorporated, shall respectively be bodies corporate designated by such names as they may usually bear or adopt, with power to sue and be sued in such names, and to hold lands for the purposes of the several Acts conferring powers on such bodies respectively, in their several characters of local boards, sewer authorities, or nuisance authorities." This is sufficient to make the office of member of a local board of health an office "of a corporate character, though not in a municipal corporation." [BLACKBURN, J.—This is neither an "office," nor is this a "place" of the kind mentioned in the Act of Anne.] In *Lloyd* v. *The Queen* (2 B. & S. 656; 6 L. T. Rep. N. S. 610), Erle, C. J., said (in the Ex. Ch. p. 662), "The statute is certainly much wider than the construction put upon it in *Rex* v. *McKay* (5 B. & C. 640), because the court there said that the provisions as to writs of mandamus and *quo warranto* informations applied to corporate offices and corporate places." Other cases upon the subject are:

Rex v. *Francis*, 2 T. R. 484;
Rex v. *Wallis*, 5 T. R. 375;
Rex v. *Williams*, 1 Burr 402.

Per curiam (COCKBURN, C.J., BLACKBURN, MELLOR and LUSH, JJ.)—There is nothing to take this case out of the rule laid down in *Reg.* v. *Backhouse*.

Rule refused

Attorneys for relator, *Brook* and *Chapman*, for *Mole*, Sheerness.

Monday, April 29, 1872.

REG. *v.* STRACHAN.

33 *&* 34 *Vict. c.* 97 (*Stamp Act*), *s.* 3—*Schedule—Voting paper—Municipal election—*5 *&* 6 *Will.* 4, *c.* 76; 7 *Will* 4 *&* 1 *Vict. c.* 78 (*Municipal Corporations Act*).

Voting papers used at municipal elections are not charged with duty by 33 *&* 34 *Vict. c.* 97, *and need no stamp.*

RULE *nisi* for a *quo warranto* in order to determine the validity of the election of an alderman for the borough of South Shields at a meeting holden under the Municipal Corporations Act (5 & 6 Will. 4 c. 76; and 7 Will. 4 & 1 Vict. c. 78, ss. 13 and 14).(*a*)

(*a*) 7 Will. 4 & 1 Vict. c. 78, s. 14, enables the electors to vote "by personally delivering at such meeting" voting papers.

16 & 17 Vict. c. 79, s. 13, provides that, "at every election of aldermen, the persons, not exceeding the number of aldermen there to be chosen, who shall have the greatest number of votes according to the voting papers signed by the persons entitled to vote at such election, and delivered to and openly read by the mayor, shall be declared by the mayor to be, and thereupon shall be duly elected aldermen."

The question to be determined was whether voting papers used at such an election required a penny stamp.(a)

C. Russell, Q.C. (with him *Hazlefoot*) showed cause.—The provisions of the Stamp Act have no application to meetings of a representative municipal body such as a town council. 5 & 6 Will. 4, c. 76, prescribes the mode of voting thereat, but contains no enactment respecting voting papers. 7 Will. 4 & 1 Vict. c. 78, ss. 13, 14, enables voting papers to be used. By 16 & 17 Vict. c. 78, s. 13, they are to be signed by the persons entitled to vote, and delivered to and openly read by the mayor. But the late Stamp Act (27 & 28 Vict. c. 11, s. 1), by the words "any such meeting," refers only to a meeting where there may be voting by proxy. And the schedule to 33 & 34 Vict. c. 97, defining "voting paper," in using the words "any meeting," means any such meeting as aforesaid.

The court called on

Holker Q.C. (with him *John Edge*) to support the rule.—If the Legislature have chosen to impose the duty, it is unnecessary to inquire why they have done so. [LUSH, J.—The improbability of their having done so is however great.] A distinction is drawn in 33 & 34 Vict. c. 97, s. 102, between papers given to be used by a proxy, and those used by the voter himself. This election was at a meeting of a "body exercising a public trust" within the terms of 27 & 28 Vict. c. 18, s. 1, and the paper in question is an instrument for the purpose of voting by a person entitled to vote "at any such meeting," coming under the very words used in the schedule. [BLACKBURN, J.—It certainly is rather difficult to say why papers to be used at a "parish meeting of heritors or proprietors of real or heritable propperty in Scotland" should be taxed. LUSH, J.—There, however, property is in trust, here there is no trust in the ordinary sense of the word. To say that a municipal elector exercises a trust in voting is a figurative mode of expression. A trustee is bound to act. An elector is not bound to vote. From the 18 & 19 Vict. to the present day no one has ever heard of stamping voting papers of this kind. Were a stamp necessary for them, every vote given by means of a voting paper at the elections held under the recent Education Act would be void.] 7 Will. 4 & 1 Vict. c. 78, shows the mode of electing aldermen. The votes are to be given by means of voting papers. Then they come within the meaning of the schedule to 27 & 28 Vict. c. 18. It is remarkable that in 33 & 34 Vict. c. 97, s. 3, the word "such" is omitted before "meeting." [LUSH, J.—But can we possibly infer from the mere slipping out of the word that the Legislature meant to make so great a change in the law?] The language used is unambiguous; a stamp is imposed on "any instrument for the purpose of voting by any person entitled to vote at any meeting."

COCKBURN, C.J.—It is quite clear that under the former Stamp Act these papers would not have required to be stamped, because the meeting at which they were presented was not such a meeting as those defined. Then, in the later statute the Legislature have broken up the schedule as it stood in the first Act, and the word "such" has slipped out of place. To suppose that the Legislature meant to provide for the stamping of the papers in question would be a most monstrous proposition, and one which I do not think we should be warranted in adopting.

BLACKBURN, J.—I am also of opinion on the construction of this Act that when it was enacted that there should be a stamp on every "letter or power of attorney," &c., for the sole purpose of appointing, nominating, or authorising any person to vote as a proxy or otherwise at one meeting of the proprietors or shareholders of any joint-stock or other company . . . or at one meeting of any body exercising a public trust," &c.; and then proceeded to impose a stamp duty on a "voting paper—that is to say, any instrument for the purpose of voting by any person entitled to vote at any such meeting as aforesaid," . . that meant where proxies are used. In the new Act (33 & 34 Vict. c. 97, s. 102) the Legislature first deal with letters of attorney appointing a person to vote as a proxy at any one meeting "at which votes may be given by proxy;" and then with respect to a voting paper, define it to be "any instrument for the purpose of voting by any person entitled to vote at any meeting," from which sentence the word "such," that should have preceded "meeting," has accidentally dropped out.

LUSH, J.—I am of the same opinion.

QUAIN, J.—I do not think this was a meeting within the terms of either of the Acts, or that persons attending a meeting for the election of the town council exercise a public trust within the terms of the schedule to the first Act. Such a meeting has no affinity with a meeting of directors of a company.

Russell, Q.C., asked for costs.

COCKBURN, C.J.—The votes were good, being given by persons entitled to vote, and this was a mere technical objection, and you ought to have costs.

Rule discharged, with costs.

Attorney for the applicant, *John Scarfe*, for *H. T. Duncan*.

Attorneys for the defendant, *Clarke, Son*, and *Rawlins*, for *J. M. Moore*.

(a) 27 & 28 Vict. c. 18, s. 1, imposes the stamp duties specified in the schedules, *inter alia* (sched. C.), for and upon any "letter, or power of attorney, commission, factory, mandate, or other instrument in the nature thereof; for the sole purpose of appointing, nominating, or authorising any person to vote as a proxy or otherwise at one meeting of the proprietors or shareholders of any joint-stock or other company, or of the members of any society or institution, or of the contributors to the funds thereof, or at one meeting of any body exercising a public trust, in the United Kingdom, or to vote at one parish meeting of heritors or proprietors of real or heritable property in Scotland, 1*d*."

"Voting paper (that is to say): Any instrument for the purpose of voting by any persons entitled to vote at such meeting as aforesaid in any part of the United Kingdom, 1*d*."

By 33 & 34 Vict. c. 97, s. 102, the use of "Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper hereby respectively charged with the duty of 1*d*." is restricted to one meeting. Sub-sect. 4: "Every vote given or tendered under the authority or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall be absolutely null and void," and in the schedule is as follows: "Voting paper. Any instrument for the purpose of voting by any person entitled to vote at any meeting, 1*d*. And see sect. 102."

Wednesday, May 29, 1872.

MERSEY DOCKS AND HARBOUR BOARD (appts.) v. OVERSEERS OF LIVERPOOL (respts.)

Poor rate — Docks — Assessment of — Parochial — Acreage system.

The Mersey Docks comprise a range of docks at Liverpool, and another range at Birkenhead. The two sets of docks are separated by the river Mersey, and are situated in different parishes, but have been amalgamated by Act of Parliament for the purposes of general management, and formed into one estate, which is vested in the appellants. Vessels may enter the docks on both sides of the river on payment of one toll. The parish of Liverpool rated the appellants in respect of the Liverpool docks on a sum ascertained by calculating the gross earnings of the docks in that parish, and deducting the amount of the necessary expenditure within the same. To this mode of rating the appellants objected, insisting that the acreage system of assessment should have been applied to the whole dock estate, as in Reg. *v.* The Hull Dock Company (18 Q. B. 325):

Held, that there being no insuperable difficulty in finding the amount of the earnings and outgoings from each range of docks within each parish, the acreage system, which must only be resorted to ex necessitate rei, must not be applied, and that the mode of rating adopted was correct.

SPECIAL CASE.

By a rate made on 27th May 1865, the appellants were assessed in a sum of 214,944*l.* in respect of the annual value of dock estates within the parish of Liverpool. The board appealed against the rate to the Liverpool Quarter Sessions. The appellants are a corporation, incorporated and regulated by and under the Mersey Docks and Harbour Act 1857, and the Mersey Dock Acts Consolidation Act 1858, and under these Acts hold docks and other property used in connection with, and for the purposes of the docks, on both sides of the river Mersey.

2. The docks and other property are situated in several parishes and townships on the Lancashire and Cheshire side of the Mersey. The part on the Lancashire side is situated in the parish of Liverpool, and in the townships of Toxteth-park, Kirdale, and Bootle. Each of the parishes and townships in which the said docks and other property are situated have separate rates for the relief of the poor.

3. The first dock on the Lancashire side of the Mersey was made under the authority of an Act 8 Anne, c. 12, whereby the mayor, aldermen, &c., of Liverpool were empowered to make a dock (since filled up) on the south side of the town of Liverpool, and the duties leviable under that Act were not to be applied to any purposes except the building and repairing of the dock.

4. Other docks were subsequently made on the Lancashire side of the Mersey by the corporation of Liverpool, under the authority of other Acts of Parliament similarly limiting the application of the receipts from the docks as was provided by the Act of 8 Anne, c. 12, until by stat. 51 Geo. 3, c. 143, the mayor, aldermen, &c., were formed into a body corporate, and the docks and works on the Lancashire side of the river were vested in them under the style of "The Trustees of the Liverpool Docks."

5. The trustees so incorporated were empowered by the last mentioned Act, to levy certain rates, and when all charges and mortgages upon such rates should be paid off, they were required to lower and reduce the rates and duties thereby granted, as far as could be done in the state of the docks and works, so as to leave sufficient for all charges of management, and collection of rates, and improving, repairing, and maintaining the docks and works so vested in them.

6. Subsequently other Acts relating to the docks on the Lancashire side of the Mersey were passed, in all twenty-two in number, and forming a series extending from the said Act of 8 Anne to 21 Vict., both inclusive.

7. Other docks were formed on the Cheshire side of the Mersey, at Birkenhead, under the authority of a series of fourteen Acts of Parliament, extending from 7 & 8 Vict. to 18 & 19 Vict., by which last mentioned statute all the Birkenhead docks were vested in the Corporation of Liverpool.

8. By sect. 26 of the Act of 1857 it is provided that all such estate and interest in the docks, buildings, and other property, both real and personal, situate at Birkenhead or elsewhere, as were transferred or intended to be transferred to the Corporation of Liverpool, by the Birkenhead Docks Act 1855, should, upon and after the 1st Jan. 1858, vest in the appellants, but subject to all charges and liabilities affecting the same.

9. By sect. 27 of the same Act of 1857 it is provided that all such docks, lights, buoys, lands, buildings, and other property, both real and personal, situate at Liverpool or elsewhere, as were held by, or in trust for, the trustees of the Liverpool Docks, under or in pursuance or for the purposes of the said Acts mentioned in the first part of the schedule thereto annexed, should, upon and after the 1st Jan. 1858, vest in the appellants, but subject to all charges and liabilities affecting the same.

10. By sect. 49 of the last mentioned Act it is enacted that, subject to the provisions of that Act, the appellants should stand possessed of all the property, powers, rights, and privileges, thereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights and privileges, were holden previously to the commencement of that Act.

11. Sect. 56 of the same Act enacts that:—

The following rules shall be observed by the board with respect to the moneys received by them under this Act, viz.:

(1) The conservancy expenditure shall be defrayed out of the conservancy receipts.

(2) The pilotage expenditure shall be defrayed out of the pilotage receipts.

(3) No portion of the conservancy receipts, or pilotage receipts, shall be applied in aid of the general expenditure.

(4) No sums shall be payable in respect of docks by any vessel that does not use the same.

(5) Save as by this Act is provided, no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes.

12. The dock estates at present consist of basins, docks, piers, jetties, graving docks, gridirons, wharfs, quays . . . and other works and conveniences affixed or appertaining to such basins and docks as are necessary for the working thereof; and the appellants are authorised to received large sums of money, under the name of

dock rates and duties, by virtue of the said Acts of Parliament, from the owners of vessels and goods, for the privilege of using the dock property. The portion of such property within the parish of Liverpool is correctly set out in the assessment.

13. The appellants have, under their Act, the power of charging lower rates in some docks than others, and have exercised such power in one or two instances on the Cheshire side.

14. The appellants are bound to apply their rates and moneys according to the directions of the Acts.

15. All the docks were made under the Acts, and all the moneys are appropriated as the Acts direct.

16. The dock estate is now subject to a large debt, and ordinary repairs are paid out of the income so far as it suffices.

17. 18. 19. 20. A sinking fund was provided by the Acts.

21. If the parochial principle of assessment were adopted in the parishes and townships in which the said property of the appellants is situated on the Cheshire side of the Mersey, the rateable value of the property in those parishes or townships would be very little, as compared with that of the property of the appellants on the Lancashire side of the Mersey, inasmuch as, under such system of calculation, the undertaking on the Cheshire side is carried on at a loss, if a proportional amount of the interest on the debt were charged against the earnings, and at an inconsiderable profit even if such interest were not charged. In fact the rates received from persons who choose to make use of that part of the dock property which is within the parish of Liverpool, make up for and pay the losses sustained by the appellants in the parishes and townships on the Cheshire side of the river.

22. The gross estimated rentals mentioned in the assessments are arrived at by considering the docks and warehouses within the parish of Liverpool as separate property from the other parts of the dock estate, and as producing a certain amount of income without taking into account the nature of the whole undertaking, or the duties and liabilities of the appellants, and without taking into account the fact that parts of the undertaking in other parishes are carried on at a loss, or the facts mentioned in the last preceding paragraph.

23. Accounts have been kept in respect of each particular dock on the following principles: Where the tonnage rate is payable on the inward voyage, the whole of the rate has been credited to that dock in which the principal part of the cargo is discharged, and where the tonnage rate is payable on the outward voyage, the whole sum is credited to that dock in which the principle part of the carge is loaded.

As to the dock dues or goods the same rule prevails. The dues on the whole cargo are credited to that dock in which the principal portion of the cargo is loaded or discharged as the case may be.

This method of keeping the accounts has been adopted because the accurate apportionment of the rates and dues has been hitherto unnecessary, and because of the difficulty of determining the proper principle of such apportionment.

24. There is no difficulty in estimating the necessary amount to be expended for the repairs and renewal of the dock estate, and in apportioning the general expenditure on the whole estate among the different docks, according to the amount of income with which each is credited, and accounts have in fact been prepared on this basis. But considerable expenditure is incurred for the benefit of the whole dock estate, and the same difficulty of apportioning the expenditure exists as that referred to in the last preceding paragraph with reference to the income of the dock estate.

25. Attached to certain of the docks there are warehouses and transit sheds, for the use of which rents are paid separately from the tonnage or other rates, and are payable solely in respect of such goods as are stored or placed in them according to the space occupied, and the duration of the occupation. There are also certain graving docks, stages for landing and shipping goods, cranes, weights, and other appliances, the charges for the use of which are wholly distinct from any other charges, and are payable only by those persons who require the use of them for their ships or goods.

There are also certain offices and other places of considerable value which are used by the dock board solely for purposes in connection with the management of the dock estate. . . . . This property . . . . is situate in different parishes, and the receipts and value of every part of it are capable of being ascertained. The whole of such property in the parish of Liverpool is included in the said assessment, and has been separately rated therein.

26. It is not contended by the appellants that they are not liable to be rated, but they contest the correctness of the principle on which they have been rated by the respondents.

27. The appellants contend—first, that the proper method of assessment is to take the net income derived from the whole of the property, and to divide the same amongst the different parishes or townships in proportion to their acreage, and that the result, after making deductions, is the rateable value; secondly, that they are entitled to deduct interest upon their debt, as they are only allowed to receive the increased rates in order to pay off the interest, and the rates would have immediately to be reduced if there were no interest to pay; thirdly, that they are entitled to deduct tenants' profits as would be done in any case of a trading body; fourthly, that they are entitled not only to a deduction for ordinary repairs, but also a deduction for deterioration of works. They calculate the time when the different works will require renewal, and then claim to deduct every year a sum of money which, put out to interest, would, in the said time, be sufficient to renew such works; fifthly, that these deductions must be calculated on the whole area of the docks, and, with the other expenditure, deducted from the gross income before the net income is arrived at.

28. The respondents dispute the several contentions of the appellants above specified, and they further contend, that in rating the appellants they are entitled to calculate the earnings of the docks within the parish, and after deducting the expenses of working those particular docks apart from the rest of the estate, to calculate the rate on the sum so ascertained. That the income from the town dues, after payment of interest on the

sum of 1,500,000*l.* (the purchase money of the dues) ought also to be taken into account in the rate.

29. The court was to draw all inferences which they might draw. The question for the court, therefore, was on what principle the dock property in the parish is to be rated, and what, if any, deductions are to be made from the rateable value as estimated by the parish, and whether the recent Parochial Assessment Act makes any and what difference between rates levied before and after that Act came into operation. The amount of the rateable value was to be ascertained on the principle laid down by the court, and the judgment in conformity therewith to be entered at the quarter sessions next or next but one after the amount had been ascertained as aforesaid with such costs as the court should adjudge.

Manisty, Q.C. (with him *C. Crompton*).—The effect of this case is to bring about a reconsideration of the principle laid down in *Reg.* v. *The Hull Dock Company* (18 Q. B. 325.) The defendants there were proprietors of several docks made at different times and under successive Acts of Parliament. The docks communicated with each other and with the river Humber, and extended into several parishes. Every vessel paid a single toll, which became due on entry into the docks, and was paid then, or on clearance outwards; and she was entitled by such payment to go into any one or more of the docks at the will of her own master, or under the direction of the company's harbour master, who had certain powers for regulating the position of vessels. All the payments at whatever dock received were carried to one general account. Held, that the poor rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of docks within that parish bore to the entire area of the docks. For that, in such a case, an assessment on the acreage principle was unavoidable; though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits it. The docks now in question should be rated as one estate, and it is only as one estate that they can be carried on under the present system. Sect. 50 of the Liverpool Docks Act 1857 enacts that all the docks shall be deemed to constitute but one estate. But the docks have been separately rated, which makes a great difference. [BLACKBURN, J.—Only a difference as to the persons who shall receive the rates—the Birkenhead or the Liverpool overseers. The amount will not be altered if the assessment is properly worked out. There would, however, no doubt, be a difference between the sum charged in Birkenhead and in Liverpool.] A vessel may go into a dock which is partly in one parish and partly in another. [COCKBURN, C.J.—Then, the *Hull case* shows that the parochial system of assessment must be applied as far as practicable; but where *ex necessitate rei* another mode must be adopted, then that may be used.]

Sir *John Karslake*, Q.C. (*Aspinall*, Q.C. and *Littler* with him) appeared for the respondent,

COCKBURN, C.J.—I do not think we need call upon Sir John Karslake to argue for the respondents, as we are of opinion that our judgment should be in their favour. The *Hull Dock Case* (18 Q. B. 325), undoubtedly established this, viz., that if docks are all contiguous to each other, forming part of an entire system with a general entrance to them all, and with tolls fixed at the same rate for vessels, and having the benefit of any of the series of docks, the principle of parochial rating cannot be applied, but recourse must be had to the acreage system. Nevertheless, the language of the judges in that case shows that the acreage system must not be resorted to except *ex necessitate rei*. It would not be right to upset the authority of the *Hull case*, which has now been law for eighteen years, without further consideration. The present case, however, is plainly distinguishable from it, because, of the docks now in question, some are on one, and the others on the opposite side of the river Mersey, and they do not come within the description of an entire system of docks. True, under the Act of Parliament they are united for the purpose of general management, and pecuniary operations; but this fact is not enough to alter that which is in itself a very essential distinction. They are two distinct estates, only considered as one property for the purposes of general management. The docks on the Birkenhead side of the river can no more be deemed to be one with those on the Liverpool side than two separate private estates would be, although under the same management. The Liverpool people have a right to the contribution towards local burthens of this property according to the value of the docks on the Liverpool side. The docks extending on that side are not all in one parish, and therefore so far as they are concerned, the *Hull* case would apply, but it seems to me that we are not entitled to adopt the acreage system (which ought not to be resorted to except when necessity requires it) here. There is no insuperable difficulty in ascertaining what proportion of the earnings from each dock is due in respect of the earnings of the docks on one side and the docks on the other side of the water. Certainly in this case it would be manifestly unjust that the people of Liverpool should lose the advantage of the superior value of the Liverpool docks, and that the Birkenhead inhabitants should obtain the benefit of the higher value of them. I think we ought to avoid applying the acreage system, which in the present instance would lead to unjust results. What would be the proper principle to adopt if the docks upon the Cheshire side ultimately prove valueless, and can only be maintained out of the earnings of the docks on the Lancashire side, is a very different question, which we are not now called upon to decide. This property must be rated according to the existing state of things, and our judgment must be for the respondents.

BLACKBURN, J.—I am of the same opinion. The Parochial Assessment Act (6 & 7 Will. 4, c. 86) is express and imperative that the several hereditaments are to be rated on an estimation "of annual value, that is to say of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates, &c., and deducting therefrom the probable average annual costs of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent:" (Sect. 1.) Now, that is the principle which the Parochial Assessment Act lays down, and in an immense majority of cases it is very easily acted upon indeed. But it has been long felt that a difficulty in the application of it comes where property lies in different parishes, and it is hard to say how much is earned in each—a difficulty which has been often met with in

assessing the rate payable by gas and water companies—and, therefore, a practical rule of thumb has been established which it is very difficult to say is to be found in the Parochial Assessment Act. In the Hull case, where a system of docks, having one entrance and one sum coming in for the whole, lay in different parishes, and another, the Victoria Dock, had been made new, opening into the river, but forming part of the old docks, the court thought it made part of the whole, and as there was one payment for entering, and one series of docks, there was no way of assessing them except by the acreage system. Here is, no doubt, one entire rent, and in any case where we can do nothing else we must go on that system. It may be that there are docks on the Liverpool side which lie in different townships, but the question before us is this, viz., that when it appears there are docks on the Birkenhead side quite separate and distinct, and more ships enter the docks on the Liverpool than on the other side of the Mersey, are we to say we must put on the Birkenhead docks a much greater value, and reduce the assessment of the Liverpool docks because they are united under one management, and the earnings of the docks on either side are received in one sum? It may be that the Birkenhead docks are worked at a loss and ultimately no profits may be derived from them, and they will then have to be kept up at the expense of the other. When that event happens, some question may arise and will be decided. I think there would be no difficulty in approximately ascertaining the amount for the purpose of "real justice and perfect law," as Lord Campbell, C.J. said, though we cannot get the sum with precise accuracy. It is perfect law and justice if the approximate value can be found. The respondents' principle of rating here seems to be the right one as applied to these docks, and any question as to the manner in which it works out may be raised hereafter.

MELLOR, J.—I am of the same opinion. To the facts on which the judgment of the court in the *Reg* v. *The Hull Dock Company* was given I think the principle of acreage valuation was properly applied, because no other was practicable. But everyone can recollect when the Birkenhead Docks were rivals of the Liverpool Docks, and there has been no physical alteration although by Act of Parliament they are worked under one management. That Act does not, however, affect the parochial assessement system so much as to require these docks to be rated on a separate system. I think also our judgment should be in favour of the espondents.

LUSH, J.—I am of the same opinion. The acreage system ought only to be applied where the parochial system is inapplicable. That is not so here. I do not think that the rateable value of the Birkenhead Docks at all altered by their union with the Liverpool Docks for purposes of management. With regard to any dock that happens to be in two parishes there may be a difficulty, and when it is impossible to apply the parochial system the other mode of assessment may be adopted.

Judgment for the respondents.

Attorneys for the appellants: *Wright* and *Venn* for *Squarey*, Liverpool.

Attorney for respondents: *Batten.*

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs., Barristers-at-Law.

Thursday, June 6, 1872.

LONG v. WILLIAMS.

Advowson—Mortgage—Sequestration—Foreclosure—Sale.

J. G. S. mortgaged the advowson of the vicarage of St. Giles's, Camberwell, to the plaintiff, as a security for the repayment of two sums of 7500*l.* *and* 5000*l., advanced by the plaintiff to him, and afterwards conveyed the said advowson, subject to the payment of the said two several sums to the defendant, who, as a security for the payment of the same, executed a warrant of attorney, whereby he confessed judgment at the suit of the plaintiff for the sum of* 25,000*l.* *The said vicarage having become vacant, the defendant was presented thereto, and default having been made in payment of the interest on the said several sums, the plaintiff caused a writ of sequestration to issue against the said vicarage. The plaintiff subsequently died, and his representatives afterwards obtained a decree of foreclosure of the equity of redemption and sold the said advowson for* 11,000*l.* *On a motion for a rule to set aside the said writ of sequestration, it was*

Held by the Court of Exchequer, (*Kelly, C.B., and Bramwell and Channell, BB.*), *that the said sale was not a satisfaction of the said judgment, and that the sequestration remained in full force and unaffected.*

By an indenture, dated the 29th March 1844, the advowson of the vicarage of St. Giles's, Camberwell, in the county of Surrey, was mortgaged by J. G. Storie to the plaintiff, to secure the payment of 7500*l.* and interest. By another indenture of the same date, the said advowson was further mortgaged by the said J. G. Storie, to the said plaintiff, to secure the repayment of the further sum of 5000*l.* and interest.

By an indenture, dated the 22nd Jan. 1846, the said advowson was conveyed to the said defendant subject to the payment of the said sums of 7500*l.* and 5000*l.* and interest; and on the treaty for the sale of the said advowson to the said defendant it was agreed that the said sums of 7500*l.* and 5000*l.*, and all interest then due and to become due thereon, should be secured to be paid by the said defendant to the said plaintiff by a warrant of attorney.

In pursuance of the said last mentioned agreement, the said defendant duly executed a deed poll or warrant of attorney, bearing date on or about the 16th Feb. 1846, whereby he empowered certain attorneys in the Court of Exchequer to confess judgment against him in an action at the suit of the said plaintiff, for the sum of 25,000*l.* and costs; and by the defeazance endorsed on the said warrant of attorney it was declared that the said warrant was given to secure the payment of the sums of 7500*l.* and 5000*l.* on the 29th Sept. 1850; and it was thereby agreed that no action should be commenced against the defendant until default should be made in the payment of the said sums, or the interest thereon; and judgment was afterwards duly entered up on the said warrant of attorney.

Shortly after the date of the said warrant of attorney, the said vicarage of St. Giles became vacant, and the said defendant, as owner and patron of the said living, presented himself, and was

duly instituted the vicar thereof; and has been ever since, and still is, vicar thereof.

Default having been made by the said defendant in payment of the interest due on the said sums of 7500*l.* and 5000*l.*, the said plaintiff issued out a writ *fi. fa de bonis ecclesiasticis*, directed to the Bishop of Winchester, who thereupon granted a writ of sequestration, which was afterwards duly published, but no proceeds whatever have been realised under the said sequestration, owing to prior sequestrations having been lodged against the said vicarage.

The said plaintiff died in or about the month of April 1849, having by his will given and bequeathed all his real and personal estate and effects unto the Rev. Walter Long, and Richard P. Long, upon certain trusts, and appointed the said W. Long and R. P. Long joint executors thereof, who duly proved the said will. The said W. Long and R. P. Long afterwards exhibited a bill of complaint in the Court of Chancery against the said defendant, and by a decree of the said court made in the said cause in 1852, it was ordered that the said defendant should stand absolutely barred and foreclosed of and from all equity of redemption of and in the said advowson.

The said Walter Long died soon after the date of the said decree, leaving the said R. P. Long, him surviving; and in or about the year 1859, the said R. P. Long sold the said advowson for the sum of £11,000.

On the 23rd July 1869, John Fry Reeves and Frederick William Reeves obtained judgment against the said defendant in the said Court of Exchequer for the sum of 15,007*l.* 10*s.*, and thereupon the said J. F. Reeves and F. W. Reeves caused a writ of *fi. fa. de bonis ecclesiasticis* to issue, directed to the said Bishop of Winchester, who thereupon granted a writ of sequestration against the said vicarage. The said J. F. Reeves and F. W. Reeves now sought to set aside the writ of sequestration issued at the suit of the said plaintiff, and accordingly

Poynter now moved for a rule calling upon the representatives of the said plaintiff and the said Bishop of Winchester to show cause why the said writ of *fi. fa. de bonis ecclesiasticis*, and the sequestration founded thereon, granted to the said plaintiffs by the said bishop should not be set aside, on the ground that the judgment on which it had been founded had been satisfied by the sale of the property comprised in the mortgage, although it did not realise the amount due, and cited

Smith's Real and Personal Property, 386;
Palmer v. *Hendrie*, 27 Beav. 349;
Lockhart v. *Hardy*, 9 Beav. 349; 10 Jur. 532; 15 L. J. 347, Ch.;
Tooke v. *Hartley*, 2 Bro. Cas. 125, Chan.:
Fisher's Digest, vol. 3, 5994;
Perry v. *Barker*, 8 Ves. 527; and 13 Ves. 198:
Bishop v. *Hatch*, 1 A. & E. 171;
Chuter v. *Hatch*, 1 A. & E. 190.

KELLY, C.B.—I am of opinion that no rule should be granted in this case. Though the creditor has availed himself of his other securities, he still possesses this security for the balance, as he has only obtained satisfaction to the extent of a portion of his debt.

BRAMWELL, B.—I am of the same opinion. None of the authorities cited go to the extent contended for by Mr. Poynter. It appears to me that this is a question for a court of equity.

CHANNELL, B.—I am of opinion that this rule should be refused. An equitable plea might, perhaps have been framed if all the money due had been paid; but I am clearly of opinion that there has been no payment in equity in this case. A court of equity would probably give relief, but only on terms. It would not, I think, grant a perpetual injunction.

KELLY, C. B.—I ought to add that, if there was no other objection to this rule being granted, it would be a fatal one that the judgment-debtor is not a party to the application.

Rule refused.

Attorney for J. F. Reeves, and F. W. Reeves, *H. M. Daniel*, Rolls-chambers, 89, Chancery-lane, W.C.

EXCHEQUER CHAMBER.

Reported by M. W. MCKELLAR, Esqr., Barrister-at-Law.

Friday, June 14, 1872.

BROWN v. NUGENT.

Licence for public music—Dancing—Penalty—25 Geo. 2, c. 36, ss. 2, 3.

By 25 Geo. 2, c. 36, s. 2, quarter sessions in London or Middlesex are authorised and empowered to grant such licences as they in their discretion shall think proper to any house, room, garden, or other place kept for public dancing, music, or other public entertainment of a like kind. Sect. 3 twice refers to a house or other place "kept for any of the said purposes."

Held, by the Exchequer Chamber (affirming the Queen's Bench), that the sessions were justified in granting a licence "for public music;" and that the holder of such a licence was liable to the penalty provided for keeping such house without a licence, if he allowed public dancing in his house.

THIS was an appeal by the defendant under the provisions of the Common Law Procedure Act 1854 against the decision of the Court of Queen's Bench in making absolute a rule of that court obtained by the plaintiff to show cause why the verdict should not be entered for the plaintiff upou a point reserved at the trial. This decision is reported L. Rep. 6 Q.B. 693.

This was a *qui tam* action brought by the plaintiff, as a common informer, to recover a penalty of 100*l.* under the statute 25 Geo. 2, c. 36, for keeping a house or room for public dancing, without a licence had for that purpose. The declaration was in the form allowed by sect. 13. The plea was *nil debet*, by statute 21 Jac. 1, c. 4, s. 3, whereon issue was joined.

This action was tried by Lush, J., at the Middlesex sittings on the 23rd Jan. 1871, when the following facts were proved:

The defendant was proprietor and keeper of the Cambridge Music Hall, Commercial-street, in the said county, and within twenty miles of the city of Westminster. On the 16th Nov. 1870, the defendant permitted dancing in the said hall by the performance on a stage, erected at one end thereof, of a ballet divertissement called "The Revels of the Sylphides." This ballet was performed by two dancers, selected, employed and paid by the defendant in that behalf. The stage was arranged with scenic accompaniments, and a cataract of real water at the back, with a nymph rising from the back.

All persons who paid at the doors were admitted to the said hall to view the said dancing, but with the exception of the said two dancers dancing the said ballet as aforesaid, no person danced in the said hall, and no dancing was permitted.

The defendant held a licence for music in the said hall, duly granted to him by the magistrates of the said county under the provisions of the statute 25 Geo. 2, c. 36; a copy of such licence is hereto annexed. Over the entrance of the hall was duly affixed and kept the inscription "Licensed pursuant to Act of Parliament of 25 Geo. 2," in accordance with sect. 3 of the said statute.

The jury, in reply to the learned judge, found that the dancing was a substantial part of the entertainment, and the music only ancillary thereto, and that the defendant kept the said hall for music and dancing.

The learned judge directed the verdict to be entered for the defendant, giving the plaintiff leave to move to enter a verdict instead thereof for him.

Within the time in that behalf allowed by the rules and practice of the said court, viz., on the 26th Jan. 1871, the plaintiff, in pursuance of the said leave so reserved at the said trial as aforesaid, applied for and obtained a rule nisi, calling upon the defendant to show cause why the verdict should not be set aside, and a verdict of 100*l.* be entered for the plaintiff instead thereof upon the ground that on the facts found by the jury, the verdict ought to be so entered; it having been found by them that the defendant kept open his house for dancing, not having a licence for that purpose under 25 Geo. 2, c. 36, s. 2.

Afterwards on the 6th July 1871, the said court made the said rule absolute.

The defendant now appealed from the said last mentioned decision and rule, pursuant to the provisions of the Common Law Procedure Act 1854.

Due notice of such appeal had been given, pursuant to the said Act, and an order of Mr. Justice Hannen made herein, dated 11th Dec. 1871, granting the necessary leave to appeal.

The question for the opinion of the court of appeal was whether the said rule of the 6th July 1871 ought to have been made upon the grounds therein stated, or whether the said previous rule to show cause dated the 26th Jan. 1871 ought to have been discharged.

The court of appeal to make such rule upon this appeal as it should think fit, and to proceed thereon pursuant to the provisions of the Common Law Procedure Act 1854.

The licence above-mentioned was as follows:

We, whose names are hereunto subscribed and set, being four of Her Majesty's justices of the peace for the county of Middlesex, assembled in the Michaelmas quarter sessions of the peace, holden in and for the said county, in the thirty-fourth year of the reign of our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, being the Michaelmas quarter sessions preceding the 1st Dec. 1870, do, in consequence of an order of this present session, and by virtue of the power given us by the Act of Parliament, made in 25 Geo. 2, intituled "An Act for the better preventing thefts and robberies, and for regulating places of publick entertainment, and punishing persons keeping disorderly houses;" hereby license George William Nugent to keep a certain house or place called the Royal Cambridge Music Hall, Commercial-street, with other buildings and appurtenances thereunto belonging, in the parish of Christchurch, in the said county, for public music. And the said George William Nugent is to take care, as far as in him lies, that no disorders be committed within the said house or place, and that nothing contrary to sobriety, decency, and good manners be exhibited, represented, or transacted therein, and that he do not suffer any of the aforesaid entertainments to very late and unreasonable hours of the night, and that he do not presume to open his said house on the Lord's Day (commonly called Sunday), Christmas Day, Ash Wednesday, Good Friday, nor on any day of solemn fast and humiliation, which now is or hereafter shall be by lawful authority appointed, and that he do in all things conduct the said house and place decently, soberly, and orderly, according to the true intent and meaning of this licence, and of the said Act of Parliament, provided, nevertheless, that the said George William Nugent, in order to giv, public notice that the said house or place is so licensed as aforesaid, do affix and keep up in some notorious place over the door or entrance thereof, an inscription in large capital letters in the words following: "Licensed pursuant to Act of Parliament of 25 Geo. 2nd." And provided likewise that the said house and place so licensed as aforesaid shall not open for any of the said purposes on any day whatever before the hour of five in the afternoon. Given under our hands and seals at the said sessions, and signed and sealed by us the said justices in open court.

HY. M. KEMSHEAD (L. S.).
THOS. JERVIS (L. S.).
J. J. MEEK (L. S.).
W. H. TWENTYMAN (L. S.).

The court has expressed a strong opinion of the impropriety of keeping open on Sunday the Saloon and other parts of the premises used for public amusements, and that such practice should be discontinued; and that the house should be used on Sundays only as a common tavern, if licensed as such.

This licence was endorsed—

The within licence is granted by authority of the Act of the 25 Geo. 2, c. 36, intituled "An Act for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses;" the second section of which Act directs that no fee or reward shall be taken for this licence.

Sect. 2 of the above mentioned Act is as follows:

And whereas the multitude of places of entertainment for the lower sort of people is another great cause of thefts and roberies, as they are thereby tempted to spend their small substance in riotous pleasures, and in consequence are put on unlawful methods of supplying their wants and renewing their pleasures: In order, therefore, to prevent the said temptation to thefts and robberies, and to correct as far as may be the habit of idleness which is become too general over the whole kingdom, and is productive of much mischief and inconvenience: Be it enacted by the authority aforesaid, that from and after the 1st Dec. 1752, any house, room, garden or other place kept for publick dancing, musick, or other publick entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace, to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place is situate (who are hereby authorised and empowered to grant such licences as they in their discretion shall think proper) signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place, and every such licence shall be signed and sealed by the said justices in open court, and afterwards be publickly read by the clerk of the peace, together with the names of the justices subscribing the same; and no such licence shall be granted at any adjourned sessions; nor shall any fee or reward be taken for any such licence; and it shall and may be lawful to and for any constable or other person, being thereunto authorised by warrant under the hand and seal of one or more of His Majesty's justices of the peace of the county, city, riding, division, or liberty where such house or place shall be situate, to enter such house or place, and to seize every person who shall be found therein, in order that they may be dealt with accord-

ing to law; and every person keeping such house, room, garden, or other place without such licence as aforesaid shall forfeit the sum of 100*l.* to such person as will sue for the same; and be otherwise punishable as the law directs in cases of disorderly houses.

By sect. 3—

Provided always, and it is hereby further enacted by the authority aforesaid, that in order to give public notice what places are licensed pursuant to this Act, here shall be affixed and kept up in some notorious place, over the door or entrance of every such house, room, garden, or other place, kept for any of the said purposes, and so licensed as aforesaid, an inscription in large capital letters in the words following, videlicet, "Licensed pursuant to Act of Parliament of 25 Geo. 2;" and that no such house, room, garden, or other place, kept for any of the said purposes, although licensed as aforesaid, shall be open for any of the said purposes before the hour of five in the afternoon; and the affixing and keeping up of such inscription as aforesaid, and the said limitation or restriction in point of time, shall be inserted in, and made conditions of, every such licence; and in case of any breach of either of the said conditions, such licence shall be forfeited, and shall be revoked by the justices of peace in their next general or quarter sessions, and shall not be renewed; nor shall any new licence be granted to the same person or persons, or any other person on his or their or any of their behalf, or for their use or benefit, directly or indirectly, for keeping any such house, room, garden, or other place, for any of the purposes aforesaid.

Day, Q.C. (with him *Bennett*) argued for defendant, the appellant.

Cole, Q.C. (with him *Thomas*) supported the judgment of the Queen's Bench.

Kelly, C. B.—In this case I am of opinion that the judgment of the court below should be affirmed. The action was brought under an Act of Parliament, about which I feel at liberty to say that the clauses are framed without that care and choice of language which it was the bounden duty of the Legislature to exercise in so important a matter as that of which it treats. When, however, I look at the provisions of the Act, I am unable to see any ground for a reasonable doubt of the propriety of the decision of the Queen's Bench. What are the words of the second section? "Any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind," "without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace," . . . "(who are hereby authorised and empowered to grant such licences as they in their discretion shall think proper)" . . . "shall be deemed a disorderly house or place." The question for us is whether, as the licence which was granted in this case only authorises the defendant to keep his house for public music, without the introduction of words which would authorise dancing, the Act is violated by the defendant's allowing public dancing in his house. It has been argued that this limitation of the licence is void, because the justices have no power to grant anything but a general licence for all the purposes mentioned in the section; that they have, in fact, granted a licence under this Act, and that the effect of such a licence cannot be restricted by unauthorised words inserted therein by the justices. It may be, however, that either this licence is void, or that the limitation to music is valid. I think, looking to the public interests, that our duty is to put such a construction upon the words of this section as to justify the granting of such licences, and for such purposes as the justices in their discretion shall think proper. I am of opinion that it is competent to the magistrates, under this Act, to grant a licence either for music or for dancing only. Looking at the general purview of the statute, and admitting that we must interpret its provisions strictly, being those of a penal statute, there can be no reasonable doubt that the Legislature intended the justices to have this power. Passing from the actual intention of the Legislature, let us consider the words of the Act. The purposes for which a house must be kept so as to make it a disorderly house are stated in the alternative in sect. 2; that, however, might perhaps leave it doubtful whether the justices might licence for either of those purposes without the others. But in the next section an inscription is directed to be affixed over the door or entrance of a house "kept for any of the said purposes;" and further on it is provided that no such house "kept for any of the said purposes" shall be open before five in the afternoon. These two expressions clearly contemplate a licence for part only of the purposes mentioned, and this seems to me to be the only reasonable construction of the Act. Moreover, the justices are expressly authorised and empowered to grant such licence as they in their discretion shall think proper. Taking with this the alternative expressions in the second and third sections, and applying the severest principles of criticism to the interpretation of the whole statute, it is impossible to conclude but that such a licence as this is within its provisions. It has been observed by counsel for defendant that the house was licensed, and that was all that people outside could know from the inscription; they would, therefore, be liable to seizure by the police if they entered the house whilst dancing was going on, although they reasonably believed that the law was duly observed. But no police could seize without a warrant, and that is a sufficient protection for innocent persons. I am of opinion that there can be no reasonable doubt that the defendant has committed an offence against this Act.

Martin, B.—I am of the same opinion, and I should think that if a licence for music only could not be granted, then this whole licence would be void. But in my judgment the Act says in sect. 2 that magistrates may grant a licence for either of these purposes only. Sect. 3 tends to the same conclusion, containing twice the expression "kept for any of the said purposes." The defendant kept this dancing room without a licence for that purpose.

Willes, Byles, Keating, and Brett, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiffs, *Webster* and *Graham*.
Attorney for defendant, *Thos. Beard*.

CROWN CASES RESERVED

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, April 27, 1872.

(Before Kelly, C.B., Willes, J., Cleasby, B., Grove and Quain, JJ.)

Reg. *v.* Watkinson.

Pleading — Indictment — Debtors' Act — Arrest of Judgment—32 *&* 33 *Vict. c.* 62, *s.* 19.

Quære—Whether the Court for the Consideration of Crown Cases Reserved can entertain a question

as to quashing an indictment, reserved at the trial.

The Debtors' Act (32 & 33 *Vict. c.* 62), *s.* 19, *enacts: That in indictments for offences under that Act it shall be sufficient to set forth the substance of the offence charged in the words of the Act, specifying the offence, "without setting out any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act,* 1860."

Held, that an indictment for misdemeanour framed upon sect. 11, *sub-sect.* 13 *of the Act, which enacts, "that if within four months next before the presentation of a bankruptcy petition, the trader by any false representation, or other fraud, has obtained any property on credit and has not paid for the same," which merely charged "that a bankruptcy petition was presented against the defendant to the County Court, &c., upon which the defendant was adjudged bankrupt, and that the defendant within four months before the presentation of the said petition did by certain false representations obtain from B. on credit, certain property, and has not paid for the same," was sufficient in arrest of judgment under the above Statute, and also under Peel's Act* (7 *Geo.* 4, *c.* 64), *s.* 20.

CASE reserved for the opinion of this Court by Quain, J.:—

Thomas Watkinson was convicted of a misdemeanor at the Spring Assizes for the West Riding of the county of York, holden at Leeds on the 21st March 1872. Sentence was postponed and the defendant was admitted to bail, in order that the opinion of the Court for Crown Cases Reserved should be taken on the following case:—

The prisoner was indicted under the Debtors' Act 1869, sect. 11, sub-sect. 13, for that he within four months next before the presentation of a bankruptcy petition against him by certain false representations did obtain property on credit and did not pay for the same.

He was also indicted in other counts of the same indictment, under the same Act, sect. 13, subsect 1, for that he did in incurring certain debts and liabilities obtain credit by false pretences.

The following is a copy of two of the counts of the indictment:

The other counts are similar, differing only in the names of the persons from whom the credit or property was obtained.

West Riding of Yorkshire, to wit,—The jurors for our lady the Queen, upon their oath present that on the 14th April 1871, a bankruptcy petition was presented against Thomas Watkinson, to the County Court of Yorkshire, holden at Bradford, and that upon such petition the said Thomas Watkinson was duly adjudged bankrupt by the court aforesaid, upon the 15th April in the year aforesaid, and that the said Thomas Watkinson within four months next before the presentation of the said bankruptcy petition against him, to wit, on the 20th Feb. 1871, did by certain false representations, obtain from one John Bryant on credit certain property, to wit, certain goods to the amount of 70*l.*, and that the said Thomas Watkinson has not paid for the same property, against the form of the statute in such case made and provided, and against the peace, &c.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Watkinson, on the 20th Feb. 1871, did in incurring certain debts and liabilities to the said John Bryant obtain credit from the said John Bryant under false pretences, against the form of the statute in such case made and provided, and against the peace, &c.

The counsel for the prisoner moved to quash the indictment on the ground that it was too vague and general. That it would enable the prosecution to prove under it any number of false representations and false pretences. That the counts should have been confined to one false representation or one false pretence. And that the false representations and false pretences, or some of them, ought to have been set out in the indictment, otherwise there would be a difficulty of pleading *autrefois convict* or acquit to such an indictment.

The counsel for the prosecution relied on the Debtors' Act 1869, s. 19, as justifying the form of the indictment. The learned judge reserved for the opinion of this court the question whether the above indictment ought to have been quashed.

Some discussion took place during the argument as to whether this court could entertain the question as left to them, but as Mr. Justice Quain reported that the real point raised was as to whether the indictment was good, the Court said the objection would be considered as taken in arrest of judgment.

T. Campbell Foster, for the prisoner.—The Debtors' Act 1869 (32 & 33 Vict. c. 62), s. 11, sub-sect. 13, enacts "that if within four months next before the presentation of a bankruptcy petition against any person, or the commencement of the liquidation, he by any false representation or other fraud has obtained any property on credit, and has not paid for the same, such person shall be deemed guilty of a misdemeanor." Sect. 19 provides that in an indictment for an offence under that Act it shall be sufficient to set forth the substance of the offence charged in the words of the Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act 1869." Under this section it is not sufficient to allege in such a general way as is done in this indictment, that the prisoner did "by certain false representations obtain property on credit and has not paid for the same." That is stating the character but not the substance of the offence. The case is similar to that of an indictment for perjury, in which by the 14 & 15 Vict. c. 100 s. 20, it is enacted that it shall be sufficient to set forth the substance of the offence charged. In that case it would be insufficient to allege merely "that the defendant committed perjury." In *Rex* v. *Perrott* (2 M. & S. 385) Lord Ellenborough said, "every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." The Legislature have so held, and have recorded their opinion to that effect in the case of perjury in stat. 23 Geo. 2, c. 11 (by which they relieved the party prosecuting from many of the forms theretofore incumbering the prosecution of that charge), when they enacted that it should be sufficient to set forth the substance of the offence charged together with the proper averments to falsify the matter wherein the perjury is assigned. The Legislature, when they so enacted, must have contemplated a form of prosecution in which the

lsely as a prefatory allegation was gene- not always used; and we must consider thinking that not a sufficient allegation to he matter without the proper averments." re merely that the defendant did by cer- se representations, obtain credit is simply the offence by its name. In *Rex* v. *Mason* 581) it was holden to be error merely to hat money was obtained by "false pre- without specifying them. In *Davy* v. 4 Burr. 2471) a declaration for a bribery was held bad in arrest of judgment, which alleged that the defendant "did receive a eward" in the words of the Act 2 Geo. 2, In *Reg.* v. *Bell* (12 Cox C. C. 37) a count he Debtors' Act 1869, s. 13, sub-sect. 1, simply that the defendant did obtain rom the prosecutor "by means of fraud an by false pretences," without setting out ns, was quashed, as being too general. The *Reg.* v. *Martin* (8 A. & E. 481); *Rex* v. (4 Camp. 494), were then cited.

y (*Wilberforce* with him) was not called argue.

r, C.B.—It might be doubtful whether this as power to quash an indictment, and I opinion on that point, but upon the report learned judge we may treat the point as upon a motion in arrest of judgment. If necessary to rely upon authority we have look to the cases of *Reg.* v. *Blake* (6 Q. B. d *Reg.* v. *Mulready*, which are fatal to the n taken upon this indictment in arrest of it. It may be that at common law, and sect. 19 of the Debtors' Act, an objection ave been made effectually to the indict- ut the answer to the objection is clear ct. 19. The question is whether it is suffi- sustain the indictment that the offence be set forth in the words of the Act. e Legislature really meant to enact was should be unnecessary to set out the pro- in bankruptcy. It is quite sufficient in he offence to adopt the words of the Act. ain, Peel's Act (7 Geo. 4, c. 64), s. 20, is clusive against the objection taken in judgment, as the offence is described in ds of the Act. The objection, therefore,

st of the court concurring,

Conviction affirmed.

Saturday, June 1, 1872

BOVILL, C.J., BRAMWELL, B., and BYLES, BLACKBURN, and MELLOR, JJ.)

REG. *v.* MARTIN AND WEBB.

anor—Jurisdiction to allow jury to view us in quo—Witnesses accompanying jury—asking questions of witnesses during the Mistrial—Venire de novo.

trial of an indictment for indecent exposure inal the court of quarter sessions may allow y to have a view of the locus in quo during gress of the trial.

indiscreet to allow the witnesses to accom- he jury in the absence of the prisoner or his te, or the presiding judge.

hether, if the facts have been examined into court, and are properly stated on record, the an order a venire de novo where the wit- nesses accompany the jury and are asked by them to point out the precise spot where they stood and saw what they had stated they saw.

But if the case sent up to the court merely states that the court below "has been informed" that the circumstances specially set forth took place, this court will not act upon such statement.

CASE reserved for the determination of the Court for Consideration of Crown Cases Reserved, by Mr. Serjt. Cox, the Deputy-Assistant Judge, at the Middlesex sessions.

The prisoners were indicted at the quarter sessions of the county of Middlesex, held on the 6th May 1872, first, for indecent exposure in a public place, and, secondly, for inciting each other to sodomy.

The case for the prosecution was proved by two policemen, John Tunbridge and Thomas Hunt.

At six o'clock in the evening of the 23rd April, Tunbridge was on duty in St. James's-park. He saw the prisoner Webb (who was well known to him as a frequenter of urinals) lurking about one of the urinals in the park, and going in and out of it repeatedly. His suspicions being roused, he hid himself and watched. Soon afterwards he saw the prisoner Martin go in, upon which he crept up behind the urinal, and, looking through the bars in the back wall, he saw the prisoners in the act of exposing and handling the private parts of each other. He beckoned to Hunt, who came to the same spot, and witnessed the same proceeding on the part of the prisoners.

The defence was that from the position in which the witnesses stood and that in which the prisoners were described as standing, it was impossible for the witnesses, looking through the bars of the urinal, to have seen so far down the persons of the prisoners as to have beheld the filthy act and exposure which they had described.

The prisoner Martin was defended by counsel.

The prisoner Webb was undefended.

After I had summed up the case, and while the jury were deliberating, they put some further questions to the witnesses as to their respective positions, and then the jury stated that it was very difficult to come to a decision without viewing the urinal, and ascertaining by personal inspection if the witnesses could have seen what they had asserted, and they asked permission to view the *locus in quo*. Martin's counsel had then left the court. No objection to compliance with this request of the jury was made by either of the prisoners or on their behalf.

In the absence of Martin's counsel I requested that his solicitor would accompany the jury on the view, and he also being absent, the view was attended by the solicitor's clerk. The jury inspected the urinal, and there, *as I am informed*, asked the witnesses to point out the precise spot on which they had stood and the place and the position in which the prisoners were standing, and then the jury placed themselves in the same position, and looked through the bars.

On the return of the jury to the court the counsel for the prisoner Martin had left the court, but his solicitor, or the clerk who had attended the view, or both, were present. No application was made by either of the prisoners, or on behalf of either of them, to be allowed to make any further comments to the jury on the proceedings at the view. I asked the jury if they required any further observations or information from me.

On their answering in the negative I directed them to retire and consider their verdict. After a short consultation they found both the prisoners guilty, and they were sentenced severally to nine months' imprisonment with hard labour.

The counsel for the prisoner Martin has applied for a case for the opinion of this Honourable Court, on the ground that there had been a mistrial, first by reason of a view having been permitted to the jury after the summing up by the judge; and secondly, by reason of the jury having at such view put some questions to the witnesses which were not heard by the judge or by the prisoners, and upon which the undefended prisoner and the counsel for the defended prisoner had not been expressly called upon to comment to the jury.

The question for the opinion of this Honourable Court is, whether, under the circumstances above stated, there has been a mistrial. If it be the opinion of the Court that there has been a mistrial, then that a *venire de novo* should issue, or such other judgment be given as the court may determine. (Signed)

EDW. WM. COX,
Deputy-Assistant Judge of Middlesex.

No counsel appeared for the prisoners.

Harris for the prosecution.—First, as to the power of the court to authorise the jury to view in a case of misdemeanor. There is no express authority against it, and it has often been done. [BLACKBURN, J.—On the trial of the Fenians at Manchester for shooting the policeman, I sent the jury out to view the police van in order that they might the better estimate the evidence that bore on it. The men were convicted and hanged. No one made any objection. We had no more power, though sitting under a special commission than any other judge presiding at a criminal trial. MELLOR, J.—In that case no witness was allowed to accompany them. Here the policemen who were witnesses accompanied the jury, and pointed out the place.] In *Reg.* v. *Hatchley* (1 Sess. Cases, 180), a *certiorari* to remove an indictment for stopping a watercourse into the Court of Queen's Bench was obtained in order that a view might be had, and the reason assigned was that without the consent of the prosecutors, a view could not be had on any indictment found at the assizes. [BOVILL, C.J.—At the last Surrey Spring Assizes at the trial of an indictment for a nuisance, the judge and jury went from Kingston to Bermondsey to have a view of the premises after the trial had been on for three days. That, no doubt, was a case where the indictment was removed from sessions to the Queen's Bench by *certiorari*.] There is no statute which deprives the court of any power it may have to direct a view. Secondly, as to the jury receiving evidence during the view, all that was done was that the jury asked the constables to point out the precise spot where they stood. That is not equivalent to putting questions on a trial. [MELLOR, J.—The two constables were the witnesses. The whole value of their testimony may have depended on their giving correct answers as to the place where they stood. BLACKBURN, J.—It was indiscreet to allow the witnesses to accompany the jury, but I am not aware that what was done renders the verdict void in law. BRAMWELL, B.—If the jury by *themselves* had gone to view the place during *luncheon time*, there would have been no harm in it, but the difficulty arises from the witnesses going with them, and pointing out the spot. What authority is there for our ordering a *venire de novo*?] In *Reg.* v. *Yeadon* (Leigh and Cave, 81; 9 Cox, C. C. 91), this court held that there had been a mistrial, and awarded a *venire de novo*. The following authorities were also cited:

2 Tidd's Pract. 922;
Witham v. *Lewis*, 1 Wils. 48;
Rex v. *Fowler*, 4 B. & Ald. 273.

The Judges retired to consider the case, and on returning into court,

BOVILL, C. J. said:—The first objection to the conviction was, that the jury were permitted to view the urinal after the summing-up of the learned judge. We are unanimously of opinion that there was no irregularity, and no impropriety in the learned judge allowing the jury to have that view. It must always be discretionary on the part of the juudge to allow a view, and he should grant it with proper caution to the jury not to receive any communications from the witnesses or otherwise whilst having the view. As to the jury, while they were having the view, asking the witnesses to point out the precise spot on which they had stood, and the place and the position in which the prisoners were standing, there appears to have been no examination by the court below into these facts. It is, therefore, impossible to reverse the conviction on the statement in the case which may be mere hearsay information or mere report. If this had been examined into by the court and stated as fact on the case, a very serious question would have arisen as to whether a *venire de novo* could have been granted, or whether it would have been ground only for an application to the Home Secretary: (*Reg.* v. *Murphy*, 6 Moo. P. C. C., N. S., 177.) (*a*) The case of *Graves* v. *Short* (Cro. Eliz. 616) does not appear to have been cited in *Reg.* v. *Murphy*. Another serious question would arise as to whether this was a matter open on the record, or within the jurisdiction of this court. On this point *Reg.* v. *Mellor* (27 L. J. 121, M. C.; 7 Cox. C. C. 454), has some bearing. As the case now stands we have no alternative but to confirm the conviction, but this will not prevent the prisoner from suing out a writ of error. If the case had come before the

(*a*) *Reg.* v. *Murphy*. The marginal note is this:—A prisoner having been tried and convicted of a capital felony by a Court of Oyer and Terminer in New South Wales, and sentence of death passed, and the judgment entered upon the record, an application was made to the Supreme Court sitting in banco for a *venire de novo*, on an affidavit which stated that one of the jury had informed the deponent that, pending the trial, and before the verdict, the jury, having adjourned to an hotel, had access to newspapers which contained reports of the trial as it proceeded with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mistrial, and ordered an entry to be made on the record of the circumstances deposed to; that the judgment on the verdict should be vacated, and a fresh trial had: Held (on appeal to the Privy Council), acting on *Reg.* v. *Bertrand* (4 Moo. P. C. C., N. S., 460): First, that the discretionary power of the Supreme Court to grant new trials does not extend to cases of felony, and that a *venire de novo* cannot be awarded after verdict upon a charge of felony tried upon a good indictment by a competent tribunal; secondly, that if a *venire de novo* could be awarded upon an application by way of error on appeal, the proceeding in the Supreme Court was defective in form, and not warranted by the suggestion on the record; thirdly, that the order for vacating the judgment, and for a venire de novo must be reversed.

court on a writ of error in its present state, the court must have acted as we have done. We cannot send the case down to be restated, as appears from the observations of Popham, C.J. in *Groves* v. *Short*. (a)

Conviction affirmed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 21 *and Dec.* 2, 1871; *June* 8, 1872.

(Present at the hearing of the appeal — The Right Hons. the LORD CHANCELLOR, the ARCHBISHOP of YORK, the BISHOP of LONDON, Lord ROMILLY, M.R., Sir JAMES W. COLVILE, Sir JOSEPH NAPIER, Lord Justice JAMES, Lord Justice MELLISH, MONTAGUE BERNARD, Sir MONTAGUE SMITH.)

SHEPPARD *v.* BENNETT.

Heresy—Communion—Real presence — Sacrifice—Adoration of Christ present in the elements—Retractation before suit—Practice—Appeal to the Privy Council on orders to reform pleadings.

In proceedings against the respondent, a clergyman, for heresy in having published certain doctrines with respect to the Holy Communion:

Held (*affirming the judgment of the Court of Arches*):

(1.) *That to maintain a "real, actual, and objective" presence in the Sacrament under the form of bread and wine is a position not contradictory or repugnant to anything in the articles or formularies of the Church.*

(2.) *That to maintain that the Communion table is an altar of sacrifice, at which the priest appears in a sacerdotal position at the celebration of the Communion, and that at such celebration there is a great sacrifice or offering of Christ by the ministering priest, in which the mediation of Christ ascends from the altar to plead for the sins of men, is not necessarily such a use of the word "sacrifice" as to contravene the* 31*st Article of Religion.*

(3.) *That to teach "adoration of Christ present in the Sacrament, under the form of bread and wine," is not so clearly heresy as to make a clerk liable to penal proceedings; since the words do not necessarily imply any adoration of the consecrated elements, or of any corporal or natural presence therein.*

The respondent, in the second edition of a book, used expressions in contravention of the formularies of the Church. In a third edition, published before suit, the respondent so altered the statements made in the second edition as to free them from heresy. The second and third editions of the book were the subject of the charges against the respondent.

Held, that, without regarding the alterations made as a retractation, it was competent for the court to take the altered language into consideration as an explanation by the accused of the language before used by him, and to accept the later words as a correct expression of the accused's meaning, if such explanation appeared to be made bonâ fide and to be entitled to credit.

Where an appeal is presented to the Privy Council from an order of the court below, directing a reformation of articles of charge or other pleadings, the actual reformation which appears to the judge to be required, should, in future, for convenience sake, be made by him on the face of the order, so that on appeal the very passages omitted may be clearly brought under the notice of the Judicial Committee instead of an order directing, by general reference only, the nature of the alteration required.

THIS was an appeal from a judgment of the Court of Arches in favour of the respondent: (23 L. T. Rep. N. S. 399; L. Rep. 3 Adm. & Eccl. 167.)

The nature of the charges against the respondent are stated in the judgment (*post*), and appear further in the reports of the suit at earlier stages: (see 20 L. T. Rep. N. S. 623, 762; 23 L. T. Rep. N. S. 145.)

A. J. Stephens, Q.C., *Tristram*, *Archibald*, and *Shaw* for the appellant.

The respondent did not appear.

Judgment was delivered by the LORD CHANCELLOR.—This is an appeal from the final sentence or decree pronounced by the dean of the Arches Court of Canterbury on the 23rd July 1870, and also from two interlocutory orders made by the same judge, in a cause of the office of the judge promoted by Thomas Byard Sheppard, the appellant, against the Rev. William James Early Bennett, vicar of the parish of Frome Selwood, in the diocese of Bath and Wells, the respondent, for having offended against the laws ecclesiastical by having within two years from the date of the institution of the cause, caused to be printed and published certain works in which he is alleged to have advisedly maintained or affirmed doctrines directly contrary or repugnant to the articles and formularies of the united Church of England and Ireland in relation to the Sacrament of the Lord's Supper, such works being entitled respectively, "Some Results of the Tractarian Movement of 1833," forming one of the essays contained in a volume entitled "The Church and the World," edited by the Rev. Orby Shipley, clerk, printed and published in London in the year 1867: "A Plea for Toleration in the Church of England, in a Letter addressed to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Christ Church, Oxford, 2nd edition," printed and published in London in the year 1867; and "A Plea for Toleration in the Church of England, in a Letter to the Rev. E. B. Pusey, D.D., Regius

(a) *Groves* v. *Short* was an issue on a writ of formedon, and the jury retired to consider their verdict. One of the jurors, while they were in their room, showed to his fellow jurymen an escrow and writing, *pro petentibus quod non fuit dat* in evidence, *per quod* they found for the defendant. Upon this error assigned it was demurred in law. The court resolved that it could not be any error. They also held that if this was cause to avoid a verdict, if it had been so found by examination as they conceive it was not, yet in regard it was not examined nor made parcel of the record it cannot be assigned for error. For Popham said the trial hereof rests only on the examination and it shall not be *per pais*, as nonage shall only be by inspection to avoid a fine, so this matter should to avoid the verdict. For if so, then every verdict upon such a surmise might be drawn in question and peradventure after the parties be dead, and all the jurors be dead, so as they cannot be examined, which would be a great inconvenience. And therefore they held that such a cause of staying the judgment ought to be always, if it be upon verdict at the Nisi Prius, upon the *postea* returned; and if it be upon verdict *in banco*, it ought to be made parcel of the record, otherwise the party shall not take advantage of staying the judgment or of assigning for error.

Professor of Hebrew, and Canon of Christ Church, Oxford, 3rd edition," printed and published in London in the year 1868. The cause was instituted in the Arches Court of Canterbury by virtue of letters of request of the late Lord Bishop of Bath and Wells, in accordance with the provisions of the Act 3rd and 4th of the Queen, c. 86: (see 20 L. T. Rep. N. S. 623, where the letters of request are set out.) The respondent was duly cited on the 26th of July 1869. No appearance was given to the citation, and in default of appearance articles were filed in accordance with the practice of the court. On the 30th Oct. 1869 the judge, having previously heard counsel on behalf of the appellant, directed the articles to be reformed by omitting such parts thereof as charge the respondent with contravening the 29th Article of Religion, entitled "Of the wicked which eat not the body of Christ in the use of the Lord's Supper." From such decree or order, a petition of appeal was presented, with the permission of the judge, and the appeal came before the Judicial Committee of the Privy Council on the 26th March 1870, when the Lords of the Committee, having heard counsel on behalf of the appellant, agreed to report to her Majesty their opinion against the appeal, and that the decree or order appealed from ought to be affirmed, and the cause remitted, with all its incidents, to the judge of the court from which the same was appealed: (see 23 L. T. Rep. N. S. 145.) An Order in Council, confirming the report of the Judicial Committee, was afterwards made. The cause was accordingly remitted to the Arches Court of Canterbury, and on the 3rd June 1870, in default of appearance on the part of the respondent, the judge of the court, having heard counsel on behalf of the appellant, himself reformed the articles, and admitted the same as so reformed, notwithstanding that the counsel for the promoter objected to the reformation of the articles so made by the judge as being at variance with and exceeding the reformation directed by the order of the 30th Oct. 1869. On the 16th June 1870 the cause came on for hearing, and an application was then made by counsel that the passages in the 5th, 6th, 7th, and 32nd articles, which had been struck out by the judge in his reformation of the articles, on the 3rd June, might be reinstated. The judge, however, made no further order thereon, and the hearing of the cause was continued. On the 23rd July 1870 the judge, by his interlocutory decree, having the force and effect of a definitive sentence in writing, pronounced that the proctor for the appellant had failed in sufficiently proving the articles, and dismissed the respondent from the suit: (see 23 L. T. Rep. N. S. 399.) The present appeal is from so much of the interlocutory decree or order of the 3rd June 1870 as in effect directs the passages in the 5th, 6th, 7th, and 32nd articles to be struck out; also from the interlocutory decree or order of the 16th June 1870, whereby, in effect, the judge declined to allow such passages to be reinstated, and from the final sentence or decree of the 23rd July 1870. The respondent has not appeared upon the hearing of the appeal, and the court has not had that assistance from the argument of counsel in his behalf which is specially desirable in cases like the *present*, where the Committee are called upon to *advise her* Majesty on matters of grave importance as a tribunal of ultimate appeal. The counsel for the appellant first opened the appeal from the interlocutory order of the judge of the 3rd June, 1870, whereby he adhered to the reformation that he had made in the 5th, 6th, 7th, and 32nd articles of charge. With regard to the reformation of the articles, the course originally taken seems to be sanctioned by usage; but it appears to their Lordships to be a course attended with considerable inconvenience, and one which might lead to great delay, if not to a miscarriage. The original order of the Arches Court directed the articles of charge to be reformed, by omitting all such parts thereof as charged the respondent with contravening the 29th Article of Religion, ad this order was affirmed on appeal, on the recommendation of this Committee. The form of the order leaves open to further determination by the court what parts of the articles of charge do, in effect, charge the respondent with contravening the 29th Article of Religion, and thus opens the door to further discussion and (as in this case) to a further appeal. In the meantime the judge himself strikes out such parts of the articles of charge as he conceives to be within the previous order of the court, and then proceeds to hear the cause with the record so altered. If he should have erroneously struck out parts not affected by the order, the attention of the accused, in his answer or evidence, will not have been called to the parts struck out, for he would be entitled to consider them as no longer forming part of the charge; but if the promoter, on appeal, should succeed in restoring the passages in question, it would obviously become necesary to allow the respondent an opportunity of meeting the restored charges. In the present case their Lordships have thought it best to allow the appellant to conduct his argument as, if the passages which he avers should not have been struck out still remained part of the record, and to found any argument upon such passages as he might be advised, provided the argument did not seek to establish a contravention by the respondent of the 29th Article of Religion. But their Lordships think it right to observe that it would be proper, in future, that before any appeal be presented to Her Majesty in Council, in respect of an order directing the reformation of articles of charge or other pleadings, the actual reformation which appears to the judge to be required, should be made by him on the face of the order, so that on appeal the very passages omitted should be clearly brought under the judgment of this committee, instead of an order directing, by general reference, the nature of the alteration required. On proceeding to the consideration of the appeal from the final decree of the Court of Arches, there is one point which was prominently brought forward in the opening of the case by the counsel for the appellant, which it appears to their Lordships may be separately disposed of. The articles of charge set forth several passages from the second and third editions of a work published by the respondent, called "A Plea for Toleration in the Church of England, in a letter to the Rev. E. B. Pusey." Now, the second edition of this work was published in 1867, and the third edition in 1868. The third edition contains important corrections of expressions in the second edition, which expressions form part of the charge against the respondent. The original expressions and their correction are fairly stated and set forth by the

appellant in the seventh article of charge. The learned judge, in the court below (23 L. T. Rep. N. S. 408), has stated that he has no doubt that the expressions originally used by the respondent, viz., "the real actual and visible presence of the Lord upon the altars of our churches," and again, "Who myself adore and teach the people to adore the consecrated elements, believing Christ to be in them—believing that under their veil is the sacred body and blood of our Lord and Saviour Jesus Christ,"—"contravened the plain and clear intent of the formularies of the church." And the learned judge has also set forth the alteration of these statements made in the third edition of the respondent's work, and on the passages so altered has found that the respondent has not been guilty of a contravention of the Articles as alleged by the promoter. Mr. Bennett's own words, in adopting the altered words, are as follows:—"My meaning and that which passed through my mind in writing the original passages was precisely the same as that which is now conveyed in the words substituted, but as the original words were liable to a different construction from that in which I used them, I therefore most willingly in this edition adopt another formula to express my meaning." The learned judge has (23 L. T. Rep. N. S. 408) regretted that these alterations made by Mr. Bennett in his third edition are unaccompanied by any expression of regret or self-reproach on the respondent's part for the mischief which his crude and rash expressions have caused. Their Lordships feel obliged to adopt the censure of the learned judge on this point. Upon this state of facts the learned counsel urged that there had been no retractation of the original user, and that, in default of actual retractation, the learned judge should have condemned the respondent in respect of the words used by him in the second edition of his work, though varied by the substituted words in the third edition, and he cited several authorities for the purpose of supporting this argument. But, without regarding the respondent's language as a retractation, their lordships think that it is competent for them to take into consideration any explanation that an accused person may give of the language used by him, and to determine whether such explanation is made *bonâ fide* and is entitled to credit. They attach great importance to the fact that the third edition was published before suit, and they think that they may accept his latter words as the more correct expression of the respondent's meaning. In proceeding to consider the substance of the charges against the respondent, their Lordships think it desirable to recall to mind the principles on which former decisions in similar cases have proceeded. In the cases of *Williams* and *Wilson* (2 Moo. P. C. N.S. 423; 9 L. T. Rep. N.S. 787), their Lordships laid down as follows: "These prosecutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation. The articles of charge must distinctly state the opinions which the clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and further, the articles must specify the doctrines of the Church which such opinions or teaching of the clerk are alleged to contravene, and the particular Articles of Religion or portions of the formularies which contained such doctrines. The accuser is, for the purpose of the charge, confined to the passages which are included and set out in the articles as the matter of the accusation; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser." So in the judgment in the *Gorham case* (Moo. Spec. Rep. 470). "The question which we have to decide is not whether the opinions are theologically sound or unsound, not whether upon some of the doctrines comprised in these opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the Church; but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its Articles, formularies, and rubrics, requires to be held by its ministers, so that upon the ground of those opinions the appellant can lawfully be excluded from his benefice." . . . . "This question must be decided by the Articles and the Liturgy; and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed." . . . . "There were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which ther may be supposed to have been influenced, or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the discussion which took place; not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected." . . . . "This court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any case to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England upon the true and legal construction of the Articles and formularies." Lord Stowell had long before said, in the case of *King's Proctor* v. *Stone* (1 Consist. 428), "If any Article is really a subject of dubious interpretation, it would be highly improper for the court to fix on one meaning and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them." To the principles thus laid down their Lordships will adhere in the present case. The attention of the court has been directed to the successive revisions of the Book of Common Prayer, and to alterations or omissions which have been made in it at different times. Changes by which words or

passages inculcating particular doctrines, or assuming a belief in them, have been struck out, are most material as evidence that the Church has deliberately ceased to affirm those doctrines in her public services. At the same time it is material to observe that the necessary effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them. In the public or common prayers and devotional offices of the Church all her members are expected and entitled to join; it is necessary, therefore, that such forms of worship as are prescribed by authority for general use should embody those beliefs only which are assumed to be generally held by members of the Church. In the case of *Westerton* v. *Liddell* (and again in *Martin* v. *Mackonochie*) their Lordships say, "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be allowed:" (19 L.T. Rep. N. S. 505.) If the minister be allowed to introduce at his own will variations in the rites and ceremonies that seem to him to interpret the doctrine of the service in a particular direction, the service ceases to be what it was meant to be, common ground on which all Church people may meet, though they differ about some doctrines. But the Church of England has wisely left a certain latitude of opinion in matters of belief, and has not insisted on a rigorous uniformity of thought which might reduce her communion to a narrow compass. Dealing only with the third edition of the respondent's work, and having regard to their former decision, that the charge of contradicting the 29th Article of Religion as to reception by the wicked should be struck out, their Lordships may consider the remaining charges against the respondent under three heads—first, as to the presence of Christ in the Holy Communion; secondly, as to sacrifice in the Holy Communion; thirdly, as to adoration of Christ present in the Holy Communion. The respondent is charged with maintaining under these three heads the following propositions: First, that in the Sacrament of the Lord's Supper there is an actual presence of the true body and blood of our Lord in the consecrated bread and wine, by virtue of and upon the consecration, without or external to the communicant, and irrespective of the faith and worthiness of the communicant, and separately from the act of reception by the communicant; and it was contended by counsel under this head that the true body of Christ meant the natural body; secondly, that the Communion Table is an altar of sacrifice, at which the priest appears in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering priest, in which the mediation of our Lord ascends from the altar to plead for the sins of men; thirdly, that adoration is due to Christ present upon the altars or communion tables of the churches, in the Sacrament, under the form of bread and wine, on the ground that under their veil is the body and blood of our Lord. The several positions so maintained are averred, each and all, to be repugnant to the doctrines of our Church, as set forth in the Articles and formularies in that behalf specially alleged. Their Lordships are bound to consider, in the first place, what has been affirmed and what has been denied, in reference to the doctrine to which these three statements relate. The 4th Article of Religion affirms, first, that Christ did truly rise from death and took again His body, with flesh and bones and all things appertaining to the perfection of man's nature, wherewith He ascended into Heaven; and there sitteth until He return to judge all men at the Last Day. In the 28th Article of Religion it is affirmed, first, "The Supper of the Lord is not only a sign of the love that Christians ought to have among themselves, one to another, but rather is a Sacrament of our redemption by Christ's death: insomuch that to such as rightly, worthily, and with faith receive the same, the bread which we break is a partaking of the body of Christ, and likewise the cup of blessing is a partaking of the blood of Christ;" secondly, "Transubstantiation (or the change of the substance of bread and wine) in the Supper of the Lord cannot be proved by Holy Writ; but is repugnant to the plain words of Scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions;" thirdly, "The Body of Christ is given, taken, and eaten in the Supper only after an heavenly and spiritual manner;" fourthly, "The mean whereby the body of Christ is received and eaten in the Supper, is faith;" fifthly, "The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." By the 29th Article of Religion it is affirmed, sixthly, "The wicked and such as be void of a lively faith, although they do carnally and visibly press with their teeth (as St. Augustine saith) the Sacrament of the body and blood of Christ, yet in no wise are they partakers of Christ; but rather to their condemnation do eat and drink the sign or sacrament of so great a thing." By the 31st, it is affirmed, seventhly, "The offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual; and there is none other satisfaction for sin, but that alone;" and eighthly, "The sacrifices of masses, in the which it was commonly said that the priest did offer Christ for the quick and the dead to have remission of pain or guilt were blasphemous fables and dangerous deceits." 9. In the Catechism it is stated that the body and blood of Christ are verily and indeed taken and received by the faithful in the Lord's Supper." Their Lordships proceed, with these passages before them, to examine the charges made against the respondent.

I. The first relates to the presence of the body and blood of Christ in the Holy Communion. The Church of England, in the passages just cited, holds and teaches affirmatively that in the Lord's Supper the body and blood of Christ are given to, taken, and received by the faithful communicant. She implies, therefore, to that extent, a presence of Christ in the ordinance to the soul of the worthy recipient. As to the mode of the presence, she affirms nothing, except that the body of Christ is "given, taken, and eaten in the supper only after an heavenly and spiritual manner," and that "the mean whereby the body of Christ is received and eaten is faith." Any other presence than this—any presence which is not a presence to the soul of the faithful receiver—the Church does not by her Articles and formularies affirm or require her

ministers to accept. This cannot be stated too plainly. The question is, however, not what the Articles and formularies affirm, but what they exclude. The respondent maintains a presence which is (to use his own expression) "real, actual, objective," a presence in the sacrament, a presence upon the altar, under the form of bread and wine. He does not appear to have used the expression "in the consecrated elements" in his third edition; this is one of the points on which the language of the second edition was altered. And the question raised by the appeal is, whether his position is contradictory or repugnant to anything in the Articles or formularies, so as to be properly made the ground of a criminal charge. Setting aside the declaration at the end of the Communion office, which will be presently considered, we find nothing in the Articles and formularies to which the respondent's position is contradictory or repugnant. The statement in the 28th Article of Religion that the body of Christ is given, taken, and eaten in the Lord's Supper, only after a heavenly and spiritual manner, excludes undoubtedly any manner of giving, taking, or receiving which is not heavenly or spiritual. The assertion of a "real, actual, objective" presence, introduces, indeed, terms not found in the Articles or formularies; but it does not appear to affirm, expressly or by necessary implication, a presence other than spiritual, nor to be necessarily contradictory to the 28th Article of Religion. The 29th Article of Religion, which is entitled "of the wicked which eat not the body of Christ in the use of the Lord's Supper," and which affirms that the wicked and such as be void of a lively faith "are in no wise partakers of Christ," may suggest, indeed, an inference unfavourable to the respondent's statements, but cannot be said to be plainly contradictory of them or necessarily to exclude them. The two propositions, that the faithful receive Christ in the Lord's Supper, and that the wicked are in no wise partakers of Christ, when taken together, do not appear to be contradicted by the statement that there is a real, actual, objective presence of the body and blood of Christ in the sacrament after a heavenly and spiritual manner. The "Declaration of Kneeling" should now be considered. It is as follows: Whereas, it is ordained in this office for the administration of the Lord's Supper, that the communicants should receive the same kneeling (which order is well meant for the signification of our humble and grateful acknowledgment of the benefits of Christ therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the Holy Communion as might otherwise ensue), yet, lest the same kneeling should by any persons, either out of ignorance or infirmity, or out of malice and obstinacy, be misconstrued and depraved, it is hereby declared, that thereby no adoration is intended, or ought to be done either unto the sacramental bread or wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood, for the sacramental bread and wine remain still in their very natural substances, and therefore, may not be adored (for that were idolatry, to be abhorred of all faithful Christians), and the natural body and blood of our Saviour Christ are in heaven, and not here; it being against the truth of Christ's natural body to be at one time in more places than one." This declaration originally appeared in the second Prayer Book of Edward VI., A.D. 1552, in which book the position of kneeling was positively enjoined upon those who received the Sacrament. It was issued by the king, and was ordered by the council to be appended to the Prayer Book, but after the book had received the sanction of Parliament, so that it was not of statutory authority. From the Prayer Book of Elizabeth (1559) the declaration was omitted. In 1662 it was inserted in the present Prayer Book, and became of equal authority with the rest of the Prayer Book. The form of the declaration was somewhat altered; the words "Unto any real and essential presence there being of Christ's natural flesh and blood" were altered to "unto any corporal presence of Christ's natural flesh and blood," and the words "true natural body" became "natural body." It was urged for the appellant that, since the Church recognises only one body of Christ, the natural and now glorified body which is spoken of in the 4th Article of Religion, and since the declaration asserts that this body is "in heaven and not here," the only presence in the Sacrament which can be held consistently with the declaration is a presence to the soul of the communicant. It was insisted that the word "natural" applied to the body of Christ can convey no additional meaning, unless it be used to distinguish the true body of Christ, which is His natural body, from the Church, which is His body in a mystical or figurative sense; and that the expression "corporal presence" cannot mean a presence in the manner or under the conditions in and under which material bodies are present or exist in space; that it must mean or include any presence whatever in the elements, as contra-distinguished from a presence to the spiritual apprehension of the receiver. There can be no question, it was argued, as to the mode or manner of the presence; for no mode or manner of presence is conceivable which would reconcile the proposition that the true body of Christ is in the elements, with the proposition that the natural body is in heaven and not here. Their Lordships are of opinion that these inferences, whether probable or not, are by no means of that plain and certain character which the conclusion they are asked to draw from them requires. The matters to which they relate are confessedly not comprehensible, or very imperfectly comprehensible, by the human understanding; the province of reasoning as applied to them is therefore very limited; and the terms employed have not, and cannot have, that precision of meaning which the character of the argument demands. Concerning the mode of reception of the body and blood of Christ by the faithful communicant, the Church affirms nothing more than that it is heavenly and spiritual, and that the mean whereby we receive is faith. Nor can their Lordships accede to the argument that the words "corporal presence of Christ's natural flesh and blood" must be understood as the appellant understands them, and the phrase "corporal presence" regarded merely as an equivalent for the different expression in lieu of which it was substituted. On the contrary, it is at the least probable that, as the declaration itself was introduced in order to facilitate scruples in one quarter, the alteration made in it was designed to remove objections entertained against it in another. Their Lordships could not advise the condemnation of a clergyman for maintaining that the use in 1662 of the word "corporal" instead of the words "real and essential" in the declaration of

kneeling was an intentional substitution, implying that there may be a real or essential presence as distinguished from a corporal presence. The respondent has nowhere alleged in terms a corporal presence of the natural body of Christ in the elements; he has never affirmed that the body of Christ is present in a "corporal" or "natural" manner. On the contrary, he has denied this, and he speaks of the presence in which he believes as "spiritual," "supernatural," "sacramental," "mystical," "ineffable."

II. The next charge against the respondent is, that he has maintained that the Communion Table is an altar of sacrifice, at which the priest appears in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering priest, in which the mediation of our Lord ascends from the altar to plead for the sins of men. The Church of England does not by her Articles or formularies teach or affirm the doctrine maintained by the respondent. That she has deliberately ceased to do so would clearly appear from a comparison of the present Communion Office with that in King Edward's First Book, and of this again with the canon of the mass in the Sarum missal. This subject was fully discussed before their Lordships in *Westerton* v. *Liddell*, when it was decided that the "change in the view taken of the sacrament naturally called for a corresponding change in the altar. It was no longer to be an altar of sacrifice, but merely a table at which the communicants were to partake of the Lord's Supper." The 31st Article of Religion, after laying down the proposition (which is adopted also, in words nearly the same, in the Prayer of Consecration), that "the offering of Christ once made, is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual," and that "there is none other satisfaction for sin but that alone," proceeds, on the strength of these propositions, to say that "the sacrifices of masses, in the which it was commonly said that the priest did offer Christ for the quick and the dead to have remission of pain or guilt, were blasphemous fables and dangerous deceits." It is not lawful for a clergyman to contradict expressly or by inference, either the proposition which forms the first part of this Article, or any proposition plainly deducible from the condemnation of propitiatory masses which forms the second part of it, and is stated as a corollary to the first. It is not lawful for a clergyman to teach that the sacrifice or offering of Christ upon the cross, or the redemption, propitiation, or satisfaction wrought by it, is or can be repeated in the ordinance of the Lord's Supper; nor that in that ordinance there is or can be any sacrifice or offering of Christ which is efficacious in the sense in which Christ's death is efficacious, to procure the remission of the guilt or punishment of sins. It is well known, however, that by many divines of eminence, the word sacrifice has been applied to the Lord's Supper in the sense not of a true propitiatory or atoning sacrifice, effectual as a satisfaction for sin, but of a rite which calls to remembrarce and represents before God that one true sacrifice. To take one example, Bishop Bull *says*:—"In the Eucharist then Christ is offered, *not hypostatically*, as the Trent Fathers have *determined*, for so he was but once offered, but *commemoratively only*; and this commemoration is made to God the Father, and is not a bare remembering or putting ourselves in mind of Him. For every Sacrifice is directed to God, and the oblation therein made, whatsoever it be, hath Him for its object, and not man. In the Holy Eucharist, therefore, we set before God the bread and wine, 'as figures or images of the precious blood of Christ shed for us, and of his precious body' (they are the very words of the Clementine Liturgy), and plead to God the merit of his Son's sacrifice once offered on the Cross for us sinners, and in this sacrament represented, beseeching Him for the sake thereof to bestow His heavenly blessings on us:" (Bull's Works, vol. ii., p. 22.) The distinction between an act by which a satisfaction for sin is made, and a devotional rite by which the satisfaction so made is represented and pleaded before God, is clear, though it is liable to be obscured, not only in the apprehension of the ignorant, but by the tendency of theologians to exalt the importance of the rite till the distinction itself well nigh disappears. To apply the word sacrifice in the sense in which Bishop Bull has used it to the ordinance of the Lord's Supper, though it may be liable to abuse and misapprehension, does not appear to be a contravention of any proposition legitimately deducible from the 31st Article. It is not clear to their Lordships that the respondent has so used the word "sacrifice" as to contradict the language of the Articles.

III. Their Lordships now proceed to the 3rd charge, which relates to the adoration of Christ present in the sacrament. The 20th and 27th articles of charge contain the false doctrines alleged to be held by Mr. Bennett. The 20th charges that he affirms the doctrine that adoration or worship is due to the consecrated bread and wine. The 27th, that he affirms that adoration is due to Christ present upon the altars of our churches in the Sacrament of the Holy Communion, under the form of bread and wine, on the ground that under their veil is the sacred body and blood of our Lord (the passages referred to for proof are set out in the 7th article.) The 31st article charges that these doctrines are contrary to the 28th Article of Religion, and the declaration on kneeling.

The passages relied on as the ground of these charges are the following: "The reader will observe that in the two first editions, at page 3, the words were: 'The real, actual, and visible presence of our Lord upon the altars of our churches.' In the present edition he will find at page 2 the following words substituted: 'The real and actual presence of our Lord under the form of bread and wine upon the altars of our churches.' He will also observe that, at page 14 in the former editions, that the words were, 'Who myself adore and teach the people to adore the consecrated elements, believing Christ to be in them—believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.' He will now find the following words substituted: 'Who myself adore and teach the people to adore Christ present in the sacrament, under the form of bread and wine, believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.' The three great doctrines on which the Catholic Church has to take her stand are these:—I. The real objective presence of our blessed Lord in the Eucharist; II. 'The sacrifice offered by the priest;' and III. 'The adoration due

to the presence of our blessed Lord therein. Well, I do not know what others of my brethren in the priesthood may think—I do not wish to compromise them by anything I say or do—but seeing that I am one of those who burn lighted candles at the altar in the daytime; who use incense at the holy sacrifice; who use the Eucharistic vestments; who elevate the blessed sacrament; who myself adore, and teach the people to adore, Christ present in the sacrament, under the form of bread and wine; believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ—seeing all this, it may be conceived that I cannot rest very much at ease under the imputations above recited." Their Lordships agree with the learned judge of the court below, that the doctrine charged in the 20th article, namely, that adoration is due to the consecrated elements, is contrary to law, and must be condemned. But they have admitted, as the learned judge has done, Mr. Bennett's explanation of that language, and therefore they are not called upon to condemn Mr. Bennett under the 20th article. The 27th article of charge, therefore, alone remains for decision; it is as follows: That in or by the passages lettered N, O, and S, hereinbefore set forth in the 7th preceding article, you have maintained or affirmed and promulgated the doctrine that adoration is due to Christ, present upon the altars (thereby referring to the Communion Tables) of the churches of the said united Church of England and Ireland in the Sacrament of the Holy Communion under the form of bread and wine, on the ground that under their veil is the sacred body and blood of our Lord and Saviour Jesus Christ." Their Lordships have now to consider whether or not the passages from the respondent's writings above set forth are necessarily repugnant to or contradictory of the 28th Article of Religion, or of the declaration of kneeling, as alleged in the 31st article of charge. The declaration of kneeling states that, by the direction that the communicants shall receive the consecrated elements kneeling, "no adoration is intended or ought to be done either to the sacramental bread and wine there bodily received, or to any corporeal presence of Christ's natural flesh and blood." According to this declaration, neither the elements nor any corporal presence of Christ therein ought to be adored. The 28th article lays down that "the sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." In the 25th article it had been affirmed that "the sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them." It was laid down in *Martin* v. *Mackonochie* that such acts as the elevation of the cup and paten, and kneeling and prostration of the minister before them, were unlawful, because they were not prescribed in the Rubric of the Communion Office, and because acts not prescribed were to be taken as forbidden. Their Lordships in that judgment adopted the words of the committee in *Westerton* v. *Liddell*; "for the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted." It follows, then, that the Church of England has forbidden all acts of adoration to the sacrament, understanding by that the consecrated elements. She has been careful to exclude any act of adoration on the part of the minister at or after the consecration of the elements and to explain the posture of kneeling prescribed by the Rubric. If the charge against Mr. Bennett were that he had performed an outward act of adoration on any occasion in the service, the principles laid down in *Martin* v. *Mackonochie* would apply to this case. Such an act could not be done except in the service, because the sacrament may not be "reserved." But even if the respondent's words are a confession of an unlawful act, it is questionable whether such a confession would amount to false doctrine. And it is also fair to remember, in the respondent's favour, that the judgment in the case of *Martin* v. *Mackonochie*, which established the unlawfulness of introducing acts of adoration, was not delivered until 23rd Dec. 1868, after the publication of the words that are now impugned. Some of their Lordships have doubted whether the word "adore," though it seems to point rather to acts of worship, such as are forbidden by the 28th Article, may not be construed to refer to mental adoration, or prayers addressed to Christ present spiritually in the sacrament, which does not necessarily imply any adoration of the consecrated elements or of any corporal or natural presence therein. Upon the whole, their Lordships, not without doubts and divisions of opinions, have come to the conclusion that this charge is not so clearly made out as the rules which govern penal proceedings require. Mr. Bennett is entitled to the benefit of any doubt that may exist. His language has been rash, but as it appears to the majority of their Lordships that his words can be construed so as not to be plainly repugnant to the two passages articled against them, their Lordships will give him the benefit of the doubt that has been raised. Their Lordships having arrived at the conclusion that they must advise Her Majesty that the appeal must be dismissed, feel bound to add that there is much in the judgment of the learned judge in the court below with which they are unable to concur. The learned judge has endeavoured to settle by a mass of authorities what is the doctrine of the Church of England on the subject of the Holy Communion. It is not the part of the Court of Arches nor of this committee to usurp the functions of a synod or council. Happily their duties are much more circumscribed, namely, to ascertain whether certain statements are so far repugnant to, or contradictory of, the language of the Articles and formularies, construed in their plain meaning, that they should receive judicial condemnation. Their Lordships will not attempt to examine in detail the catena of authorities which the judge of the Arches has brought together, nor that of the learned counsel who appeared for the appellant. No mode of argument is more fallacious on a subject so abstruse and of so many aspects; short extracts, even where candidly made, as in this case, give no fair impression of an author's mind. Thus Dean Jackson is quoted in the judgment; but the quotation omits the preceding sentence (Works, vol. 10, p. 41), which gives to the whole passage a meaning difficult to reconcile with the purpose for which it is used; while the opinion of this eminent divine would have been more correctly represented by referring also to the following remarkable passage in a previous chapter of his work: "What need then is there of His bodily

presence in the sacrament, or of any other presence than the influence or emission of virtue from His heavenly sanctuary into our souls? He has left us the consecrated elements of bread and wine, to be unto us more that the hem of his garment. If we do but touch and taste them with the same faith by which this woman touched the hem of His garment, our same faith shall make us whole" (Works, vol. 9, p. 611). Several of those who are cited by the learned judge are living persons of greater or less note, who cannot rank as authorities for the history of the great controversy. One of the authorities is so questionable, that it requires a passing examination. The learned judge, after quoting the 28th Article of Religion, introduces as "a *contemporanea expositio*, from the compiler of this article, which cannot, I think, be gainsaid," a letter from Bishop Gheast to Cecil, under the date 1556 (probably a mistake for 1566) explaining the sense which he put upon the word "only" in the 28th Article. Gheast does not say that he was the "compiler" of the 28th Article, all but one sentence of which had been in substance in the Articles of 1552; and the context shows that he used the word "Article" only of this sentence. which he says, was ('of mine own penning." Upon the faith of this letter, genuine or not, avowedly written for a personal purpose ("for mine own purgation") is founded an exposition of the words "only after a heavenly and spiritual manner," as meaning that though a man "took Christ's body in his hand, received it with his mouth, and that corporally, naturally, really, substantially, and carnally . . . . yet did he not for all that see it, feel it, smell it, nor taste it." Upon this alleged exposition their Lordships feel themselves free to observe that the words "only after a heavenly and spiritual manner," do not appear to contain or involve the words "corporally, naturally, and carnally," but to exclude them; and that it is the Article, and not the questionable comments of a doubtful letter written for personal motives, which is binding on the clergy and on this court. Their Lordships recall once more, in acknowledging the learning that has been brought to bear upon this case, the principle which this Committee has long since laid down. "There were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which they may be supposed to have been influenced, or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the discussion which took place; not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected." Citations from established authors may be of use to show that "the liberty which was left by the Articles and formularies has been actually enjoyed and exercised by the members and *ministers of* the Church of England": (See *the judgment* of the Privy Council in the *Gorham* case). But, to say the least, very few of the quotations in the judgment exhibit the same freedom of language as do the extracts from Mr. Bennett. And after every authority had been examined, there would still remain the question that is before this Committee, whether the license or liberty is really allowed by the Articles and formularies—whether anything has been said by the respondent which plainly contradicts them. If the respondent had made statements contradicting the Articles or formularies, the citation of great names would not have protected him; if he has not done so, he is safe without their protection. There is one passage in the judgment which seems especially to call for comment:—"With respect to the second and corrected edition of his pamphlet, and the other work for which he is articled, I say that the objective, actual, and real presence, or the spiritual, real presence, a presence external to the act of the communicant, appears to me to be the doctrine which the formularies of our Church, duly considered and construed so as to be harmonious, intended to maintain. But I do not lay down this as a position of law, nor do I say that what is called the Receptionist Doctrine is inadmissible; nor do I pronounce on any other teaching with respect to the mode of presence. I mean to do no such thing by this judgment. I mean by it to pronounce only that to describe the mode of presence as objective, real, actual, and spiritual, is certainly not contrary to the law." Their Lordships regret that the learned judge should have put forth this extra-judicial statement, in which he adopts words that are not used in the Articles or formularies as expressing their doctrine. The word "receptionist" is as foreign to the Articles as the word "objective." Their Lordships have already said that any presence which is not a presence to the soul of the faithful receiver, the Church does not by her Articles and formularies affirm. They need not ask whether there is really any doubt as to the admissibility of the doctrine of Hooker and Waterland, who appear to be described as "Receptionists," in the Church of which they have been two of the greatest ornaments. Their Lordships have not arrived at their decision without great anxiety and occasional doubt. The subject is one which has always moved the deepest feelings of religious men, and will continue to do so. There might have been expected from a theologian dealing with this subject, if not a charitable regard for the feelings of others, at least a careful preparation and an exactness in the use of terms. The very divine whose opinions Mr. Bennett seems to have sought to represent, was obliged himself to point out how erroneous was his statement of those opinions. The respondent corrected the manifest error without an expression of regret at the pain he may have caused to many by his careless language. Even in the maturer form, his words are rash and ill-judged, and are perilously near a violation of the law. But the Committee have not allowed any feeling of disapproval to interfere with the real duty before them, to decide whether the language of the respondent was so plainly repugnant to the Articles and formularies as to call for judicial condemnation; and as these proceedings are highly penal, to construe in his favour every reasonable doubt. There will be no order as to costs, as the respondent has not appeared.

Judgment affirmed

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Thursday, May 30, 1872.

SECOND COURT.

REG. *v.* THE JUSTICES OF MIDDLESEX.

THE HOUSELESS POOR SOCIETY (appts.) *v.* THE CHURCHWARDENS, &c., OF THE PARISH OF ST. LUKE, MIDDLESEX (resps.).

Valuation list — Omission of notice—Appeal to quarter sessions—Application to guardians — 48 Geo. 3, c. xcvii—Valuation (Metropolis) Act 1869 (32 & 33 *Vict. c.* 67).

The appellants were assessed in the valuation list of the respondents' parish in pursuance of the Valuation (Metropolis) Act 1869, *but received no notice from the overseers, as required by sect.* 9. *They appealed, directly to quarter sessions, against a poor rate upon the amount of this assessment, expressly made under a local Act of* 1808, *governing the respondents' parish, in which they were situated, but declared by the overseers in pursuance of sect.* 73 *of the Valuation (Metropolis) Act* 1869; *and the quarter sessions quashed the rate.*

By the said local Act persons aggrieved by any rate or other matter done in pursuance of that Act must apply to the guardians of the parish before appealing to quarter sessions.

By the Valuation (Metropolis) Act 1869, *sect.* 77, *so much of any Acts, whether public or local and personal, as authorises any valuation of hereditaments to be made for the purposes of any rate or tax in respect of which the valuation list is by this Act made conclusive, are thereby repealed.*

Held, upon a rule for certiorari, that the quarter sessions had no jurisdiction under the circumstances.

Poland had, on the 25th April, at the instance of the inhabitants of the parish of St. Luke, Middlesex, obtained a rule *nisi* calling upon the keepers of the peace and justices in and for the county of Middlesex to show cause why a writ of *certiorari* should not issue, directed to them, to remove into this court all and singular orders made by them or some of them upon a certain appeal wherein the Houseless Poor Society were appellants, and the Churchwardens and Overseers of the Poor, and the Vestrymen of the parish of St. Luke, in the said county, were respondents, touching a certain rate or assessment made for the relief of the poor of the said parish on the 25th April 1871.

It appeared from the affidavit of the respondents' attorney, upon which the rule was moved, that since the 24th June 1869 the respondents' parish has formed part of the Metropolitan Union of Holborn. The valuation list for the said parish was made by the overseers of the poor on the 31st May 1870, under and in pursuance of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), and the said list was finally approved of by the assessment committee of the said union on the 7th Jan. 1871. In the list so finally approved the property of the appellants is charged, assessed, and valued as follows:

Valuation Metropolis Act 1869, 32 & 33 Vict. c. 67. } **Valuation List for the Parish of St. Luke, Middlesex, in the Metropolitan Union of Holborn, in the County of Middlesex.**

Number.	Name of Occupier.	Name of Owner.	Description of Property.	No. of Class.	Name or Situation of Property.	Extent.	Gross value as estimated by Overseers.	Gross value as estimated by Surveyor of Taxes.	Rate of deduction per cent.	Rateable value.	Gross value as finally determined by Assessment Committee.	Rateable value as finally determined by Assessment Committee.
569	Houseless Poor Association.	Ecclesiastical Commissioners.			3 and 2, Bannerstreet.		£500			£417	£500	£417

Signed this 31st May, 1870. JAMES CLITHEROW, HENRY HARRIS, } **Overseers of the Poor of the Parish aforesaid.**

This list came into force in the said parish on the 6th April 1871.

On the 25th April 1871 the vestrymen of the said parish duly made a rate for the relief, maintenance, lodging, and employment of the poor of the said parish, and for other purposes chargeable thereon, as appears at the commencement of the said rate, which is as follows:

St. Luke, Middlesex.

A rate or assessment of 13d. in the pound made by the vestrymen, under the Act 18 & 19 Vict. c. 120, pursuant to the provisions of the before-recited Act, and of an Act of Parliament passed in 48 Geo. 3, intituled "An Act for making more effectual provision for maintaining, regulating, and employing the poor of the parish of St. Luke in the county of Middlesex, for the relief, maintenance, lodging, and employment of the poor of this parish, and for the payment of any interest or annuities chargeable on the rates of this parish, and for the discharge of all other expenses under the said Act (including the expense of the police during the quarter of a year from the 25th March 1871 to the 24th June 1871) upon all and every person or persons who do or shall inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement, or hereditament within the said parish, and which said rate or assessment in this book includes that part of the said parish called No. 4 district.

The amount of this rate assessed upon the appellants in accordance wich the above valuation list was 22*l.* 11*s.* 9*d.* This rate was duly signed by sixteen of the vestrymen, was duly declared to be according to the valuation list in force for the said parish by the churchwardens and overseers, and was duly allowed by justices.

The said parish of St. Luke is governed by a local Act (48 Geo. 3, c. xcvii.), cited in the above rate, and deemed to be a public Act, and to be judicially taked notice of as such.

By sect. 27, the vestrymen, whose qualifications are given in sect. 2, and of whom, by sect. 15, the guardians are to be composed, are to make and sign rates or assessments upon all persons inhabiting or occupying any land, house, or other building in the parish for the relief of the poor of the said parish.

By sect. 29, rates are to be allowed by justices

and then, by sect. 30, they are to be deemed and taken to be good, valid, and effectual.

By sect. 96:

Provided always, and be it further enacted, that if any person or persons shall think himself, herself, or themselves aggrieved by any rate, or rates, assessment, or assessments, or by any bye-law, rule, or order made in pursuance of this Act, or any other matter or thing done or directed to be done in pursuance of this Act, such person or persons shall apply for relief to the guardians of the poor of the said parish at any meeting to be held within fourteen days next after demand made of such rate or rates, assessment or assessments, or next after any such matter or thing done and committed by, or by an order of, the said guardians, by which such person or persons shall think himself, herself, or themselves aggrieved; and the said guardians are hereby authorised and empowered to give such relief in the premises as to them shall seem necessary; and if such person or persons shall not be satisfied with the determination of such guardians, he, she, or they may appeal to the quarter or general sessions of the peace to be holden for the county of Middlesex, as the case shall be, within seven weeks next after such determination of the said guardians shall be made: such appellant first giving, or causing to be given, seven days' notice at the least in writing, of his, her, or their intention to bring such appeal, and of the matter thereof, to the clerk or clerks of the said guardians, or leaving such notice for him or them, at his or their last or usual place or places of abode, and within two days next after such notice, entering into a recognizance before one of His Majesty's Justices of the Peace for the said county, with two sufficient sureties, in the sum of 40*l.*, conditioned to try such appeal, and to abide the order of, and to pay such costs as shall be awarded by the justices at such quarter or general sessions, and the said justices at such quarter or general sessions of the peace for the said county, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing, or appealed against, as they the said justices shall think proper; and the said justices may then and there, if they see cause, mitigate any forfeiture or fine, and may order any money to be returned which shall have been levied in pursuance of any such bye-law, rule, or order, and award such further satisfaction to be made to the party injured as they shall judge proper; and the determination of such justices, at their quarter or general sessions, shall be final, binding, and conclusive.

On the 19th Sept. 1871, the attorney for the Houseless Poor Society attended before justices in petty sessions, in answer to a summons previously served, to show cause why the said society had not paid the rate, and why a distress warrant should not be issued to levy the amount due, viz., 22*l.* 11*s.* 9*d.* The respondents' attorney stated that he had previously informed the appellants' attorney that the Houseless Poor Society could not legally appeal to the general quarter sessions against this rate, as they had not applied to the guardians of the parish of St. Luke for relief, as required by the said local Act. The same objection was taken by the respondents' attorney before the justices at petty sessions, who, however, issued no warrant, the attorney for the society having stated their intention to appeal to quarter sessions. The appellants gave notice, and the appeal came on for hearing on the 28th Oct. last, when the counsel for the respondents objected to the hearing of the appeal, on the grounds that the appellants had not applied for relief to the guardians of the poor of the said parish, as required by sect. 96 of the local Act before referred to, and that no notice of appeal had been given to the clerk to the guardians, and no recognizances had been entered into by the appellants conditioned to try the appeal, and to abide the order of and to pay such costs as should be awarded by the justices. The counsel for the respondents read to the court sect 96 of the said Act, and referred to the various provisions of the Act relating to the making of the rates. The counsel for the appellants admitted as a fact that no application had been made to the guardians for relief, that no recognisances had been entered into, and that they had only served the notice of appeal before referred to. He further stated that the provisions of the local Act referred to by the counsel for the respondents had taken him by surprise. The Assistant Judge, Sir W. H. Bodkin, who was presiding in court at the hearing of the appeal, said that he should under such circumstances adjourn the appeal until the next general quarter sessions of the peace, upon which the counsel for the respondents protested against such adjournment, as the court had no jurisdiction either to hear the appeal or to adjourn it. The Assistant-Judge, notwithstanding, adjourned the hearing of the appeal to the next sessions.

On the 27th Jan. 1872, the appeal day for the January quarter sessions, the appeal was again called on for hearing, and the counsel for the respondent again objected to the jurisdiction of the court on the same ground as before, and again referred to the various clauses of the Act relating to the matter. The counsel for the appellants interposed, and stated that it was conceded on the part of the appellants, that they had not appealed under the local Act at all; but he contended that as the declaration at the end of the rate was signed by the overseers, the court had jurisdiction to hear the appeal under sect. 4 of 27 Geo. 2, c. 38. In answer to which the counsel for the respondents contended that that clause referred to rates made under the statute of Elizabeth, by overseers of the poor, and that as the rate was made under a local act specially applying to the parish of St Luke, it must be appealed against in conformity with the provisions of such Act; and that although the declaration was the act of the overseers, the appellants on a notice given under that section to the overseers, could not upset a rate made by vestrymen under a local Act; and the counsel for the appellants objected that the valuation list upon which the rate was made was not binding upon the appellants, because they had not received the notices required to be given by the Valuation (Metropolis) Act 1869. The counsel for the respondents said that he declined to discuss that matter until the court had determined whether they would hear the appeal or not. The Assistant Judge stated that he should decline then to give any opinion upon the point raised as to the jurisdiction, but that he would hear the evidence as to value. The counsel for the appellants, notwithstanding the protest from the counsel for the respondents, called a witness, who stated that when the valuation list was signed by the parish officers in May 1870, the two houses, numbers 2 and 3 Banner-street were being altered and converted into one house; and that the appellants did not open them as a refuge until December 1870; and he stated that the full yearly value of the house as altered was, in his opinion, 250*l.* It was also stated by the witness that the appellants had received no notice as required by sect. 9 of the Valuation (Metropolis) Act 1869. The counsel for the respondents declined to discuss the questions either of value or as to whether notice had been properly served

relying upon the point that the court had no jurisdiction to hear the appeal. The justices present retired to consider their judgment, and on their return into court the Assistant Judge stated that the rate so far as it affected the appellants would be quashed; but he gave no reasons for that judgment, and did not refer in any way to the preliminary point as to the jurisdiction. The counsel for the respondents upon the decision being announced stated that an application would be made to the court of Queen's Bench to remove the order by *certiorari* on the ground of want of jurisdiction; the respondents' attorney afterwards refused to attend the taxation of the costs of the appeal on the ground that the order was invalid.

The churchwardens and overseers of St. Luke's parish are appointed under the local Act before referred to. The guardians of the poor of St. Luke's parish appointed under the local Act duly held meetings for the purpose of giving relief to the persons who felt aggrieved by the rate, and the only appeal against such rate by the appellants was that hereinbefore referred to. If persons were to appeal directly to the sessions, without first applying to the guardians, it would cause great inconvenience and lead to unnecessary expense.

Affidavits, in answer to that upon which the rule was moved, were filed on behalf of the appellants and the justices. The appellants disputed the assertion of the respondents' attorney that he had given them information concerning the local Act, and stated that they never heard of it until they came to the quarter sessions. They also asserted that no notice of a new or altered assessment, as required by sect. 9 of the Valuation (Metropolis) Act 1869, was served upon them by the overseers.

Metcalfe showed cause, on behalf of the Houseless Poor Society, against the rule.—This local Act is not expressly mentioned amongst those which are repealed by 32 & 33 Vict. c. 67, s. 77; but by implication the appeal clauses of that Act repeal all previous special systems of appeal. The words are: "The enactments specified in the fifth schedule to this Act, and so much of any other Acts, whether public or local and personal, as authorises any valuation of hereditaments to be made for the purposes of any rate or tax in respect of which the valuation list is by this Act made conclusive, are hereby repealed, where they relate only to the metropolis absolutely, and in other cases so far as they relate to the metropolis." Further, the appeal clause, sect. 96, of the local Act relates only to matters done in pursuance of that Act; here the ground of appeal was the improper assessment in a valuation list, which was made in pursuance of an Act passed in 1869; and it was impossible, in consequence of the omission of the overseers to give notice to the appellants under sect. 9 of the Valuation (Metropolis) Act 1869, that the appellants should adopt the proceedings upon appeal provided by ss. 18 to 41 of that Act. [BLACKBURN, J.—The rate was a matter in pursuance of the local Act, and the appeal upon such a matter is not affected by the Act of 1869.] There was an important difference between the rate as it was made and as provided by the local Act; the declaration of the rate by the overseers is required by sect. 73 of the Act of 1869, and is not provided for by the local Act; the churchwardens and overseers have, therefore, by *declaring this rate*, travelled out of the local Act, and subjected themselves to the general law of appeal, which is provided by 17 Geo. 2, c. 38 s. 4. There is no provision in the Act of 1869 for an appeal on the ground of omission by the overseers to give notice of an alteration in the valuation list; and there is no provision in the local Act upon any matter other than those done in pursuance of that Act.

Huddleston Q. C. and *Mackey* showed cause on behalf of the justices.

Poland, who appeared to support the rule on behalf of the respondents, the churchwardens, overseers, and vestrymen of the parish of St. Luke, was not heard.

BLACKBURN, J.—I do not think that we need trouble Mr. Poland. The real grievance of which the appellants had to complain was that, although duly inserted in the valuation list, they were assessed at an excessive value, and no notice of their having been assessed was given them. Neglect of the notice by the overseers prevented their going to the assessment committee in time, as provided by the Act of 1869. As to whether the valuation list was binding at all upon those persons whose names were inserted without notice to them, we express no opinion. Certainly it would be just and proper if it had no effect. The only question for us is whether the quarter sessions had power to give the appellants relief under the circumstances of this case. It appears upon the face of the rate, against which this appeal was brought, that it was made under the local Act concerning the parish of St. Luke (48 Geo. 3, c. xcvii. Sect. 25 enables the vestrymen of the parish to settle and ascertain the respective sums of money necessary to be raised by a just and equal pound rate for the relief, maintenance, lodging, and employment of the poor of the said parish and for the discharge of other expenses of the said parish. Now, since the valuation list is provided for by the Act of 1869, all rates made by these vestrymen must be in accordance with that list. The present rate, of which the appellants complained, was duly made upon the assessment in the valuation list, but the assessment was excessive, and the appellants had received no notice of it. The appellants contended that the general law of appeal contained in 17 Geo. 2, c. 38, s. 4, afforded a remedy for their cause of complaint, but I do not think that is so. That Act gives an appeal only in the cases mentioned, and it requires the persons aggrieved to give reasonable notice to the churchwardens or overseers of the poor of the parish before appealing to the sessions. Now to make notice to churchwardens and overseers necessary for an appeal against a grievance caused by an assessment committee seems to be absurd; and further than that, all rates in this parish are governed by the Local Act 48 Geo. 3, c. xcvii.; and by the 96th section, all persons aggrieved by any rates, assessments, or orders, or any matter or thing, done or directed to be done in pursuance of that Act, must first apply to the guardians before appealing to the quarter sessions. The appellants went to the quarter sessions without making any application to the guardians, and I think the quarter sessions had under the circumstances no jurisdiction to make any order in this matter. The rule, therefore, must be made absolute.

MELLOR, J.—I am of the same opinion.

LUSH, J.—I am of the same opinion. The only

question is whether the quarter sessions had jurisdiction to act as they did, and to my mind clearly they had not.

Rule absolute without costs.

Attorneys for appellants, *Hallowes, Price,* and *Hallowes.*

Attorney for respondents, *W. W. Hayne.*

Attorneys for the justices, *C.* and *J. Allen* and *Son.*

Saturday, June 1, 1872.

GREAT WESTERN RAILWAY (apps.) *v.* BISHOP (resp.).

*Nuisance—Water dripping from a railway bridge—Order to abate—*18 *&* 19 *Vict. c.* 121, *ss.* 8, 12.

The appellants were ordered by justices at petty sessions under the Nuisances Removal Act for England 1855 (18 *&* 19 *Vict. c.* 121) *sect.* 12, *to abate a nuisance, consisting of a want of proper and sufficient means to prevent the percolation and overflow of water upon persons passing under or near a railway bridge, the premises of the appellants:*

Held, upon a case stated, that this Act applied only to nuisances, and matters in the nature of a nuisance, which were injurious to health, and that the justices had no power to make this order.

THIS was a case stated by two justices of the peace in and for the borough of Aberavon, in the county of Glamorgan, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a petty sessions holden at the Police Station, Aberavon, in and for the borough of Aberavon, in the county of Glamorgan, on the 20th July 1871, a complaint preferred by John Bishop as such inspector of nuisances as aforesaid, hereinafter called the respondent, against the Great Western Railway Company, hereinafter called the appellants, under sect. 12 of "The Nuisances Removal Act for England 1855" (18 & 19 Vict. c. 121), charging that in and upon the premises of the appellants, being a railway bridge, situate in Church-street, within the district of the Aberavon Local Board, the following nuisance existed, that was to say, a want of proper and sufficient means to prevent the percolation and overflow of water upon persons passing under or near to the said premises, and that the said nuisance was caused by the act or default of the said appellants being the owners of the said premises, was heard and determined by them, the said parties respectively being then present or represented by their attorneys, and upon such hearing, the appellants were by them ordered to abate the said nuisance, and to pay to the respondent the sum of 1*l.* 5*s.* 6*d.* for his costs.

And whereas the appellants being dissatisfied with the determination of the justices upon the hearing of the said complaint as being erroneous in point of law, have in pursuance of sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to them in writing to state and sign a case setting forth the facts and the grounds of such their determination as aforesaid for the opinion of this court, and have duly entered into a recognizance as required by the said statute in that behalf. Now, therefore, they, the said justices, in compliance with the said application and the provisions of the *said statute,* did hereby state and sign the following *case.*

Upon the hearing of the complaint it was proved on the part of the respondent, and found as a fact, that the bridge in question, being the property of the appellants, was situate near Church-street, in the borough of Aberavon, being the principal street leading to the parish church.

That the bottom of the said bridge was formed of wooden planks, and that both during rainy weather, and for some time afterwards, the water percolated through the said bridge on to the street below, inasmuch that foot passengers were even after the rain had ceased obliged to make use of their umbrellas when passing under the said bridge, and that the water having passed through the bridge was dirty.

That there was nothing under the said bridge to prevent the water falling upon the passengers passing along the said street, and it was admitted by the respondant that no water from either side of the said bridge flowed on to it; the bridge itself being as a fact somewhat higher than either side of the railway, and the water so running from the bridge no rain or other water did or could percolate through the bridge except such as came down from the clouds on to the bridge itself.

It was contended on the part of the appellants, first, that the percolation of the water through the said bridge upon the passengers in the said street was not a nuisance within the meaning of the Nuisances Removal Act for England, 1855, inasmuch as it was not injurious to health; secondly, that the bridge in question did not come within the meaning of the word "premises" as interpreted by the said Act; and, thirdly, that the offence was not sufficiently set forth in the summons served upon the appellants, and of which the following is a copy, but this objection was not taken until the case for the respondent had been closed.

(Copy Summons.)

To the Great Western Railway Company, the owners of the premises situate and being a Railway Bridge in Church-street, within the district of the Aberavon Local Board.

Borough of Aberavon to wit. You are required to appear before two justices of the peace of the borough of Aberavon, at the petty sessions to be holden at the police court in the town of Aberavon, on Thursday, the 20th July, inst., at the hour of eleven in the forenoon, to answer the complaint this day made to me by John Bishop, inspector of nuisances on behalf of the Aberavon Local Board, that in or upon the premises above mentioned, situate at Church Street within the district of the Aberavon Local Board, under the Nuisances Removal Acts for England, the following nuisance exists, that is to say, a want of proper and sufficient means to prevent the percolation and overflow of water upon persons passing under or near to the said premises, and that the said nuisance is caused by the act or default of you the owners of the said premises.

Given under the hand of me, a justice of the peace acting in and for the borough of Aberavon, this 14th July, 1871. (Signed) DANIEL SMITH.

They, however, being of opinion that the percolation of water through the said bridge upon passengers passing under the said bridge was a nuisance within the meaning of the 8th section of the said Act, 18 & 19 Vict. c. 121, and that it was not necessary for the respondent to prove that the same was also injurious to health, the words of the Act "being a nuisance or injurious to health;" and they being also of opinion that the bridge in question came within the meaning of the word "premises," as interpreted by the second section of the said Act; and they being also of opinion

that the offence as set forth in the information and summons was sufficient, and not calculated to mislead the appellants, gave their determination against the appellants, and made an order for the abatement of the said nuisance.

The questions of law arising on the above statement for the opinion of this court, therefore, are: First, whether it was necessary on the part of the respondent to prove that the nuisance complained of was injurious to public health; secondly, whether the bridge in question came within the meaning of the word "premises" as interpreted by the Nuisances Removal Act for England, 1855; thirdly, whether the offence as described in the summons to the appellants was sufficient, and if not, whether the appellants could object to the form of such summons after the case for the respondent had been closed.

If the court should be of opinion that the said order was legally and properly made, and the appellants are liable, as aforesaid, then the said order is to stand, but if the court should be of opinion otherwise, then the complaint is to be dismissed.

Lopes, Q.C. (with him *Raymond*), argued for the appellants.—This is not a nuisance which is injurious to health, and therefore is not subject to the remedies provided by this Act. Throughout the Act the intention of the Legislature appears to limit its enactments to nuisances, or other matters in the nature of a nuisance, which are injurious to the health of the public, or of some individuals. Many things may be nuisances for which this Act cannot provide a remedy, and the limit to be drawn is that which may be gathered from the object of the Act. [Stopped by the court.]

Herschell, Q.C. (with him *Hughes*), for respondent.—The Act consolidates and amends two separate kinds of legislation, the Nuisances Removal Acts, and the Diseases Prevention Acts; and its application need not be limited to a matter relating to both kinds. I should say any nuisance which could inconvenience the public at large is within the scope of the Act if it can possibly be remedied by an individual. [COCKBURN, C.J.—Could the Act apply to an obstruction, or the keeping a dangerous animal, or too low an awning over a shop window, or a hoarding kept an unreasonable time in front of a house?] It is intended to remedy any nuisance within the four categories mentioned in section 8, some of which might not in any way affect health. [COCKBURN, C.J.—If any restriction be put upon the word "nuisances"—and it would be monstrous to apply a Sanitary Act to every common law nuisance—health must be the criterion. Must not the Act be limited to matters injurious to health?] The Act contemplates only premises having an owner or occupier, therefore private premises; and there can be no reason why it should not give this remedy against all private premises which are kept so as to be a nuisance, without their being necessarily injurious to health. It would be beneficial to the public so to extend its application, and there is no sufficient reason to limit it.

COCKBURN, C.J.—I think this conviction cannot be upheld. I agree that it would be convenient and useful there should be a summary jurisdiction in such a case as this, but we cannot act upon any such view unless we can properly put a construction consistent with it upon the language of the Act. Now the Act *speaks of nuisances* in sect. 8 as certain things in such a state or so kept as to be a nuisance or injurious to health; and, as Mr. Lopes says, it secures the means to abate certain public as well as private nuisances; but still it was intended to apply only when the thing complained of was injurious to health. It is impossible to maintain that a remedy is provided by this Act against all nuisances whatever; for instance, obstructions and the like are not within the scope of the Act, and it becomes necessary therefore to draw the line somewhere. The Act certainly has not made any distinction in express terms between the nuisances to which it applies and those to which it does not apply, and we can only discover a limit by reference to the general object of the legislature. It is a sanitary enactment, and it was clearly intended to protect the health of individuals That gives us a guiding principle whereby to construe the statute; and from it the subject appears to be nuisances, and other matters not amounting to nuisances, but limited to such as affect the public health. This matter complained of may be a serious annoyance, and one to which the public ought not to be subjected; I pronounce no opinion as to whether it amounts to a nuisance indictable at common law, but I hope that there will be no necessity for such a remedy, and that steps will be taken by the company to put a stop to all the inconvenience the matter occasions. It is not a nuisance which is injurious to health within the application of this Act. The possible injury to health by the dripping of this water is too indirect to bring this case within the powers granted to the justices by this Act to enforce a remedy for a nuisance.

LUSH, J.—I am of the same opinion. It is clear that the word "nuisances" in sect. 8 cannot include all nuisances at common law. There must be some limit to its application; and if so, I see no other guide except by reference to the scope and object of the Act, which seem to be for the remedy of matters injurious to health only.

HANNEN, J.—I am of the same opinion, and I only desire to add to what has been said that I think the clue to the interpretation of the expression in the 8th section, "a nuisance or injurious to health," is an injury to the health of some person. I think the intention of the Legislature was to extend the remedies provided by that Act not only to cases in which a public nuisance exists, but also to cases of the nature of a nuisance where there is no injury to the public; provided always that there is an injury to the health of some individual.

Judgment for appellants.

Attorneys for appellants *Young, Maples* and *Co.*

Attorneys for respondent, *Norris, Allens*, and *Carter*, for *M. Tennant*, Aberavon.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKINS, H. F. POOLEY, and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

Friday, June 7, 1872.

COPE v. BARBER.

Celebrating Divine Service—Collection of alms—Interference by churchwardens—Rubric—23 & 24 Vict. c. 32, s. 2.

The 23 & 24 Vict. c. 32, s. 2 enacts that any person who shall molest, let, disturb, vex, or trouble, or by any other lawful means disquiet or misuse any

preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any Divine Service, rite, or office in any cathedral, church, or chapel, or in any churchyard or burial ground, shall on conviction be liable to a penalty of not more than five pounds for every such offence.

The Rubric to the Communion Service of the Church of England orders that "Whilst the sentences are in reading, the deacons, churchwardens, or other fit person appointed for that purpose shall receive the alms for the poor and other devotions of the people in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table.

During the reading of the sentences in the offertory, the rector and his curate collected the alms of the people at one end of the church, whilst the churchwardens were at the other.

The churchwardens who objected to the rector collecting alms placed themselves in a menacing position across the centre aisle so as to prevent the rector passing down the aisle, but they did not push or touch him, neither did he attempt to pass.

Upon an information against the defendants the churchwardens under the 23 & 24 Vict. c. 32, s. 2, the magistrates dismissed the summons, but stated a case for the opinion of the court.

Held: That the magistrates were right in dismissing the case, for the appellant was not at the time of the disturbance ministering or celebrating any Divine service rite or office, the collection of alms not being a part of the service which the rubric enjoins the priest to celebrate.

CASE stated for the opinion of the court under 20 & 21 Vict. c. 43.

At a petty sessions holden at Macclesfield, in and for the division of Prestbury, in the county of Chester, on the 24th Oct. 1871, an information came on to be heard before us, the undersigned justices, which was preferred by the above-named appellant against the above-named respondents, under the statute 23 & 24 Vict. c. 32, s. 2, charging that Charles Barber the younger, of the parish of Wilmslow, in the said county, silk manufacturer; Thomas Clark, of the said parish, physician; and Thomas Hobson, of the said parish, merchant, on the 24th Sept. last, at the said parish, in the said county, unlawfully did molest, let, disturb, vex, and trouble him, the said Francis Horden Cope, then being a clergyman in holy orders, celebrating divine service in a certain parish church of the Church of England, to wit, the parish church of the said parish of Wilmslow, there situate, and called the Church of St. Bartholomew, contrary to the statute in such case made and provided; and upon such hearing we dismissed the said information in the manner and upon the grounds hereinafter stated.

Upon the hearing of the information aforesaid, George Fox deposed before us as follows, that is to say:

I live at Haresfield Wilmslow, and am a merchant and a magistrate. I attended at Wilmslow parish church on Sunday morning the 24th Sept., and the seat I occupy is No. 30 on the south side of the middle aisle. I was sitting at the entrance of my seat nearest the aisle. The service was conducted by the Rev. Mr. Cope, Rev. Mr. Hinder, and Rev. Mr. Cocks, and at the appointed time in the Communion Service Mr. Cope preached. At that time Mr. Cocks and Mr. Hinder sat within the communion rails. Immediately after the sermon Mr. Cocks went up to the altar and proceeded to say the offertory sentences, and Mr. Cope and Mr Hinder then began the collection of the people's offerings. Mr Hinder went into the Prescott Chapel and commenced his collections there, and Mr. Cope descending from the pulpit at the same time, they both came down the chancel steps together, Mr. Hinder turning to his left hand and Mr. Cope, with a bag in either hand, commenced to take the offertory down the middle aisle. Mr. Cocks, during this time, was reading the offertory sentences. Mr. Cope had proceeded to within two pews of where I was sitting before I noticed anything; but simultaneously with Mr. Cope's descending from the pulpit I heard, but did not see at the time, the defendants coming from their pew at the extreme west-end of the church. I then looked round and saw Dr. Clark collecting from the south side of the middle aisle, and Mr. Barber from the north side, and at the same moment Mr. Thomas Hobson came towards them; these three gentlemen were all in the same aisle, Dr. Clark occupied the south side, Mr. Barber the north side, Mr. Hobson filled up between the two with his hands behind his back. This was the position when they were abreast of the pew I was occupying. They proceeded until they met Mr. Cope. Mr. Cope then essayed to pass by Dr. Clark, when Dr. Clark put his hands on the side of the pew so as to form a barrier with his arms, and swaying his body at the same moment in the same direction, so as the more perfectly to impede Mr. Cope's progress. Mr. Hobson, who, up to this moment was about 18in. behind the other two gentlemen, immediately stepped forward, took his hands from behind his his back and put one so as to form a support to Dr. Clark. Mr. Cope then turned to the other or north side, and immediately thereupon Mr. Barber laid hold of the pew with his left hand in the same way precisely, and Mr. Hobson at the same moment threw himself to the other side of the aisle so as to support Mr. Barber. Seeing this, Mr. Cope seemed a good deal embarrassed. He seemed as if he did not exactly know what to do, but at last he endeavoured to pass between the two defendants, Clark and Barber, when Mr. Hobson immediately put himself in the centre so as effectually to obstruct Mr. Cope passing between. The position of the three defendants on this occasion was such as to prevent Mr. Cope passing without his having resort to violence. And there was no doubt their position was one of menace, as they assumed a defiant menacing position, and the result was that Mr. Cope was obliged to return back again to the eastern part or head of the aisle when he saw it was impossible to pass without using physical force. Instead, however, of ascending the altar steps the complainant walked to the north aisle of the church, and proceeded collecting the offertory down it and along a portion of the west, and then turned up the middle aisle, collecting on the north side of it, where he had been unable to collect before by reason of the defendants' obstruction. The three defendants then came up to the top of the centre aisle, and there they remained in the same attitude as when Mr. Cope had been originally stopped by them, so that it was impossible for him to pass. They did not physically impede him there, because he did not proceed up the middle aisle from the west, but went along the west aisle and up the south aisle, collecting the offerings of the people as he went, till he joined the Rev. Mr. Hinder. Then Mr. Cope and Mr. Hinder together went up to the Communion Table with the offertory they had collected. Mr. Barber and Dr. Clark then followed them up the church, and Mr. Hobson turned down the centre aisle again to his pew; he had not a collecting box or anything in his hand at any particular time. Upon cross-examination by the defendants, the witness said, "You" (the defendants) "have collected occasionally; you did not strike Mr. Cope. You did not speak to him; your attitude was defiant and menacing." I believe the boxes which were in the hands of Dr. Clark and Mr. Barber were given up to the Rev. Mr. Cocks. I know nothing of my own knowledge about the swearing in or the admission of the rival churchwardens, not having been present at the visitation. No churchwarden other than you and Mr. Wallworth have acted for the church for the last eighteen months.

Upon the same hearing John Vincent, Claude Rivaz, and other witnesses, deposed to the same facts.

Counsel for the complainant stated he had other witnesses, but the defendants said they did not dispute the facts, but wished the complainant to be put in the witness box. He was accordingly sworn, but asked no questions in chief. Upon cross-examination by the defendants, the complainant said that there were unfortunately two sets of persons claiming to be churchwardens of Wilmslow, but that he had never recognised the defendants as such; that they had on several occasions collected the alms, but that he had prevented them doing so on more than one occasion, for sometimes an empty box would be brought. He stated that he was a priest and a deacon. On re-examination he stated that formal notice had been given in the church that the clergy would collect the offertory for church expenses. The defendants had written a letter suggesting a brawl in the church. The complainant admitted that a protest had been made against the validity of the defendants' appointment as churchwardens, but that the chancellor had, notwithstanding, administered the declaration to them, and that they had continuously claimed to be the legal churchwardens of Wilmslow.

When called upon for their defence, the defendant, Dr. Clarke, on behalf of all the defendants, read a paper, which was in these words—

This summons charges us with behaving unlawfully to the Rev. Mr. Cope and the Rev. Mr. Hinder, when administering Divine Service on the 24th Sept. last, in the parish church of Wilmslow. To this we reply first, that we did nothing unlawfully on that day. We say and maintain that we are churchwardens duly and legally sworn in on two occasions before the archdeacon, that we alone almost have acted as wardens for more than eighteen months, and that the clergy have allowed us, even during this dispute, to collect the alms for the sick and poor unmolested. That on this particular Sunday the offertory was for the expenses of the church, which we had not refused to collect, and we do allow that acting as wardens, and having collected our parts of the church we did stop the clergy from collecting it over again because it had been complained of, but we emphatically deny that we either spoke a word, lifted a hand, or touched them, even so much as with a finger. The money we had collected we handed over to them at the Communion Table in the usual way. Secondly, we say and maintain that the clergy were not performing Divine Service, but that they were wandering up and down the church collecting money for a secular purpose. We affirm that they had no business to collect at all. That it is a lay function and the special and ablsolute duty of the wardens alone and we hold that it would be just as scandalous for us to assume their duties as for them to assume ours. Moreover, the rubric distinctly commands them as priests to remain at the Communion Table to read the offertory sentences and receive alms from them who collect. They were in a part of the church, therefore, where they had no business to be, and doing something they had no business to do—something, indeed, opposed to all law, to all customs, and even to all decency. We contend, therefore, that on both these pleas we acted lawfully in virtue and right of our office as churchwardens, and that they were wrong, and we therefore pray the court to dismiss the charge which has been brought against us.

The Justices upon this evidence and this defence were of opinion and adjudged that it was the duty of the churchwardens to collect the offertory, and not that of the complainant, and consequently dismissed the summons, but stated their willingness to grant a case for the opinion of a Superior Court, and if such court should be of opinion that upon the evidence and having regard to the true intent and meaning of the statute, they ought to have convicted the defendants, or any one or more of them, they were of opinion that in such case each defendant, or such one or more should be fined 20s. and costs. The question, therefore, for the opinion of the court is whether upon the undisputed evidence above set forth, and which we find to be true in fact, and having regard to the position and claims of the defendants disclosed on the evidence, an offence against the statute 23 & 24 Vict. c. 32, s. 2 was committed by them in the premises. If the court shall be of opinion that the circumstances stated do not amount to an offence against that statute, the dismissal of the said summons is to stand. If otherwise the defendants, or such of them as aforesaid are to stand convicted accordingly, and to pay the said fine of 20s each and costs.

Manisty (*Edwards* with him) for the appellant.—The clergyman was collecting the alms when the churchwardens interfered with him. He was doing a perfectly legal act in collecting the alms. The rubric says that while the sentences are being read the deacons, churchwardens, or other fit persons appointed for that purpose, shall collect the alms, and reverently bring them to the priest. [WILLES, J.—What is the meaning of the deacons collecting the alms; does it mean that it is beneath the dignity of a priest to collect the alms?] No, for a person of higher degree is never excluded, and he may collect himself, and if he may collect himself he may appoint others to collect for him. [KEATING, J.—If you assume the rector is a proper person to collect you are assuming the whole question.] Even if the rector had not a strict legal right to collect, I say that the conduct of the churchwarden was indecent. The duties of the churchwardens are well laid down in *Hutchins* v. *Denziloe and Loveland* (1 Hag. Consist. Cas. 170). The churchwardens had forbade the organ to play, and the children to sing at certain parts of the service when the clergyman had ordered them to do so. Lord Stowell said, the first point is whether the churchwardens have a right to interfere in the service of the church? as if that interference is legal in any case it is so in the present. To ascertain this it is proper to consider what are their duties, and I conceive that originally they were confined to the care of the ecclesiastical property of the parish over which they exercise a discretionary power for specific purposes. In all other respects it is an office of observation and complaint but not of control with respect to divine worship. So it is laid down in Ayliffe (Parergon, p. 170) and in the canons of 1571. In these it is observed that the churchwardens are appointed to provide the furniture of the church, the bread and wine for the Holy Sacrament, the surplice, and the holy books, but it is the minister who has the use. In the service the churchwardens are to do nothing but collect the alms at the offertory, and they may refuse the admission of strange preachers into the pulpit. Again, if the minister introduces any irregularity into the service, they have no authority to interfere, but they may complain to the ordinary of his conduct. I do not say there may not be cases where they may be bound to interpose; in such cases they may repress, and ought to repress, all indecent interruptions of the service by others, and are the most proper persons to repress them, and they desert their duty if they do not. If a case could be imagined in which a preacher himself was guilty of any act grossly offensive, I will not say that the

churchwardens, and even private persons, might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes all ordinary rules. In cases which fall short of such singular pressure, and can await the remedy of a proper legal complaint, that is the only mode to be pursued by a churchwarden, if private and decent application to the minister himself shall have failed in preventing what he deems to be the repetition of an irregularity. [WILLES, J. —If the clergyman introduced howling into the church, or any such indecent noise, I think the churchwardens might turn him out.] He referred to *Worth* v. *Terrington* (8 M. & W. 781). [WILLES, J.—I am glad that case is referred to, because it gives me an opportunity of publicly stating that the reporter misunderstood Lord Wensleydale in that case, and I possess a letter of his in which he says that he never said what is imputed to him, and in his own copy of Meeson and Welsby there is a note in the margin of that page in his own hand, "I never said so."] There is no objection to the clergyman collecting alms, and there is no authority that he may not. [WILLES, J.—If the churchwarden was a notorious evil liver and non-communicant, could the clergyman appoint some one else to collect?] I should say so. The priest collected by the desire of the congregation. [KEATING, J.—There is a case in Howitt's State Trials, vol. 10, p. 88, fol. edit., where, on a collection for charity, the clergyman collected the money, and he was indicted at the Rochester Assizes for collecting money without authority; but Lord Stowell mentions it as of little authority.] If the priest was not performing the service, but left it to his curates, would he be the more open to molestation? He referred to *Office of Judge promoted by Ritchings* v. *Cordingley* (L. Rep. 3 Adm. & Eccl. 113).

McIntyre, Q.C. (with whom was *Coxon*).—The question is, What is the real duty of the churchwarden? He is the person who has the care of the furniture of the church, and he is to collect the alms. The churchwardens were, therefore, doing no more than their duty, and if there was an interference it was by Mr. Cope. The proper vessel in which to collect the alms was a basin, and not a bag, and it is admitted that Cope considered the churchwardens the proper persons to collect. Mr. Cope was not then celebrating Divine Service or any rite or office; but the summons describes him as doing so, and by the Act of Parliament under which the summons was taken out he must be at the time celebrating Divine Service *quâ* clergyman, and celebrating a part of it which no one except a clergyman can take a part in. If a clergyman as an ordinary person was at church, could a person who molested him be said to have molested a clergyman celebrating Divine Service? I say certainly not, he must be absolutely at the time engaged in the service.

WILLES, J.—The question is whether the magistrates rightly dismissed the respondents on an information by the appellants, charging that they unlawfully did molest, let, disturb, vex, and trouble Mr. Cope, then celebrating divine service in the Church of England. We are not called upon to decide whether any other proceedings could be taken, for, as they are laymen, they could not be proceeded against in the Ecclesiastical Court. The 2nd section of the 23 & 24 Vict. c. 32, says: "Any person who shall be guilty of riotous, violent, or indecent behaviour in any cathedral church, parish or district church, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office in any cathedral church or chapel, or in any churchyard or burial ground, shall on conviction before two justices of the peace be liable to a penalty of not more than 5*l.* for every such offence, or may be committed to prison in the discretion of the justices." It is a remarkable fact that the Act draws a distinction between a clergyman preaching in the church and the priest celebrating divine service, rite, or office. In the case of preaching, that it is said to be not strictly celebrating a rite or office shows that the Legislature meant to provide for that which in its character and nature is meant to be done by a clergyman in holy orders. The clergyman is said to have been celebrating divine service when he was molested, then being a clergyman in holy orders and celebrating divine service in a parish church of the Church of England. What Mr. Cope was doing was collecting alms. The clergyman, when walking from the reading desk to the communion table, or from the communion table to the reading desk, is doing part of his duty, and he is to be protected while making any movement in celebrating that office. But when the clergyman is engaged in doing something that is not a rite or office within the meaning of the statute he is not so protected, nor is he because he has been previously celebrating some rite or office with which his present occupation has nothing to do. Observe the words "ministering or celebrating any sacrament or any divine service." Now take the substantive words, "rite or office;" I take it these words would not apply to a collection of alms if a churchwarden was employed in collecting. It is necessary for a priest to be present at the sacrament of the Lord's Supper, and there ought to be one, although it is not necessary at baptism. Now, was the collecting of alms a rite or office ministered by him as priest? If the rubric imposed on the clergyman the collection of alms I should have thought that the words "ministering or celebrating" might be so strained, for I think the offering of alms in charity is as much a part of the service as the prayers that are offered up, but we can find no such provisions in the rubric that the collection of alms should be made by the clergy. But because the rubric does not impose that duty on the clergyman, it is not a bit the less a part of the divine service; for I do not consider the divine service, or even the sacrament, absolutely requires a priest to officiate. There is no doubt that baptisms may be administered irregularly but effectually without the presence of a priest—by a lay man or perhaps a lay woman. This was not part of the divine service where the interference of a priest was necessary, for the rubric clearly excludes the idea of the necessity of a priest for such purpose. The rubric says, "Whilst these sentences are in reading the deacons, the churchwardens, or other fit person appointed for that purpose shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose and reverently bring it

to the priest, who shall humbly present and place it upon the holy table." From this I infer that the rubric considers that if there be a deacon present he may properly collect the alms, but if he does not do so the alms are to be collected by the churchwarden, who, although he be an ecclesiastical officer in law, is a lay person. The rubric goes on to say, "or other fit person appointed for that purpose." The collection is therefore to be a collection by a person of a lower order than a priest. We are called upon to inquire who is to appoint such other fit person. Looking at the language of the rubric, that person is not to be a clergyman, and it is clear that sect. 2 of the Act would not apply for the protection of such lay person or of a churchwarden, although for a deacon it may; but that we need not decide. Originally the word "curate" meant priest or incumbent; "deacon" is used with reference to a person in a lower order. It is intended by the rubric that the proper place of the priest was at the communion table, and the deacon must go round and receive the alms. The words "other fit person" do not extend to persons of the higher order. In general, where a person of a lower order is mentioned, the words do not extend to persons of a higher order in a hierarchy. There is nothing improper in a priest or a patriarch if there be one, collecting the alms; but if he does so, he exercises an office which is not an office where the clergyman ministers or celebrates any divine service. I think that there would be no offence in Mr. Cope collecting the alms, only it cannot be said that he was celebrating divine service at the time. On the whole the magistrates were right, and the decision must be affirmed.

KEATING, J.—I am of the same opinion. The magistrates were right in their refusal to convict the respondents on this information, that they unlawfully did molest, let, disturb, vex, and trouble the said Francis Cope, then being a clergyman in holy orders celebrating divine service in a parish church in the Church of England. Now, for the reasons already given, and which it is unnecessary to repeat, it seems to me plain that the rubric never contemplated this to be a duty to be discharged necessarily by the clergyman; the rubric speaks of three persons who may collect; and therefore, without deciding whether a priest may or may not collect, it is clear that, while Mr. Cope was taking upon himself that duty, he was not a clergyman celebrating divine service. The decision of the magistrates must be affirmed, and the appeal dismissed. *Judgment for the respondent.*

Attorneys for appellant, *Chester* and *Urquhart*, for *Potter* and *Knight*, Manchester.

Attorneys for respondent, *Stephens* and *Stephens*, for *Parrot*, *May*, and *Sons*, Macclesfield.

BAIL COURT.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

June 11 *and July* 6, 1872.

REG. v. ARMITAGE AND BEAUMONT (Justices of the West Riding).

*Bastardy order—Application by mother—Her death before summons heard—Evidence—Cross-examination—*7 & 8 *Vict. c.* 101.

A woman having been delivered of a bastard child personally applied for and procured an affiliation summons to the putative father, under 7 *and* 8 *Vict. c.* 101 (*a*), *but died before the hearing of the case.*

Held that in consequence of the death of the mother, no valid affiliation order could be made, for that the statute required her to give evidence on oath as to the paternity of the child, and, by so doing, to submit herself to cross-examination.

Rule calling on the defendants, justices of the West Riding of Yorkshire, to show cause why a writ of *certiorari* should not issue to bring up a certain bastardy order made by them, to be quashed.

The facts were as follows: On the 23rd Jan. 1872, a woman was delivered of a bastard child. On the 13th Feb. she applied in person to Mr. Armitage, one of the defendant justices, for an affiliation summons to one Brierley, whom she alleged to be the father of her child. The summons was granted, and, on the 19th Feb., served upon the putative father. On the 20th Feb. the mother of the child died. On the 27th Feb. the case came on to be heard. An attorney, instructed by the grandmother of the child, appeared to support the application for an order on the father, and stated that the mother was then

(*a*) 7 & 8 Vict. c. 101, sect. 1, enacts that from and after the passing of the Act all powers for obtaining or making an order upon any putative father for the maintenance of a bastard child shall cease and determine except as hereinafter provided.

Sect. 2. That any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this Act, or who has been delivered of a bastard child within the period of six calendar months before the passing of this Act, may, either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child; and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

Sec. 3. That after the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child under the provisions of this Act, of a sum of money weekly, &c.; and if the application be made before the birth of the child, or within two calendar months after the birth of the child such weekly sums may, if the said justices think fit, be calculated from the birth of the child, at a rate not exceeding five shillings per week for the first six weeks after the birth of such child; and in other cases such sum shall not exceed two shillings and sixpence per week from the time of the making of the application . . .

dead. The putative father also appeared by his attorney, who objected that, as the mother's evidence was not to be had, no valid order could be made. The justices doubted; but they heard such testimony as was given on behalf of the applicant, and made the order in question. This order was bad *ex facie;* but, that the opinion of the Court of Queen's Bench might be obtained as to whether any valid affiliation order could, on the above facts, be made, it was assumed that the order was regular in point of form, and on such assumption

Waddy (Sir *John Karslake*, Q.C., with him) showed cause.—7 & 8 Vict. c. 101, s. 3, enacts that any single woman who has been delivered of a bastard child *may* make an application to justices. It does not say that she, and she alone, must do so. But if such application be made before the birth of the child, the woman *shall* make adeposition on oath stating who is the father of such child. There is a change of phrase where an oath is required. Then sect. 3 is quite different: "the justices shall hear the evidence of such woman, and such other evidence as she may produce." Does that mean that the woman is a competent witness, and that the justices are empowered to hear her, with corroborative testimony? Or does it mean that no one else will be a competent witness unless the woman's evidence is first heard? The point has never been raised before, and no case is to be found upon it. [HANNEN, J.—You do not contend that if she died before taking out the summons any other person could make the application?] No; but here she herself had applied. [HANNEN, J.—The Act seems only to contemplate an application by the woman.] The argument that the words of 7 and 8 Vict. c. 101, s. 4, simply enjoin the justices to hear the evidence of the mother if offered, and do not make her testimony necessary, is supported by 8 & 9 Vict. c. 10, "An Act to make certain provisions for proceedings in bastardy," whereof sect. 5, after reciting the first part of sect. 4 of the earlier statute, and that doubts had been raised as to whether the mother could be heard by the court of quarter sessions on appeal by the father, enacts, "that on the trial of any such appeal . . . the justices . . . *shall* hear the evidence of the said mother, and such other evidence as she may produce." Therefore any decision which could be founded on those words would equally apply to the identical ones in the former enactment. Clearly the death of the mother after an order made, but before appeal, would not invalidate the order by reason of her evidence being wanting at the quarter sessions. Otherwise the man might, on her death after the making of the order, get rid of the order by appealing if time allowed. [HANNEN, J.—But in case of an appeal there would *already* have been an opportunity of cross-examining her, and her evidence, properly sifted by cross-examination, would have been obtained. QUAIN, J.—And she being dead, her evidence given at petty sessions might be read on appeal.] In *Reg.* v. *The Justices of Middlesex* (17 L. J. 111, M. C.) it was held, upon sect. 6 of 8 & 9 Vict. c. 10, that the mother was a competent witness to prove that she had due notice of appeal. There again the *competency* of the woman to give evidence is the question considered. "Competent;" but suppose the woman were a lunatic, incapable of testifying, is the father of her child to escape liability on that account? The words are used in the Act not to insist that the mother shall give evidence, but to entitle her to be heard. These proceedings are *quasi*-civil. At the time of the passing of the statute it was doubtful whether she could be heard at all. So the justices were empowered to hear her, but *must* have corroborative testimony to support her. [QUAIN, J.—How do you meet the words of 7 & 8 Vict. c. 101, s. 4, "and if the evidence of the mother be corroborated . . . to the satisfaction of the justices?" do you interpolate words such as "given on behalf"?] In *Reg.* v. *Justices of Buckinghamshire* (3 New Sess. Cas. 500; 18 L. J., M. C. 113), it was held that under 8 & 9 Vict. c. 10 the woman need not be examined on the trial of an appeal against an order in bastardy, but that, if she be tendered as evidence, she must be corroborated in some material particular by other testimony; and Erle, J. (*inter loq.*) said (p. 505), "There was a doubt whether the evidence of the woman was admissible; and it was enacted that, if she offers herself, she shall be admitted to give evidence, subject to this, that, if they do hear her testimony, it must be corroborated in some material particular. If the woman's evidence be not wanted, the trial will go on as in any other case." And Wightman, J., delivering the judgment of the court, prepared by the former learned judge, said: "The objection that the woman was not examined before the quarter sessions was disposed of on the argument." [HANNEN, J.—But observe the ground upon which Erle, J. founded his remark. "Here, when judgment had been given on the point as to jurisdiction, the appellant said there was no further objection, and the order was of course confirmed:" (see 18 L. J. 116, M. C.) He meant that it would have been an idle ceremony to put in the evidence of the woman when the point raised was only as to the jurisdiction.] In *Reg.* v. *The Justices of Leicestershire* (19 L. J. 209, M. C.), the sessions had refused to hear an appeal against a bastardy order, on the ground that the statute had not been complied with by sending a notice by post to the residence of the woman after her decease. Paterson, J. (*inter loq.*) said, "If the appeal can be heard, I am disposed to think that the notice is sufficient; but can the appeal now be *heard*, as the statute requires it should be?" And the court held that the sessions ought to have heard the appeal. [QUAIN J.—Any other decision would have been perfectly monstrous, or the man would by the death of the woman have been deprived of his opportunity of appealing.] In some cases the mother's evidence would be immaterial, in others impossible to obtain. For example, suppose satisfactory independent proof of admissions by the father of his paternity, or suppose the mother is carried away or deserts her child. Then, is the father thereby to gain an exemption from liability, and the parish to maintain his child?

Besley in support of the rule.—Formerly the proceedings were instituted against the father of a bastard child in order to reimburse the parish, and not to cause payments to be made to the mother for its maintenance. By 4 & 5 Will 4, c. 76, s. 71, the mother was bound to maintain such child up to a certain age, and sect. 72 enacted that when such child became chargeable to the parish the overseers might apply for an order on the putative father, and the section went on to direct that "the court to which such application shall be made

shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order. . . Provided always that no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony to the satisfaction of such court." 2 & 3 Vict. c. 85 transfers the powers of quarter sessions to make such orders to special or petty sessions. *Rex* v. *Ravenstone* (5 T. R. 373), and *Re Clayton* (3 East. 58) are the only authorities in favour of the argument that the mother's evidence is not needed; but they were decided before the Act now in operation was passed. And in the *Queen* v. *Read* (9 Ad. & E. 619), an order was held to be bad which alleged that the sessions heard evidence in corroboration of the mother's statement, without adding that the corroboration was in some material particular. [QUAIN, J.—That does not help your argument much. Suppose a clearly proved admission of paternity by the man, would an order then be made without the evidence of the woman?] It is not necessary to go so far as to argue that it would. [HANNEN, J.—Might not a man be convicted of rape in the absence of the woman upon whom he is alleged to have committed the crime?] Probably, for, under certain circumstances, full proof of the offence might be given by other witnesses. The mother of a bastard child is not punishable under the Vagrant Act for running away and leaving her child chargeable: (*Reg.* v. *Maude*, 11 L. J. 120 M. C.) Even where the application being made before the birth of the child is *on oath*, under 7 & 8 Vict. c. 101, s. 2, yet sect. 6 of the later Act, which is to be read therewith, provides that it shall be lawful for the justices at the petty session to adjourn the hearing from time to time until the woman shall be able to attend. [HANNEN, J.—"It shall be lawful." The words are not imperative, and only aid to show a general intention that the woman shall be called as a witness.] If not imperative, they would be uselessly inserted. In *Hodges* v. *Bennett* it seems to have been taken for granted that the evidence of the mother was essential, although the case turned only on the point as to the necessity of her testimony given at the application being corroborated. Then this order is bad, because it is not in the form given by the schedule to 8 & 9 Vict. c. 60 (No. 8). It may not be necessary to follow the form exactly, but here an evasion is attempted by omitting the recital that the justices have heard the evidence of such woman. From the passing of the Act to the present time no like order has been made. *Reg.* v. *Justices of Buckinghamshire* (*sup.*) turns on a technicality.

Waddy, in reply, referred to a bastardy order (temp. Car. 2) set out in *Reg.* v. *Eve* (1 Show. 257), and expressed to be made on the evidence of persons named therein, of whom the mother was not one.

Cur. adv. vult.

HANNEN, J., delivered the judgment of the court.—This was a rule for a *certiorari* to bring up a bastardy order of justices for the purpose of its being quashed. The material facts are these: A bastard child was born on the 23rd Jan. 1872. On the 13th Feb. the mother made application to a justice for a summons against the alleged father under 7 & 8 Vict. c. 101, s. 2. On the 20th Feb., and before the hearing of the summons, the mother died. On the 27th the summons was heard, and an order made against the alleged father. The question we have to determine is whether the order was properly made without the evidence of the woman herself. This depends on the construction to be put on the 3rd section of the above-cited Act. By that section it is enacted that after the birth of such bastard child, on the appearance of the person so summoned, the justices in petty sessions shall hear the evidence of such woman, and such other evidence as she may produce, and, if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child. It was contended, in opposition to the rule, that the object of the section was merely to clear up doubts as to the admissibility of the evidence of the mother, and that it did not render it obligatory that such evidence should be given if other sufficient proof could be afforded, and it was argued that this construction was to be adopted rather than one which would render proceedings in bastardy impossible, not only in case of death of the mother, but also in case of her being of unsound mind or otherwise incapable of being a witness. We, however, are of opinion that the statute makes it necessary that the mother shall be called as a witness. The remedy provided is given to the mother only. In the event of her death without having made an application, it is clear that no one else can take proceedings against the supposed father. It was to be expected, therefore, that in the event of the death of the mother before the hearing of the summons, proceedings which could not in that state of circumstances have been instituted should not further be prosecuted. But we are further of opinion that it was the intention of the Legislature, having regard to the peculiar nature of such inquiries, that the mother should support her accusation by her oath, and submit herself to cross-examination. The paternity of the child is a fact as to which no evidence can be satisfactory without the statement of the mother, and the peculiar language of the statute, requiring that the evidence of the mother shall be corroborated by other testimony, cannot, as it seems to us, be given reasonable effect to without holding that the mother herself must be a witness on her own behalf. With regard to the instances of alleged hardships, in which the production of the evidence of the mother may be impracticable, it is sufficient to say that these, if within the contemplation of the Legislature, were probably deemed to be of such rare occurrence as not to make it expedient to make an exception in their favour from the general law applicable to this peculiar class of cases. We do not pronounce any opinion upon the effect of the death of the mother after the hearing and before the appeal. That would undoubtedly be subject to consideration, which it is not necessary to enter upon in this case. For these reasons we think that the rule should be made absolute. *Rule absolute.*

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esqr., Barrister-at-law.

June 24 and 25, 1872.

ANTHONY v. THE BRECON MARKETS COMPANY.

Local Act—Erection of slaughterhouse—Consent of corporation—Licence of local board.

The corporation of B. was also the local board of health under 11 *&* 12 *Vict. c.* 63. *By the Local Government Act, which is to be read with that Act, the clauses of* 10 *&* 11 *Vict. c.* 34 *(Towns Improvement Act) with respect to slaughterhouses are incorporated. The effect of the clauses as incorporated is to provide that no slaughterhouse shall be erected or used without the licence of the Board of Health. By the B. Market Act, passed subsequently to the Local Government Act for the better management of the property of the corporation of B., a company was incorporated, in which certain property of the corporation was vested, and the Act provided that the company, with the consent of the corporation in writing under the hand of the town clerk, might erect and maintain slaughterhouses in the borough. The company erected a slaughterhouse, having previously obtained the consent of the corporation in a memorandum of a resolution under the hand of the clerk; but the corporation, acting as local board, afterwards refused to licence the slaughterhouse.*

The plaintiff, to whom the company had agreed to demise the tolls receivable under the Act for slaughtering cattle in the said slaughterhouse, brought an action against the company for not making a good title to the tolls. The Court of Exchequer decided that the consent given by the corporation alio intuitu did not operate as a consent by them as local board of health, and that therefore the defendants were liable. On appeal,

Held, reversing the judgment below, that the consent given under sec. 65 *of the Brecon Markets Act included the licence of the local board required by sec.* 126 *of the Towns Improvement Act,* 1847.

APPEAL from a decision of the Court of Exchequer making absolute a rule to enter a verdict for the plaintiff in an action brought for an alleged breach of agreement to let the tolls payable by the Brecon Markets Act, 1862.

The facts of the case will be found in the report of it on the argument of the rule (15 L. T. Rep. N. S. 665); and the various sections of Acts of Parliament bearing upon the subject examined in the Exchequer Chamber are succinctly stated by Willes, J., delivering judgment *infra*.

The point in dispute was whether a consent given by the corporation of Brecon under 25 & 26 Vict. cap. clxxxvi. to erect a slaughterhouse in respect of which the tolls in question were to be taken, was given by them merely in respect of their rights under the above private Act, or whether it also amounted to a licence by them in their capacity of the Local Board of Health for Brecon under the Towns Improvement Clauses Act 1847, sect. 126

Dowdeswell, Q.C. (with him *G. B. Hughes*) for the appellants.—The question is whether the defendants had a good title to let the tolls. First, the consent given by the corporation in pursuance of sect. 65 of the Brecon Markets Act, 1862 was a substitute *for the licence* required from the Local Board of Health. Secondly, if not, it was in itself a good licence. He referred to the various sections of the different Acts of Parliament discussed in the court below. The Legislature considered the Towns Improvement Act not to deal with matters of health, but questions respecting the safety and convenience of erections; for in the year following that in which the Act received the Royal assent the statute relating to local boards of health was passed, which operated to repeal the clause of the former Act relied on *contra*. It would be extraordinary if the same body had to give a double consent—viz., one assent *quâ* corporation, and the other *quâ* local board. Sect. 65 of the Brecon Market Act provides every required security. Under the Towns Improvement Act, s. 126, no licence to *use* is needed if there be a licence to *erect* the slaughterhouses. The Act contemplates offences which may be committed in unregistered slaughterhouses. "The rule as laid down by Sir Orlando Bridgman is, that 'the law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it:'" (per Montague Smith, J., in *Conservators of the Thames* v. *Hall*, 18 L. T. Rep. N. S. 361; L. Rep. 3 C. P. 421.) And wherever there is a particular provision imposing one penalty, and an Act passed subsequently imposing another, the latter Act will be deemed to be a repeal of the former, as in *Rex* v. *Cator* (4 Burr. 2026) and *Rex* v. *Davis* (1 Leach Cr. Cas. 271), a doctrine quite borne out by *Reg.* v. *Champneys* (24 L. T. Rep. N. S. 181) by the observation of Bovill, C. J., who says (p. 394): "It is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication; we had occasion to consider that matter in the case of *Thorpe* v. *Adams*," in the same volume, at p. 120, where Willes, J. points out the distinction between an express repeal of a local Act and a general provision in a subsequent public Act inconsistent with the terms of the earlier one. [WILLES, J.—I only laid down there the general rule that *generalia specialibus non derogant* —part of the acrobatism of students.] See also per Lord Campbell, C. J. in *Mitchell* v. *Brown* (1 E. & E. 267). Here is a subsequent statute that gives authority to a corporate body to erect slaughterhouses in a particular manner, and supersedes and renders unnecessary the consent or licence to do so which was previously required by the statute 21 & 22 Vict. c. 98; for it would be straining language if, when the Legislature has said that persons may do a particular act in a particular way on a certain spot, subject to prescribed regulations, a local board could control that, and say, "You shall not do that on that spot, although it is a place designated by your special Act." Next, the consent of the local board is the same as the consent of the corporation. (*Pedder* v. *The Mayor, &c., of Preston*, 6 L. T. Rep. N. S. 540; 31 L. J. 291 C. P.) [WILLES, J.—There an account of the corporation *generally* was set off against an account of the corporation as a local board of health.] Precisely so; and the same principle appears in *Nowell* v. *Mayor, &c., of Worcester*, 9 Ex., expressed per Pollock, C.B., at p. 406. The

licence was good. Sect. 76 authorised the taking of the tolls. By sect. 81 the tolls are granted to the company. Sect. 82 gives power to let the market. It is let to the plaintiffs, who say, "We are entitled to maintain an action against you for letting the tolls because you have not obtained a licence to erect this slaughterhouse." The only penalty is imposed on the person *using* the slaughterhouse.

Giffard, Q.C. (with him *Rees*), for the respondents.—There must be a licence for the slaughterhouse and use of it under the Towns Improvement Act, and there not being a licence, the plaintiff is entitled to the damages found by the jury, and it is not open for the other side to contend there was no proof of the breach relied on at the trial. The only point is whether the building erected by the defendants, which they purported to let, was a slaughterhouse in which tolls could be lawfully levied or not. The Acts relied on for the appellants have reference to totally different objects. The Markets and Fairs Clauses Act is for the purpose of allowing trading companies to obtain the franchise of holding a market, and to enable them to trade as private companies, and the sections which have been referred to in support of the plaintiff's case are provisions enabling them to manage their own property effectively. Then the bulk of the sections in the Towns Improvement Act relate to the public health (sects. 126, 127, 128, and 129), providing for the licensing, registration, and regulation of slaughterhouses. But the Local Government Act in effect repeals all the provisions having reference to slaughterhouses. The Brecon Act is but a local Act, and expresses merely a contract between the vendors and vendees of property, sanctioned indeed, but not devised, by the Legislature. The consent of the *corporation* was applied for and given, but the *local board*, who have to look after the general health, refused their licence. [BRETT, J.—Could the Legislature have meant that they in one capacity should allow a person to expend money in building, and then in another capacity refuse to license its erection?] There are cases going so far. [WILLES, J., intimated that it was unnecessary to cite them.] The Towns Improvement Act is not generally applicable to all boroughs. [BLACKBURN, J.—No, only to those in which it is adopted, and doubtless the Legislature in passing the Brecon Act were aware that the Towns Improvement Act had been adopted in Brecon.] The judgment below was right.

Dowdeswell, Q.C., in reply.

Cur. adv. vult.

Jan. 24.—WILLES, J.—This was an action brought by the plaintiff Anthony against the Brecon Markets Company stating that they had demised to him, amongst other things, the tolls of a new slaughterhouse, and the declaration showed, as a breach of the contract of letting the slaughterhouse, that they had not at any time during the period of the demise any right or title to let to farm to the plaintiff the tolls of the slaughterhouse, or any part thereof. It appeared at the trial that the defendants had erected a slaughterhouse, and had done so under the licence and consent of the corporation of Brecon. On the 14th May 1863, previously to its erection, the consent in writing of the corporation was obtained, purporting to be under sect. 65 of the Brecon Markets Act 1862. The document having been lost, evidence was given of its contents, and it appeared to have been in form of a resolution of the town council, signed by the town clerk, giving permission to the defendants to provide and maintain a slaughterhouse under sect. 65 of the Brecon Markets Act; not to maintain any particular slaughterhouse." The contention on the part of the plaintiff was that that was insufficient licence to erect a slaughterhouse, and he insisted that there ought to have been a licence pursuant to sect. 125 and the following sections of the Towns Improvement Act 1847, and he complained that by reason of the want of such licence the inspector of the Board of Health interfered with slaughtering, and prevented him earning the tolls of the slaughterhouse. The interference of the inspector went for nothing unless a licence was necessary under 10 & 11 Vict. c. 34, and the question arising for this court is whether consent of the corporation, under sect. 65 of the Brecon Markets Act, stood in the place of and included a licence under the Towns Improvement Act. The Court of Exchequer thought it did not, and founded their opinion on the notion that the application made to the corporation was in the express terms under the 65th section of the Brecon Markets Act, and was granted by the corporation intending to act under that 65th section, and, intending to act on that power only, they could not be deemed to have meant to act under the 125th and 126th sections of the Towns Improvement Act; that their intention was to be taken into consideration; that the consent was only in exercise of the power given under the local Act, and not in exercise of the power given under the public Act; and the special ground of the judgment was stated by the Lord Chief Baron to be that the 65th section of the Brecon Act had no intention to protect the public health, but was only introduced with respect to the claims of the Brecon Markets Company and the corporation on one another, and that still the power of the corporation under the public Act remained to be exercised. It is necessary to consider how these Acts of Parliament ran in point of time, and in the first place to deal with the local Act and its effect, and then to see what operation the public Act has upon it. It seems the corporation of Brecon, one of the most ancient in the kingdom, had got a right to various tolls for a fair or market, and it was thought advisable that power should be given of providing a slaughterhouse for the town, and 1 & 2 Vict. c. 12 was passed, which gave the corporation power to provide slaughterhouses in the borough, and also gave them power to provide a market house in their borough, in exercise of their old right of market. They had before that provided a market house but not a slaughterhouse. They had become indebted to a great number of persons, and it was supposed that the tolls had not been properly collected, and would be better collected by constituting a new company or corporation to collect them. Accordingly, by 25 & 26 Vict. c. clxxvi., the Brecon Markets Company was formed of the creditors of the corporation, and by the recitals therein it is stated that it was expedient that parts of the estate of the corporation should be vested in certain members of the company, and provisions made for the discharge of the debts of the corporation. And further, that it was expedient to repeal the 1 Vict. c. xii., and make other provisions with respect to the markets and fairs, and that it was expedient that the company should be autho-

rised to provide a new market place in the borough, to acquire a building for the purpose, and to remove the cattle market. Sect. 4 incorporated various Acts of Parliament, including the Markets and Fairs Act, but not the Towns Improvement Act, 1847. Provisions are made for the management of the company, for making payment to the corporation, and for the application of the tolls to be received. The latter provision is to be found in sect. 47. The tolls are to be applied to pay the debts of the corporation. By sect. 64 the company are to make, provide, and maintain a proper and sufficient place for holding a cattle market, and all such proper conveniences as they should think fit. That gives an absolute power to make a market. The corporation is given control over it. The next, sect. 65, is differently framed, and enacts that "the company from time to time, if and when they think fit, and with, but not without, the consent of the corporation, testified by writing under the hand of the mayor or town clerk, may provide and maintain slaughterhouses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they think expedient; but if any slaughterhouses be provided, they shall be provided as near as conveniently may be to the cattle market-place provided under this Act, and the slaughterhouses as provided shall be deemed part of that market-place. The only other sections in the Act to which it is necessary to refer are the 75th section, which gives power to the company to take tolls for slaughtering, and the 85th section, authorising the inspector of the company to enter into and inspect any building or place used for slaughtering cattle so as to keep up a monopoly, and sect. 86, by which the company are given control over the erection of slaughterhouses. Under that Act application was made to the corporation, and consent given by the town council and signed by the town clerk according to the provisions of sect. 65. Pursuant to that consent, the slaughterhouse was made. Everything up to that point appears to be regular, and it is in consequence of the operation of the Public Act that the present difficulty arises. It is to be observed that this analysis of the 25 & 26 Vict. c. clxxxvi., clearly shows that the consent of the corporation under sect. 65 had something more than the interest of the debtors in its regard. The payment of the debts was provided for by other sections. The power to erect a market-house was given absolutely without any such consent at all, and it is with respect to the erection of the slaughterhouse that the consent is required. And for an obvious reason, because the slaughterhouse might become a nuisance, and the corporation, having charge of the inhabitants of the borough for their welfare, were entrusted with power to consent to or dissent from the erection of a slaughterhouse. On that point, without looking to the Public Act, it is difficult to follow the reasoning of the Court of Exchequer when they say that the consent of the corporation had nothing to do with public purposes. It is certainly difficult to consider the consent under sect. 65 given otherwise than with a view to those consequences. Now, it is necessary to turn to the public Act for the purpose of tracing the power which the corporation had to give a licence for the erection of a slaughterhouse apart from the privileges contained in the 25 & 26 Vict. c. clxxxvi.; and here we must begin with the session of Parliament in 1847. In this session two Acts were passed relating to slaughterhouses. One, the 10 & 11 Vict. c. 14, called the Markets and Fairs Act, 1847, and in the 17th and following sections thereof, up to and including sect. 20, provisions are contained for the erection of slaughterhouses. To these provisions it is unnecessary to refer more particularly, except in reviewing the history of the law giving a power to erect slaughterhouses under this Act or the special Act. The other statute of the same year relating to slaughterhouses is the 10 & 11 Vict. c. 34, by which, in sects. 125 to 131 inclusive, various powers are given as to slaughterhouses to commissioners appointed under the statute. It is called the Towns Improvement Act. By sect. 125 "the commissioners may license such slaughterhouses and knackers' yards as they from time to time think proper for slaughtering cattle within the limits of the special Act." Then sect. 126 enacts that "no place shall be used or occupied as a slaughterhouse or knacker's yard within the said limits which was not in such use or occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof, or for the use and occupation thereof as a slaughterhouse or knacker's yard, has been obtained from the commissioners." There the Legislature is speaking of future slaughterhouses, and omitting those previously erected. What is that licence to be for? It has hardly been even *suggested* that there was to be a separate licence for the erection of a slaughterhouse, and a subsequent licence for the use when erected. That might be a possible construction of the enactment, but it would practically be such a subtle and refined construction, preventing people spending their money on slaughterhouses, that it is one which ought not to be adopted. I think the true meaning of that was that a licence to erect a slaughterhouse means *primâ facie* to erect a slaughterhouse *which shall be used as a slaughterhouse*, and not that there should be two separate licences, one for the erection, and another for the use. True, in two subsequent sections the *abuse* of the slaughterhouse may lead to its suspension or its abolition, and perhaps then the licence for the *use* may come into play separately. But a licence given for the erection of a slaughterhouse means a licence for a house to be used as a slaughterhouse. The 126th section of the public Act, compared with sect. 25 of the Brecon Markets Act, shows that. That statute was followed by another, which made the corporation commissioners, substituting them for the commissioners under 10 and 11 Vict. c. 34. That later statute was 21 and 22 Vict. c. 98, known as the Local Government Act, 1858, an Act which is to be classed in the same category with the Acts relating to public health, and it refers to them in terms unnecessary now to dwell upon. By sect. 34 of that Act the duty of carrying into execution the Act is to be vested in a local board, consisting (1) in corporate boroughs of the mayor, aldermen and burgesses, acting by the council. The town council is the proper board, and therefore it was that I observed that the consent given was not a mere formal consent by the corporation, but a consent by the very council which, under the 21 & 22 Vict. c. 98, s. 24, is constituted the local board. Then by sect. 45 the provisions of "The Towns Improvement Clauses Act 1847," with respect to the following matters, shall be incorporated

with this Act, and one of those matters is (7) with respect to slaughter-houses. Therefore, looking into the history of the licence to erect slaughter-houses under the public Act, it is found that, at the time when the 25 & 26 Vict. passed, the proper persons to give licence for the erection and use of a slaughterhouse were the corporation, acting by the council; and on turning back to sect. 65 of the local Act, on which our judgment must be given, this comes under contemplation, viz., that the corporation act first in the ordinary way by consenting. Sect. 65 says, "with the consent of the corporation," and in fact that was acted on by the council giving the consent. You have the same persons giving the consent, the same persons to receive the consent, and you have the thing consented to be licensed the same. The language is somewhat different, but the effect of that language is precisely the same, because the language of the Towns Improvement Act, s. 126, is "licence to erect and use," whereas the language of sect. 65 of the Brecon Act, is "consent to provide and maintain" a slaughter-house. The donors, therefore, are the same, the effects of the licence are the same, the language is the same, the donees the same, and the object, as already observed, for which the corporation must have been intended to give consent under sect. 65 the same (because if no other object is suggested the natural object is naturally presumed), viz., the preservation of public health and convenience. It seems therefore to result necessarily from the comparison of the two sections, on what has been done under sect. 64, that the consent under that section did include a licence under sect. 126. Now, the way in which the question was reserved at the trial ought to be regarded. The question was whether there ought not to have been a licence of the corporation as local board, and it would probably be inconvenient that we should go into the third point made by Mr. Dowdeswell, for that was rather raised by his ingenuity than actually reserved. But, looking at that question, it appears that the consent under sect. 65 is a licence under sect. 126. Whether by the provision as to the use of the slaughterhouse under sect. 129 in this Act, the Brecon Company are entrusted with the privileges of managing this slaughterhouse, or whether they are to fall under the supervision of the corporation, are questions on which it is unnecessary to give an opinion. It would be desirable that they should do so. It appears that the company have been recognised by 25 & 26 Vict. c. clxxxvi., as persons entrusted in the welfare of the borough by Parliament. Very likely the conduct of the market will be such as that no one in the borough would like to interfere. We think the market may be so used, and that the judgment of the Exchequer must be reversed.

BLACKBURN, J.—I agree in the result of my brother Willes's judgment, and only add these few words to express distinctly that we do *not* decide one point which is of very considerable importance. The result of the conflict of Acts is that where there is a borough in which the Towns Improvement Act is adopted, no new slaughter-house can be set up without a licence to erect and use granted by the local board, acting by the town council, and subject to the many provisions mentioned in the 129th section, in which the right to use a new slaughterhouse is on abuse taken away. Now when there is a borough in which that Act has not been adopted, and in consequence persons are permitted to have a market, and in the local Act there is a clause requiring them to have a licence, that incorporates the Markets and Fairs Clauses Act and gives a market place; and it is a question of general importance whether the board authorised under the Market Act to erect and use a slaughterhouse of this sort are to any and to what extent under the control of the local government board. I am anxious to point out that we do not decide that. I think that the licence given by the corporation, who *are* the local board, is to all intents and purposes a licence to erect and use, and therefore, either way, the judgment should be reversed.

KEATING, J.—I am of the same opinion. I concur with my brother Willes, and for the reasons he has given.

MELLOR, LUSH, and BRETT, JJ., also concurred.

Judgment reversed.

Attorney for the plaintiff, *R. Fowke*, for *W. Garnes*.

Attorney for defendants, *Dobinson* and *Geare*, for *Cobb* and *Price*.

HOUSE OF LORDS.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

June 29, 1871; *Feb.* 15, *and April* 30, 1872.

(Present, Lord CHELMSFORD, Lord WESTBURY, Lord COLONSAY, and Lord CAIRNS.)

DUKE OF BUCCLEUCH *v.* THE METROPOLITAN BOARD OF WORKS.

Compensation—Award—Admissibility of umpire's evidence—Riparian proprietor—Lands "injuriously affected"—Lands Clauses Act 1845, *s.* 63—*Thames Embankment Act, s.* 27.

The plaintiff was the lessee of a certain house and premises, abutting on the river Thames at Whitehall, for the residue of a term of 99 *years. Part of the premises in question consisted of a causeway leading from the garden of the house, and running out into the river at low water mark. This causeway had for a long period been used for landing and embarking goods. The defendants, under the powers of the Thames Embankment Act* (25 *&* 26 *Vict. c.* 93) *constructed an embankment, and in the course of so doing took away the causeway and a landing place connected with it and direct access from the plaintiff's premises to the river was cut off by a public roadway.*

The plaintiff thereupon gave the defendants, under the Lands Clauses Act 1845, *notice of arbitration and claim for compensation, stating in his notice that he was owner of the causeway, as lessee, and entitled to the use of the landing place, and claiming compensation for their removal and for the depreciation in value of the house and lands, and otherwise injuriously affecting them.*

The arbitrators referred the question of amount to an umpire, who eventually awarded 8325*l. to the plaintiff. This sum the defendants refused to pay, and an action on the award was brought. Among other pleas, the defendants pleaded that the sum awarded included damages and compensation in respect of which neither the arbitrators nor the umpire had any jurisdiction whatever. At the trial the defendants called the umpire as a witness, who stated that among other items he had awarded*

5000*l.* *for diminution in value of the house, and that in fixing the amount he had taken into consideration the loss of privacy and other "amenities" by reason of the defendants' works.*

Held, first (affirming the judgment of the Exchequer Chamber): That the umpire's evidence was admissible to show what matters were considered by him, and generally the course of the proceedings up to the making of the award; but not to show the considerations which affected the umpire's mind in determining the quantum of compensation. Secondly (reversing the judgment of the Exchequer Chamber): That the plaintiff's property was "injuriously affected" by the interposition between it and the river of an embankment to be used as a public highway; and that the umpire was, therefore, authorised both by the special Act and the Lands Clauses Act, to give the plaintiff compensation.

Per Lord Cairns: The plaintiff was, as a riparian proprietor, entitled to compensation for depreciation in the value of his property arising from a deprivation of the right to water frontage.

The cases of Hammersmith Railway Company *v.* Brand *(21 L. T. Rep. N. S., 238; L. Rep. 4 H. L. Cas., 171) and* Glasgow Union Railway Company *v.* Hunter *(L. Rep. 2 Sc. App. 78) commented on.*

ERROR from a judgment of the Court of Exchequer Chamber, in part affirming, and in part reversing, a judgment of the Court of Exchequer.

The facts are shortly stated in the head-note, and fully in the reports in the courts below: (18 L. T. Rep. N. S. 906; 23 Id. 255; L. Rep. 3 Exch. 306; 5 Id. 221.)

The following judges were present at the hearing:—Martin, B., Byles, Blackburn, Smith, and Hannen, JJ., and Cleasby, B.

Sir *R. Palmer*, Q.C. and *Kemplay* for the plaintiff in error.

Hawkins, Q.C. and *Philbrick* for the defendants in error.

The following cases were cited as to the admissibility of the umpire's evidence:

Re Dare Valley Railway Company, L. Rep. 6 Eq. 429; 37 L. J. 719, Ch.;
Hodgkinson v. *Fernie*, 3 C. B., N. S., 189;
Johnson v. *Durant*, 4 C. & P. 327;
Ponsford v. *Swaine*, 4 L. T. Rep. N. S. 15; 1 J. & H. 433;
Mortimer v. *South Wales Railway Company*, 1 E. & E. 375

As to the validity of the award:

Hammersmith Railway Company v. *Brand*, 21 L. T. Rep. N. S. 238; L. Rep. 4 H. L. Cas. 171;
Glasgow Union Railway Company v. *Hunter*, L. Rep. 2 H. L. Sc. App. 78;
Attorney-General v. *Johnson*, 2 Wils. Ch. 87;
Gann v. *Free Fishers of Whitstable*, 12 L. T. Rep. N. S. 150; 35 L. J. 29, C. P.;
Ricket v. *Metropolitan Railway Company*, 16 L. T. Rep. N. S. 542; L. Rep. 2 H. L. Cas. 175;
Mason v. *Hill*, 5 B. & Ad. 1;
Miner v. *Gilmour*, 12 Moo. P. C. 131;
Sampson v. *Hoddinott*, 1 C. B., N. S., 590;
Leigh v. *Stockport, &c., Railway Company*, 10 L. T. Rep. N. S. 426; 33 L. J. 251, Q. B.;
Caledonian Railway Company v. *Ogilvy*, 2 Macq. Sc. App. 230;
Reg. v. *Eastern Counties Railway Company*, 2 Q. B. 347;
Re Penny, 7 E. & B. 660;
Brophy v. *Holmes*, 2 Molloy 1.

The following questions were proposed to the judges: First, whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose? Secondly, whether, upon the facts, admissions, and evidence set forth in the case and the appendix (so far as such evidence was admissible), the plaintiff in error is entitled to a verdict on the issue raised on the seventh plea?

CLEASBY, B.—Two questions were put by your Lordships to the judges in this case—First, whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose? Secondly, whether, upon the facts, admissions, and evidence set forth in the case and appendix (so far as the evidence was admissible) the plaintiff in error is entitled to a verdict on the issued raised on the seventh plea? I answer the first question by giving it as my humble opinion—First, that the umpire was a competent witness, like any other person, to prove matters material to the issues; secondly, that questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject matter of adjudication when the proceedings closed, and he was about to make his award; thirdly, that as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it. First, with regard to the competency of the umpire as a witness, I am not aware of any real objection to it. With respect to those who fill the office of judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say prevent them being examined. But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence. The practice entirely agrees with this: for it is every day's practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined as a witness without objection: secondly, being competent generally, it follows that he may be questioned as to what took place before him, so as to show over what subject matter he was exercising jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter, A., and also in respect of another matter, B., and that both were entertained without objection; or he might prove that claim B. was objected to and rejected, or that it was after objection received. He might, in short, give any evidence for the purpose of showing what was the subject matter into which he was inquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given. And it deserves notice, that as to this evidence the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award. He could be corrected by any other person present at the proceedings, including the shorthand writer, if there was

one; thirdly, as soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of showing what he intended to be included in the award. In the first place it is (and, indeed, must be) a written instrument, and the general rule is applicable, that its effect must be collected from the instrument itself. The subject matter to which it is applicable is ascertained by proof of the subject matter of the inquiry. I cannot think that if the umpire admitted upon the inquiry claims A. and B., and made a general award of one sum for compensation, he could be allowed to prove that in arriving at that sum he had rejected claim B. from the computation, or *vice versâ*, if he had rejected claim B. upon the inquiry could he be allowed to prove that he had included it in the computation. The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow anyone to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it. The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined in an award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed we know that agreement in such a result is often only arrived at by some concession and compromise, and in case of a difference in the evidence of what was intended, which is to govern and influence the award? Or it may be further illustrated by supposing the case, instead of going to arbitration, to go to a jury. There is an assessor who presides, and he directs the jury to reject certain heads of claim and to compensate for others. The jury give a general verdict. Could the twelve jurymen be called as witnesses to show to what extent they had severally acted upon the direction given, or against it, so as to vitiate the verdict by showing that some of the jury included in it matters they could not properly include? I submit not, and that the verdict must speak for itself and be applied to the proper subject matter, viz., so much of the claim put forward as had been entertained. An authority has been referred to which does not seem to agree with the opinion which I have ventured to express, the case of *Brophy* v. *Holmes* (2 Molloy, 1), decided by Hart, L.C. A question arose in that case whether a certain equitable claim under a guarantee had been disposed of by arbitrators in a reference of all matters in difference. It appeared that the claim had been brought forward by the plaintiff, but the defendant protested the arbitrators had no right to consider it, and gave them a caution not to entertain it. The Lord Chancellor says, "If the arbitrators said we think the guarantee not within our jurisdiction, that would be one case." All would agree, I apprehend, that so far the view taken was correct, because there would be an act of the arbitrators in refusing to entertain the claim which would be decisive. But in what follows the Lord Chancellor appears to think the state of mind of the arbitrators is the subject of inquiry and not their acts; for he goes on to say, "The plaintiff might have examined each of the arbitrators, and put this plain interrogatory to each, Did you abstain in consequence of the caution, or for any other reason, from weighing the effect of the guarantee, or did you look into it and all the matters in difference between the parties, and conclude on the whole case?" I beg most respectfully to dissent from this, as not being a correct mode of dealing with the case. The acts of the arbitrators, and not the hidden operations of their minds, are the proper subjects of inquiry. If the claim was made and received, and evidence given upon it, this would be decisive of the jurisdiction exercised by the arbitrators, quite independent of any reservation in the minds of the arbitrators at the time. One cannot help asking what would be the effect in this case of the arbitrators giving different answers to the supposed question. It certainly strikes me very strongly that the state of the arbitrator's or judge's mind is of no importance, except so far as it is embodied in some judicial act done by him. His mind may fluctuate and change more than once until the decision is delivered, and then, whether it be upon an interlocutory or final matter, the case is so far bound. I wish to add that what has been said has reference only to such a proceeding as the present, and not to a proceeding of a different nature, viz., when an application is made (the submission having been made a rule of court) to refer back the award, or set it aside on the ground of some mistake or misconception of the arbitrator so as to make it wrong that the award should stand. In the exercise of such a jurisdiction the court to which the application was made would probably reject no means of informing itself whether the arbitrator had proceeded upon such a mistake or misconception. This was the nature of the application in the case *Re Dare Valley Railway Company* (L. Rep. 6 Eq. 429), where Giffard, V.C., thought a written statement by the arbitrator of his reasons admissible in considering whether the arbitrator had proceeded upon an erroneous view of his duties or not. The opinion given has reference only to an action at law upon the award, in which of course the rules of evidence must be attended to. I beg, therefore, to answer your Lordships' first question, by giving my humble opinion that the umpire was a competent witness, that he might be properly questioned as to the subject of claim put forward and inquired into before him, and that he could not be properly questioned as to the matters which he included in or excluded from his award. I am authorised by my brother Bramwell to state (by permission of your Lordships) that he was misunderstood when he gave his opinion in the Court of Exchequer, if he was supposed to hold that the

umpire was not a competent witness; he did not hold that he was not competent for any purpose, but only that he could not be questioned as to the composition of his award. This appears from the report of what he said, especially from that in the *Law Journal*. The second question put to the judges is, whether upon the facts, admissions, and evidence set forth in the case (so far as the evidence was admissible) the plaintiff in error is entitled to a verdict on the issue raised on the seventh plea. The seventh plea alleges that the amount awarded by the umpire included certain damages and compensation in respect of which the umpire had no jurisdiction. The substance of the plea may be regarded as being that the award was made in respect of some claim for compensation which the claimant was not lawfully entitled to under his claim, and over which the umpire had not jurisdiction. And this raises the main question which has been argued before your Lord ships, viz., whether the Duke of Buccleuch can claim compensation for the depreciated value of Montague House, resulting from the loss of privacy, and the noise and dust caused by a public road between it and the river. Before answering the second question put to the judges, and which turns to some extent upon the form of the claim sent in by the Duke, and the terms of the plea, I which to be allowed to consider generally what compensation he could properly claim. He was the owner of Montague House for the unexpired term of a lease under the Crown, with an agreement to remain for ninety-nine years, from the 5th Jan. 1855. The premises adjoined the river, and the natural flow of the river brought it at high water up to his gardens. He had at the north-east corner of the gardens a landing-place and steps, with a causeway running down to low water mark, which gave him the convenient use of the river at all states of the tide. The ground between the house and the river is described in the lease of 1810 as being used and occupied for ornamental gardens or pleasure ground, and as being separated from the river by iron rails only. So that by the terms of his lease, which expressly gave him in the fullest terms all rights of water and other rights belonging to the premises, the Duke was entitled, as riparian owner, to the regular flow of the water all along the extremity of his garden. This valuable water right insured to the house and garden privacy, quiet, freedom from the noise and rattle of carriages by night and by day, and freedom from the dust of a public road. Now, the deprivation of the water right is clearly an injurious affecting of the premises to which it is annexed within the proper meaning of that term. It would be an actionable wrong at the suit of the owner of the premises unless justified by special Acts, and it is unnecessary to rely upon the 27th section of the special Act, which recognises the right to compensation for loss of river frontages, or to the 4th section of the Act. The last-named section, however, ought to be noticed, because it expressly makes such a right come within the meaning of the word "land" for the purposes of the Lands Clauses Consolidation Act. We must take it, therefore, that the defendants in taking from the Duke this right are to compensate as they would be bound to do if they took his land, with this difference, perhaps, they if they really took *his land they might* be said to take something separate from his house and garden, but by taking this right they take something which only exists as annexed to his house and garden, and may so be said to form a part of them. We have only then to apply to such a case the 63rd section of the Lands Clauses Consolidation Act, which enacts, that in estimating the compensation regard shall be had "not only to the value of the land" (in this case water right) taken, but to the damage sustained by the severance of the land taken from the other lands, or by otherwise injuriously affecting such other lands by the exercise of the powers of the special Act. The claimant may say to the defendants in the present case, "You sever and take away the water right annexed to my house and garden, and which gave value for habitation by securing to them privacy and freedom from noise and dust, and in the exercise of the powers of your Act, by constructing a public road where the water right existed, you actually deprive me of my privacy and my freedom from noise and dust." Independent of the 4th section of the Special Act, making the water right land for the purpose of compensation, it cannot be doubted that the construction of an embankment where the water flowed before would be an injurious affecting of the house and garden, and entitle the Duke of Buccleuch to compensation. And it appears to me that as regards the amount of compensation he may fairly and properly say that by the injurious act of the company his house and garden are changed from river-side premises to road-side premises; and it follows that in estimating the damage you must take into account the advantages of the one and the disadvantages of the other. would be unreasonable in such a case to separate the making of the road in the place of the river from the consequences of it, and to say that there was jurisdiction to compensate for the one and not for the other. I do not propose to trouble your Lordships with the authorities relating to this subject. It is not necessary to rely upon the case of the *Stockport Railway Company* (33 L. J. 251, Q. B.; 10 L. T. Rep. N. S. 426) in furtherance of the view above taken, because that view is not founded upon any land of the claimant; for example, the causeway being taken by the defendants. And it cannot be said that there is any analogy between the case of *Brand* v. *The Hammersmith Railway Company* (L. Rep. 4 H. of L. Cas. 171; 21 L. T. Rep. N. S. 238), where the claim was for vibration caused by the use of the railway constructed on land to which the claimant had no title, and the present case, where the claim is for the injurious act of depriving the plaintiff of the flow of the river to which he had a complete right, by erecting an embankment for a public road in the place of it. I cannot help thinking that the claimant has caused the chief difficulty in this case by making the alleged ownership of the jetty or causeway the pivot of the whole case, as if the taking of the slip of land was the only injurious act, the only *damnum cum injuriâ*, whereas that appears to me to be only part of the case, the main grievance being the destruction of the valuable water right. If the only wrongful act against the defendants had been the taking of that strip of land leading, it might be to some distant stream, and the embankment and road had been built, not upon the site of a public river adjoining the claimant's property but upon other land of the defendants, I should hesitate in saying that be-

cause the taking this strip of land satisfied the word "injurious" in the statute, and so gave the claimant a *locus standi* for compensation, it could properly be made the foundation for the recovery of compensation for the inconvenience and annoyance or depreciated value of the house and garden caused by a public road so near, although the Stockport case, already referred to, is some authority for such a conclusion. Such being the real title of the claimant to compensation, it still remains to consider the exact question for compensation upon the issue joined on the seventh plea. The foundation of the umpire's jurisdiction is the claim made by the claimant. The umpire has nothing to do with the title of the claimant or the extent of his rights, but he is to assess the proper amount of compensation to which he is entitled in respect of what he claims. Before the claimant can recover the amount awarded, he can be put to proof of his title to what he claims, as is done in the present case by the second and third pleas. Upon the issues joined on those pleas, which involve the title of the duke to the soil of the jetty, no question is put by your lordships to the judges, and therefore I offer no opinion. It will be seen by reference to the terms of the claim that the duke claims to be owner of the jetty or causeway by virtue of the lease, and he claims compensation for the defendants having entered upon it and taken it, and having shut up and removed the landing place to it; and he also claims further large damages to his messuage and lands by the otherwise injuriously affecting the same by the execution of the works authorised by the Act, and by the exercise of the power of the Act. Now this claim makes no distinct reference to the depriving the messuage and lands of the water privilege as a head of compensation, except so far as the landing-place is shut up, and it may seem to put forward the taking of the land of the claimant, that is the jetty, as enabling him to claim compensation for the other premises being injuriously affected. At the same time the words are "otherwise injuriously affected," and they may, I think, be fairly read as putting forward a claim for a separate *damnum cum injuriâ* to the premises by the works which deprive the claimant of his water right all along his garden, and substitute for the river a public road. It is unfortunate that the claim is so defectively worded. I do not presume to say that it is clear that the view which appears to have been taken of it is an incorrect one, viz., that it limits the claim for deprivation of property to the jetty and landing-place only, but still it does appear to me that no undue effect is given to the words "otherwise injuriously affecting" by making them include the wrongful diversion of the flow of the river by an embankment and public road as well as the damaging consequence to the house and garden by that being done. If this construction of the claim be allowed, then for the reasons already given the umpire did not go beyond his jurisdiction in taking into account upon the claim the depreciatory effect upon the house and garden of having an embankment and public road constructed where there was a flowing river before. And I, therefore, answer the second question by giving my humble opinion that upon the facts, admissions, and evidence, so far as it is admissible, the plaintiff is entitled to a verdict upon the issue joined on the seventh plea.

HANNEN, J.—My Lords.—In answer to the first question proposed by your Lordships, I say that I am of opinion that the evidence of the umpire was admissible, and, in support of this opinion, I beg leave to refer to the reasons given by my brother Blackburn in his judgment in the court below, to which I am unable to add anything. In answer to the second question, I say that I am of opinion that the verdict, on the issue raised by the seventh plea, should be entered for the plaintiff. The point submitted for our consideration is, whether the umpire, in assessing the sum he has awarded to the plaintiff, has included any head of damage not properly the subject of compensation. The facts which it is necessary to mention are these: The plaintiff is lessee under the Crown of a house and grounds abutting on the north bank of the Thames, to which house and grounds belonged a causeway projecting into the river, of which causeway the plaintiff had the exclusive enjoyment. The defendants, acting under the powers of the Act for embanking the north side of the River Thames, entirely deprived the plaintiff of the causeway, and constructed the Thames Embankment along the whole line of his garden which previously abutted on the river. No doubt has been entertained by any of the judges who have had to consider this case that the plaintiff is entitled to compensation in respect of the taking of his causeway and the consequent injury to his property by depriving it of the direct access which that afforded to the Thames. The difference of opinion has been whether to any, and if to any, to what, further extent the plaintiff can claim compensation. This depends on the true construction and effect of the 63rd section of the Lands Clauses Consolidation Act 1845, which is incorporated with the Special Act, and which enacts, that in estimating the purchase money or compensation to be paid by the promoters "regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands, by the exercise of the powers of the Act." It is not disputed that the taking of the plaintiff's causeway brings him within the terms of this section as an owner of lands taken, and consequently that he is entitled to compensation for any damage sustained by severing the causeway from the house and garden; and the question is narrowed to this: has the umpire awarded compensation for anything not properly coming within the concluding words of the section, as "damage by reason of the plaintiff's lands being *otherwise injuriously affected* by the exercise of the powers of the Act?" It becomes necessary to see what claims the umpire has in fact allowed under this head of damage. They may be divided thus:—First, damage resulting from the making the embankment against the plaintiff's garden, not only upon the causeway, but along the whole front of his property, and by the interposition of the embankment between the plaintiff's land and the present shore of the river. Secondly, damage resulting from the use of the embankment when made as a roadway. I think that the umpire rightly included both these heads of claim in the compensation awarded, but the justification for his doing so rests upon different grounds in each case. With regard to the first, the plaintiff, as

owner of land abutting on a navigable river, was entitled to a right of access to the stream along his whole frontage, and not merely at the spot where his jetty projected. If in the course of time it should have become advantageous to the plaintiff to use the whole of the land abutting on the Thames as a wharf, or for any other purpose, he would have been entitled to do so, and anything which would permanently deprive him of that right of property would be the subject of an action if it were not authorised by Act of Parliament. The causeway or jetty was only constructed for the purpose of more conveniently using the right of access to the river, which might have been exercised, if desired, at any other spot. This right of access to the river is expressly recognised by the 4th and 27th sections of the Special Act as one of the subjects of compensation. The 27th section makes special provison with reference to the compensation which the owner may be entitled to claim for the damage, if any, "to be sustained by loss of river frontage, or otherwise by reason of such embankment and roadway, or other the exercise of any of the powers of the Act." It seems to me clear, therefore, that the plaintiff was entitled under this section to compensation, not merely for the damage resulting from the destruc- of his causeway by the embankment and roadway, but also for the loss thereby occasioned of his whole right of frontage. The extent of that damage must necessarily depend on the quantity of land interposed between the plaintiff's former frontage and the river, and on the level and disposition of its surface. These injuries to the plaintiff's property in the causeway and right of frontage are brought about by one and the same act, namely, the making of the embankment, and are inseparable the one from the other. I think, therefore, that the plaintiff is entitled to be compensated for the whole loss he has sustained from the combined injuries resulting from the embankment, such as it is, being constructed along his whole frontage, and ought not to be limited to so much of the loss as can be ascribed to the mere deprivation of the causeway alone. The second head of damage, namely, that resulting from the use of the embankment when made as a roadway, is the one on which the objection to the umpire's award has been chiefly based. Again, referring to the language of the 63rd section of the Lands Clauses Act, 1845, it is clear that the concluding words of the section give compensation not only for the damage sustained by reason of the severance of the lands taken from those left, but also for damage otherwise occasioned to the lands not taken, by the exercise of the powers of this Act. It appears to me that these words are wide enough to embrace damages much more extended than those now the subject of consideration; but construing them as applying only to damage strictly *ejusdem generis* with severance, I cannot doubt that the damage arising to the owner of property from the junction to his lands of others converted to a purpose detrimental to him is *ejusdem generis* with the damage arising from having his lands severed from others. It is obvious that the mischief which would arise from having the embankment converted into a road would be much greater than it would be if it were converted into a garden. If the Act of Parliament had not been passed the plaintiff would have had it in his power, by refusing to part *with his rights*, to prevent the land now made into a road from being so converted. It seems but just that if his power to prevent mischief being done to him is taken away by law, he should receive compensation according to the measure of the injury inflicted upon him. The language of the 63rd section is comprehensive enough to secure to the plaintiff such compensation; why, then, should it be construed in a more restricted sense so as to inflict on the plaintiff a wrong without redress? It has indeed been argued that this restricted construction ought to be put on the Act, because otherwise persons whose lands are taken will be able to obtain complete redress, whereas persons whose lands are not taken may suffer injury for which compensation is not given. I cannot see the force of this reasoning. It may well be that there is a hardship in awarding no compensation to a person who sustains loss for the public benefit unless his lands are taken; but there is a manifest difference between the position of a person whose lands are taken and that of one whose lands are not. The former was possessed of something without which the proposed public purpose could not be accomplished; he could have prevented the carrying out of the undertaking if he had not been deprived of his power by Act of Parliament, whereas the person whose lands are not taken had no such power, and could not have hindered the appropriation of lands not his own to any purpose not amounting to a nuisance. The Legislature has recognised this right of property, and the power growing out of it, as a fact, but has guarded against its abuse by compelling its possessor to avail himself of it only as means of obtaining a fair compensation for real damage. But it is contended that the decision of your lordships in *Brand* v. *Hammersmith Railway Company* (*ubi sup.*) is an authority that the plaintiff is not entitled to compensation for damage resulting from the use of the embankment as a roadway, because it is said, in that case as in this, the claimant was entitled to some compensation for obstruction to light and air, which would have been the subject of action but for this Act of Parliament, and which might therefore have been made an instrument by which to compel the company to give compensation for all injury resulting from the execution of the works authorised by their Act. It is, however, to be observed, that both the noble lords who gave judgment in favour of the railway company in that case agreed that the sections of the Lands Clauses Act referred to, includiug the 63rd, were not applicable. Lord Colonsay gives the reason, namely, "that no land belonging to the plaintiffs or in which they were interested was taken or touched by the railway;" and Lord Chelmsford expresses his regret that he is "compelled very relunctantly to come to the conclusion that the Legislature has not provided for the case of the respondents, but has left them without remedy." I respectfully submit, therefore, that that decision is not an authority applicable to the present case, where, as land of the claimant has been taken, the 63rd section of the Lands Clauses Act is applicable, and where, therefore, the omission to provide a remedy for real damage, which my Lord Chelmsford regretted in *Brand's* case, does not exist. This view of the effect of the Lands Clauses Act has the authority of the late Mr. Justice Crompton in the case of *The Stockport Railway Company* (*ubi sup.*), and I beg leave to refer to the reasons given by that learned judge in support of the opinion I have expressed.

BLACKBURN, J.—My Lords,—In answer to your Lordships' first question, I have to state that I am of opinion that the evidence of the umpire was admissible, so far as it tended to show that he had exceeded his jurisdiction by including in the award compensation for matters for which he was not authorised to give compensation. I stated fully in the judgment I delivered in the Exchequer Chamber in this case (5 L. Rep. Ex. 228; 23 L. T. Rep. N. S. 256) my reasons for coming to this opinion, and then quoted all the authorities that I am aware of bearing on the question; and, as nothing has occurred to me in addition to what I there stated, I think it better to refer your Lordships to that printed judgment than to repeat the same words. I have only to add that I think the evidence of a juryman as to what were the grounds of the verdict of himself and his fellow jurors has always been rejected on grounds of public policy, some of which are well indicated in the opinion which my brother Martin is about to deliver to your Lordships in this case, and which I have had the advantage of perusing. I think those grounds are not applicable to an umpire, and consequently I do not think that a decision by your Lordships that the umpire's evidence is admissible would render it necessary to admit the evidence of jurors. In answer to the second question, I am of opinion that the plaintiff (the Duke of Buccleuch) is not entitled to a verdict on the issue raised on the 7th plea. I come to this conclusion because I think that the evidence shows that the umpire has included in his award compensation for the inconvenience sustained by the plaintiff in common with all owners of house property adjoining to the Thames Embankment, from the the general carrying out of the undertaking authorised by the Legislature; which inconvenience was not caused by the severance of the causeway from the rest of Montague House; and that to give compensation for such inconvenience was beyond the jurisdiction of the umpire. No fresh case bearing on this point has arisen since the decision below, except that in your Lordships' House, of *The City of Glasgow Union Railway Company* v. *Hunter* (2 L. Rep. H. of L. Sc. App. 78.) The facts in that case approached very nearly to the present case; and the reasoning of the Lords Chancellor and Lord Chelmsford seems to me to be in favour of the view I take of the matter; but I do not think that the decision of your Lordships can properly be said to conclude this case. The present case was very much considered by the judges who formed the Court of Exchequer Chamber, and no fresh argument has occurred to me, nor did I hear anything suggested during the argument at your Lordships' Bar, which had not occurred either to those judges who took a different view from me, and whose reasons were fully stated by M. Smith, J. in his judgment, or to those judges who took the same view as myself; and I am unable to add anything to the judgment delivered by me in the court below, to the report of which I refer your Lordships without attempting to restate it in other words. I think it better to do so, because those words were adopted by the learned judges who agreed with me and expressed their opinion as well as my own. But there is an expression of opinion in my brother Martin's opinion which leads me to add this: If an action of trespass was brought, and the defence was that there was a public highway over the spot, if at the trial it turned out that those who dedicated the highway had mistaken the boundaries of their own land, and run the proposed highway over a small portion of the plaintiff's land, there would no doubt be a verdict for the plaintiff; and the judge ought to direct the jury in assessing damages to take into account not only the interference with the plaintiff's property but all damages directly arising therefrom. But I think it would be a misdirection if he were to add that they should in addition give damages for the "traffic, and dust, and dirt, and commotion and noise" on the part of the intended high road which was on the defendants' own land, and which, therefore, the defendants might lawfully dedicate to the public, and so lawfully bring all these things there, even though the jury were of opinion that the roads would not have been brought so near the plaintiff's land had the trespass not been committed. The supposed plaintiff could no doubt force them to divert the highway and go round his land; but I think the damages I have supposed would be too remote. I mention this because I think the umpire has in fact given compensation for such damages. The supposed case is perhaps only *idem per idem*, but it may illustrate the argument; and I mention it because I perceive that my brother Martin in his opinion seems to think that such damages might properly be given. I know of no authority directly bearing on the point, but the general principle that the damages resulting from any act are confined to the immediate and natural consequences of the act is, I believe, universally agreed on, though it is not easy always to apply it. In such a case as is supposed it seems to me the supposed damages would be too remote, and therefore were not in this case submitted to the umpire; and I think that where an umpire has one thing submitted to him, and gives an award on that and also on something not submitted to him, that award, so far as regards the latter, is not binding.

BYLES, J.—I entirely agree with the judgment about to be delivered by my brother Martin.

MARTIN, B.—My Lords,—In answer to your Lordships' first question, I am of opinion that the evidence given by the umpire was admissible, and I see no limit as to its purpose and extent beyond the ordinary one, that evidence is to be confined to the matter in issue. The object of calling him was to prove the seventh plea, viz., that the sum awarded by him included damages and compensation for matters in respect of which he had no power or right to award or assess compensation. Now, if this matter is to be the subject of judicial inquiry, there is no person who possesses the same means of proving the truth as the umpire. He must know in respect of what he awarded, and to exclude him would seem as if to exclude the truth. At the same time I cannot but feel that if he be an admissible witness there will be very great difficulty in excluding a juryman who has assessed compensation in a case under the Lands Clauses Act. The award is said to be bad, because the umpire has only a limited authority by virtue of the 63rd section, which it is alleged he has exceeded. By the 49th section the jury have precisely the same limited authority. They must deliver their verdict in two separate sums, but the same limited authority is conferred upon both. Now if the arbitrator or umpire is competent to give evidence that he exceeded his authority, and so to annul and defeat his award, what reason is there why a juryman is not competent to give evi-

dence to prove that the jury included in their verdict compensation in respect of a matter which is without the 49th section? I find a difficulty in answering the question. There can be no doubt as to the inconvenience and uncertainty which will arise if jurymen are permitted to give evidence to defeat their verdicts. If one juryman is admissible all are admissible, and their evidence may be conflicting, and great inconvenience arise. In ordinary cases in the courts of law and equity jurymen are not permitted to make affidavits, or give evidence to affect or defeat their verdicts, and although I feel myself bound to answer your Lordships' question as I have done, I am conscious that your Lordships, as the court of ultimate resort, may, by reason of the great inconvenience, feel yourselves called upon to arrive at a different conclusion. I can find no authority against the umpire's admissibility. Two cases have been cited in its favour, and although I feel that great inconvenience may arise from permitting an award to be so impeached, I nevertheless feel constrained to answer your Lordships' first question as I have done. In answer to your Lordships' second question, I am of opinion that the plaintiff in error is entitled to the verdict on the issue raised on the seventh plea. The action is upon an award, and the substantial question is, whether an award of an umpire dated the 5th Aug. 1867 is good? It is admitted to be good upon its face, but it is alleged that there were certain facts proved by the umpire himself in his evidence at the trial before the Chief Baron which show the award to be bad. The seventh plea alleges that the sum awarded was an entire sum, and that it includes compensation for matters in respect of which the umpire had no power to assess compensation, and in respect of which he had no jurisdiction, and if this plea be true the award is bad. In the year 1862 an Act of Parliament was passed for embanking part of the north side of the Thames (25 & 26 Vict. c. 93), and by the 1st section the 8 & 9 Vict. c. 18 (the Lands Clauses Consolidation Act 1845), except sects. 32 and 92, was incorporated with it; the excepted sections are not material to the present question. By the 4th section the word "lands" in the Lands Clauses Act is declared to include "easements, interests, rights, and privileges in, over, or affecting lands." By the 15th section, save as otherwise provided, it was lawful for the board to purchase and extinguish any easement which any person might have over the bed of the river Thames within the limits of deviation, and by the 27th section rights of frontage to the Thames are dealt with as a valuable property. When the Act was passed the Duke of Buccleuch was in possession, under two agreements with the Crown, of a leasehold interest for a long term of years of Montague House, the ancient London residence of his family. The property is shown on the plan; the front is to the west, and opens to Whitehall; the back is to the east, and was and is a garden which had a river frontage to the Thames of 145 feet. The tide flowed up to the garden wall, and at the north-east corner of the garden there was a flight of steps which led down to a private gate of the Duke's, which afforded access to the river by a causeway or jetty which ran from the bottom of the steps to low-water mark in the river. It was about four or five feet in breadth, and was covered by the river at high water. It was made of stone and timber, and was used for landing coals, ice, vegetables, and other matters brought by boats and barges for the Duke's use at Montague House. The embankment was intended to be made, and has since been made, upon the foreshore in front of the garden, and is made upon and over the causeway or jetty, and the consequence and intended consequence is, that instead of the river flowing at high water up to the garden wall, as it previously did, the embankment intervenes between the garden and the river, and was constructed, amongst other purposes, for making a public roadway upon it; the whole river frontage, together with the causeway and jetty, is therefore destroyed, and a road frontage substituted. Upon the 14th Feb. 1867, the Duke made his claim, which seems to me quite wide enough to include all rights of compensation to which he was entitled. By the 63rd section of the Lands Clauses Consolidation Act he was entitled to compensation, not only to the value of the land to be taken, which here (by virtue of the 4th section of the Embankment Act) includes "easements, interests, rights, and privileges in, over, or affecting lands," but "also to the damage to be sustained" "by reason of the severing of the lands taken from other lands of the owner, or otherwise injuriously affecting such other lands by the exercise of the powers" conferred by this Act or Acts. It was said, and said truly, that by the construction put upon the Lands Clauses Act, compensation can only be claimed when the act done is such that except for the Act of Parliament an action at law would have lain for doing it. Now, applying this to the present case, the Duke had the land constituting the residence, Montague House, with the courtyard, offices, and garden attached, and had annexed and appurtenant to it the jetty or landing place, and although he had not the soil of the bed of the river, he had the easement or right or privilege, by whatever name it may be called, of the flow of the water of the river Thames in its natural channel up to his garden wall. He had one entire thing. He had not the land alone, or the jetty alone, or the right to the flow of the water of the river alone —he had all combined together; and if anyone had done an act injurious to the land or the jetty, or to the right to the flow of the water, he would have had a legal right of action against him. If the owner of the soil of the bed of the river, or anyone else, had constructed an embankment and roadway upon the jetty or landing place, so as to shut out the Duke's premises from the river, he could have maintained an action against him for two causes; first, for destroying his jetty; secondly, for depriving him of his riparian right: (*Miner* v. *Gibson*, 12 Moo. C. P. 156; *Lord* v. *The Commissioners of the City of Sydney*, 12 Moo. P. C. 473). Now, supposing such an action tried, what would be the proper direction to the jury as to damages? In my opinion there is not a single matter mentioned in the umpire's evidence as operating upon his mind, and in respect of which he gave compensation, which would not have been a proper element to be submitted to the jury with a view to the legal assessment of damages. The only item complained of is the 5000*l.*, which he says in his opinion was the market value of the loss if a purchaser had desired to buy the residence or take it on lease. I think that the judge might properly tell the jury that Montague House with its belongings, corporeal and incorporeal, was one

entire thing, and that in assessing the damages they might take into consideration the actual depreciation of its value as an entire thing in the market; that in doing so they might consider that when the river was the boundary of the garden there was perfect privacy, no noise, or traffic, or dirt, or dust, and that they might contrast that state of things with the noise, and traffic, and dirt, and dust which would be consequent upon the river boundary being converted into a boundary of roadway for the traffic of horses, carts, and carriages. Suppose at any of the residences higher up the Thames, or on the Wye, or Dart, or other beautiful river, where the owner was not the owner of the soil of the bed of the river, but was entitled to the flow of the water, and the owner of the soil of the bed made an embankment and shut out the river, could it be successfully contended that this being an unlawful act the injured person would not be entitled to recover damages (if it were persevered in by the wrongdoer) to the amount of the market value of the injury done to his property? By the 4th section of the Embankment Act the rights of the Duke to the jetty and to the flow of the river are included in the word "lands" in the Lands Clauses Act, and in my opinion the construction of the embankment and roadway, in exercise of the powers of the Embankment Act, was a severance from and an injury affecting the other land of the Duke, within the true meaning of the two Acts. An argument was adduced on behalf of the defendant in error, in which I cannot concur. It was said that upon the construction given by the courts of law and equity to the Lands Clauses Act, the immediate neighbour of the Duke might possibly have been damaged to the same extent, and yet be unable to obtain compensation. Supposing this to be so, what argument is to be derived from it? General Acts of Parliament must of necessity be framed in general language, and because a man who has sustained damage is not within the terms of the Act of Parliament, and therefore must submit to the loss, is that any reason why a man who is within the terms of the Act is not to recover compensation for the loss and damage he actually sustains? These were the reasons which led me to the conclusion I arrived at when the case was before the Court of Exchequer. I have read the judgments of the judges in the Court of Exchequer Chamber, and heard the arguments before your Lordships, and I retain the opinion I originally formed; I cannot, however, but think that too little stress has been laid upon the right of the Duke as a riparian proprietor. There were very many wharves between Westminster and Blackfriars bridges for loading and unloading coal and other merchandise. The embankment does not touch very many of them; it runs quite outside the land whereon they stood, and the only legal right the owners had which was directly interfered with by the embankment was the right to the flow of the water of the river up to them. The bed of the River Thames belongs to the Crown. This was a few years ago contested by the Corporation of London, but I believe they have abandoned their claim, and that the Crown is now the undisputed owner. The embankment does not touch most of the wharves, and, so far as I can see, except the injury to their water rights gives them a *locus standi* for compensation, they would be entitled to none. In my opinion the Duke's right to compensation under the two Acts is not less extensive than it would have been to damage (excluding vindictive damage) in an action of tort in the event of the defendants in error having made the embankment without the authority of Parliament. As to the amount awarded it was a matter entirely and exclusively for the umpire. For these reasons I am of opinion that the plaintiff in error is entitled to the verdict on the issue raised on the seventh plea. I am authorised to state that Sir M. Smith, who heard the arguments, concurs in this judgment.

April 30.—Lord CHELMSFORD.—My Lords, in this case the four judges in the Court of Exchequer were unanimous in favour of the plaintiff in error, but in the Court of Exchequer Chamber their judgment was reversed by a majority of four judges to three, the opinions of seven judges having been thus overruled by a minority of four. Of the six judges whose assistance your Lordships had upon the hearing of the appeal, all of them, with the exception of Blackburn, J., concurred in the judgment of the Court of Exchequer. The case upon the appeal may conveniently be considered under the heads of the two questions put by your Lordships to the learned judges: First, whether the evidence given by the umpire was admissible, and, if so, to what extent and to what purpose? secondly, whether, upon the facts, admissions, and evidence (so far as such evidence was admissible), the plaintiff in error is entitled to a verdict on the issue raised on the seventh plea. The Duke of Buccleuch is tenant to the Crown of Montague House in Whitehall-place. At the time the Metropolitan Board of Works was proceeding to construct the embankment on the north side of the river Thames, the duke held the premises under a lease dated the 19th April 1810, for a term of sixty-two years from the 5th Jan. 1806, by the description of "all the piece of ground, &c., abutting eastward on the river Thames, on which Montague House stood, together (*inter alia*) with all easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said piece of ground belonging or appertaining, or therewith or with any part thereof held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof." This lease would have expired in Jan. 1868, but before its expiration, the duke, by agreements with the Crown upon spending 20,000*l.* upon the premises in rebuilding the house and in other improvements, was to be entitled to a renewal for a term of ninety-nine years. He had performed his part under these agreements, and therefore, at the time of the execution of the works by the Metropolitan Board of Works, his interest in Montague House and premises was that of a lessee for the residue of a term of 99 years Montague House and premises were bounded on the river side by a wall, along the whole length of which, at high water, the river flowed. There was a gate in this wall, usually kept locked, which led from some stairs in the garden of the house to a causeway or pier which ran out into the river at low water mark. The causeway had been used for more than forty years for landing coal from barges and for bringing vegetables, &c., for the use of the tenants in Montague House, who always repaired the causeway at their own expense when it needed repair. By the Thames Embankment Act (25 & 26 Vict. c. 93) the Metropolitan Board of Works was

authorised to construct an embankment on the north side of the Thames, from Westminster-bridge to Blackfriars-bridge. In the course of performing the necessary works it became necessary to remove the causeway and the landing-place connected therewith, and also entirely to shut off Montague House and premises from direct access to the river. In the place where the water previously flowed a solid embankment was made which has since become a public highway. The plaintiff gave the defendants notice that he claimed compensation as well for the entering upon and taking by them of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the landing-place, and for all other damage sustained or to be sustained by him by such injurious affecting of his said messuage or dwelling house, and other lands, premises, and hereditaments. And he further gave notice under the provisions of the Lands Clauses Consolidation Acts (which are incorporated with the Thames Embankment Act) that he desired to have the amount of such compensation settled by arbitration. Arbitrators were named by the respective parties, who nominated Mr. Charles Pollock, Q.C., as umpire. Mr. Pollock having taken upon himself the reference, ultimately made an award in the following terms: "I award, order, and determine that there is due from the said Metropolitan Board of Works, to the said Duke of Buccleuch and Queensberry, the sum of 8325*l.* as and for compensation for the interest of the Duke of Buccleuch and Queensberry in the said causeway, pier, and jetty, and for the shutting up of the said landing-place, and for the damage by the depreciation of the said mansion house, lands, tenements, and hereditaments by otherwise injuriously affecting the same by the execution by the said board of their said works and by the exercise of the powers of the said Act." The defendants having refused to pay the compensation an action was brought against them to recover the sum of 8325*l.*, the sum awarded. To the declaration upon the award the defendants pleaded several pleas; only one in this stage of the case is necessary to be considered. By the seventh plea the defendants pleaded that the sum of 8325*l.* awarded was and is one entire and indivisible, and unseparated and inseparable sum, and that the said sum includes damages and compensation for matters and things in respect of which neither the arbitrators nor the umpire had any power or right to award or assess damages or compensation, and over and in respect of which neither the arbitrators nor the umpire had any jurisdiction whatever. At the trial before Kelly, C.B., the defendants, in support of this plea, called Mr. Pollock, the umpire, as a witness. I do not quite understand whether an objection was made *in limine* to his admissibility as a witness, or merely to certain parts of his evidence; but I rather collect that the latter must have been the case, because at the close of his examination there follows the statement, "The evidence of the umpire was objected to by the plaintiff and admitted by the judge, subject to such objection, and on the terms that such parts as the court should think inadmissible should be deemed to be struck out." But if the umpire was not a competent witness the whole of his evidence ought to have been struck out. That the umpire was admissible as a witness was without a single exception the opinion of all the judges who have considered the question in this case, Cleasby, B., having been authorised to state (by permission of your Lordships) that Bramwell, B., was misunderstood when he gave his opinion in the Court of Exchequer, if he was supposed to hold that the umpire was not a competent witness, for he did not hold that Mr. Pollock was not competent for any purpose, but only that he could not be questioned as to the composition of the award. The umpire being a competent witness, the only question is to what extent the defendants were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and, therefore, not within his jurisdiction. To prevent the defendants from questioning so far would have been to deprive them of information to which they were entitled, by shutting them off from the only source of it in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award. But, this having been ascertained, the defendants were not at liberty to go farther and to ask the umpire what were the elements which entered into his consideration in determining the *quantum* of compensation. Within the limits of the reference the amount to be awarded was entirely in the discretion and judgment of the umpire. His opinion as to the extent of the damage done to Montague House by the execution of the works of the defendants was necessarily of a speculative character, and founded upon a general view of the annoyance and inconvenience which would result from the new state of things after the embankment was made and publicly used. To ask the umpire, as the counsel for the defendants did, what led him to the conclusion as to the proper sum to be awarded, was really to inquire what passed through his mind before he formed his judgment. It would be, in my opinion, contrary to all principle so to scrutinise the exercise by an arbitrator of a discretionary power to award compensation; and I think that all the questions put with this object were objectionable, and the evidence given upon them ought to be struck out. Before proceeding to the next question, I must observe that, even if the evidence of the umpire had been admissible as to his reasons for thinking that Montague House would be depreciated by the construction and use of the embankment because "there would be traffic, and dust, and dirt, and commotion, and noise, which seemed to alter the character of the house entirely," I do not think it would prove that his award was invalid. In *Hammersmith Railway Company* v. *Brand* (L. Rep. 4 H. of L. 171; 21 L. T. Rep. N. S. 238), it was held that a person, whose land had not been taken for the purposes of a railway, was not entitled to compensation from the railway company for damage arising from vibration, occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Union Railway Company* v. *Hunter* (L. Rep. 2 H. of L. Sc. App. 78), it was held that compensation could not be claimed by reason of the noise or smoke of trains by a person, no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which

were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction of the railway. But if, in each of the cases lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise occasioned by passing trains. In this case (as I shall presently show) land of the plaintiff was taken, which would have given a foundation for a claim to compensation for other lands injuriously affected. But in addition to this in the two cases cited, there were distinct claims made in the one on account of vibration, and in the other on account of smoke and noise occasioned by the passing trains; whereas here the umpire did not say, "I gave so much for dust and noise, &c., but it occurred to my mind that these would be the consequences of the public use of the embankment, and would altogether alter the character of the house." I now proceed to consider whether the umpire has included in his award any head of damage not properly the subject of compensation. It appears to me that the notice of claim is rather imperfectly framed, as it does not point distinctly to the injury to Montague House arising from the construction and use of the embankment. It requires the Metropolitan Board of Works to pay the Duke of Buccleuch compensation, as well for the entering upon and taking of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the said landing place, and for all other damage sustained and to be sustained by him by such injurious affecting of his said messuage and dwelling house, the word "such" referring to the taking of the causeway and removing of the landing place. However, it has never been questioned that the umpire had authority to take into his consideration the injury to Montague House arising from the construction and use of the embankment. There can be no doubt, and none has been entertained, that the plaintiff is entitled to compensation in respect of the taking away the causeway and landing place, and the injury arising to his house and premises by depriving him of access to the river. The only question upon which there has been a difference of opinion among the judges is, whether the umpire was authorised to give compensation in respect of the depreciation of Montague House, by the conversion of the land between it and the river into a highway, and the consequent public use of it. This question partly depends upon the 63rd section of the Lands Clauses Consolidation Act 1845, which is incorporated with the Thames Embankment Act, and which enacts that in estimating the purchase money or compensation to be paid by the promoters of an undertaking regard shall be had not only to the value of the land to be purchased or taken, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of such power." The plaintiff was the owner of lands within the meaning of the this clause, in respect of the causeway which was taken away from him. It is quite immaterial whether the soil of the causeway belonged to him or he had merely an easement over it; for, by the 4th section of the Thames Embankment Act, the word "land" is to include easements, interests, rights, and privileges in, over, or affecting lands; and the 27th section of the said Act empowers the Metropolitan Board of Works to appropriate, by grant or demise, any reclaimed land, &c., to any owner of lands now situated on the present left bank and river frontage of the river Thames, in front whereof the said intended embankment shall pass as aforesaid, in consideration of and in lieu, in whole or in part, of the compensation which such owner or person may be entitled to claim for the damage, if any, to be sustained by him by loss of river frontage or otherwise by reason of such embankment or roadway or other the exercise of any of the powers of the Act. This section contemplates two descriptions of damage likely to be sustained by the owners of lands on the river frontage of the Thames—one, by loss of the river frontage, the other, in any other manner by reason of the embankment or other the exercise of any of the powers of the Act. It seems to me to be quite clear that the umpire was entitled to consider, not only the damage which the plaintiff sustained by being deprived of the causeway, but also whether he was entitled to compensation in respect of damage otherwise sustained by reason of the embankment. Now if he was of opinion that Montague House was depreciated in value as a residence by reason of the proximity of the embankment, and of the consequences of its use as a public highway, he was bound to give the plaintiff some compensation, and the amount proper to be awarded was entirely for him to determine. It can hardly be doubted that, in addition to the damage sustained by the loss of the river frontage, the house must have been "injuriously affected," *i.e.*, depreciated in value, by the interposition between it and the river of an embankment to be used as a public highway; and this seems to bring the right to compensation within the very words of the 27th section of the special Act, because it is a damage, otherwise than by loss by the river frontage, by reason of the embankment or roadway. It is unnecessary to consider the cases of the *Hammersmith Railway Company* v. *Brand* and *The City of Glasgow Union Railway Company* v. *Hunter* (*ubi sup.*), and other cases which were cited in argument, because their applicability to the present case depended upon that part of the evidence of the umpire which I think ought to be struck out as inadmissible. The only question then arises upon the award itself: whether the umpire had any power to give compensation for the damage by the depreciation of the mansion house, lands, tenements, and hereditaments by the otherwise injuriously affecting the same by the execution by the defendants of the said works, and by the exercise of the powers of the Act. Now he was authorised both by the special Act and by the Lands Clauses Act to give compensation if the premises were injuriously affected, a fact which it was the duty of the umpire to ascertain and determine. He has determined it, and awarded compensation in respect of the damage thereby sustained by the plaintiff, and I see nothing in the case to impeach the correctness of his award. I think that the judgment of the Court of Exchequer Chamber must be reversed.

LORD WESTBURY.—My Lords,—I concur entirely with the majority of the judges in the point relating to the admissibility of the evidence of the umpire, and also with respect to the limit to which the

right of examining the umpire ought to be carried. On the other point I must confess, that on this occasion, as on some others, I do not concur in the principles which have been established. But it would be useless to enter into that discussion, as I understand that the majority of your Lordships is on that point in harmony with the opinion which has been expressed by my noble and learned friend who has just addressed the House, and, therefore, I concur in the judgment proposed to be pronounced.

Lord COLONSAY.—My Lords,—I entirely concur in the judgment proposed to be delivered, on both grounds. First, as to the competency of examining the umpire, I think the distinction has been well drawn and the opinions of the majority of the judges are right. And, in regard to the other part of the case, I think that my noble and learned friend now on the woolsack (Lord Chelmsford) has stated the most conclusive reasons for the judgment he has proposed to pronounce. I, therefore, do not think it necessary to take up your Lordships' time by stating particularly the grounds on which I have arrived at the same conclusion.

Lord CAIRNS.—My Lords,—I must express my own sense of the obligation, and I am sure there is the same feeling on the part of your Lordships to the learned judges who have favoured us with their opinions upon this very important case. I own that, speaking for myself, both as regards the extent to which the evidence has been challenged as receivable, and as regards the other points in the case I should have felt great hesitation in coming to the conclusion at which I have arrived had I not had the advantage of the concurrence of so large a majority of the learned judges. As regards the reception of the evidence, in my opinion the line has been most properly and accurately drawn by Cleasby B. It appears to me that on every point which may be considered to be a matter of fact with reference to the making of the award the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted—so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument. My lords, upon the other part of the case I own I have had less doubt than I had with regard to the extent to which the evidence was receivable. It has appeared to me throughout that the property of the plaintiff in error in this case was what is commonly called riparian property. The meaning of that is that it had a water frontage. The meaning of its having a water frontage was this, that it had a right to the undisturbed flow of the river which passed along the whole frontage of the property in the manner in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with these rights which the plaintiff in error possessed, were taken for the purposes of the Act. Beyond all doubt the water right was a property belonging to the plaintiff, for which compensation was to be made, and it was for the arbitrator to assess the compensation to which the plaintiff was entitled upon that footing. Now it is quite true that some difficulty might have arisen in consequence of the wording of the claim put forward by the plaintiff in error. In that claim undue weight, as it seems to me, is laid upon the possession of the causeway, that is to say, upon the one point in the whole frontage by means of which, for the time being, he enjoyed access to the water in a particular and convenient way. But it seems to me that his claim is quite large enough to cover the damage to the whole of his interest, whatever that interest might be, and that interest, it appears to me, was a claim to a water right along the whole of the frontage. Then, that being so, when the arbitrator came to consider that claim it seems to me that it was entirely open to the arbitrator to say what was the value of it. It was impossible for the arbitrator in estimating that value to reject from his mind the consideration of the entire depreciation of value which the property would be subject to by reason of its being deprived of that water right. If we are to look at the whole of the evidence, it appears to me that that is nothing more than what the arbitrator says. Upon these grounds it appears to me that the motion which has been submitted to your Lordships is entirely correct, and that judgment should be given for the plaintiff in error.

Judgment reversed.

Attorneys for the plaintiff in error, *Nicholl, Burnett*, and *Newman*.

Attorney for the defendants in error, *W. Wyke Smith*.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PEAT, Esqrs., Barristers-at-Law.

May 28 *and* 29, 1872.

(Before the LORDS JUSTICES.)

LORD AUCKLAND v. THE WESTMINSTER DISTRICT BOARD OF WORKS.

Metropolis Local Management Acts (18 & 19 *Vict. c.* 120, *s.* 76, *and* 25 & 26 *Vict. c.* 102, *ss.* 63, 74, *and* 75)—*General line of buildings—Site of old buildings—Compensation—Injunction—Jurisdiction.*

A person purchased from a railway company a piece of land formerly the site of houses which the company had taken for the purposes of their railway. The company had pulled down the houses and constructed their railway underground, and then restored the surface of the land, and advertised it for sale as building land. The land came within the provisions of the Metropolis Local Management Acts:

Held, that the purchaser was in the same position as to his right of building on the site, as if he had bought the land with the houses standing on it, and had himself pulled them down for the purpose of rebuilding, and that the Metropolitan Board of Works had no power to require the new buildings to be set back to the general line of buildings in the street, without compensating him for damage under the 74th section of the Metropolis Local Management Act 1862.

The 75th section of the Metropolis Local Management Act 1862 *only applies to buildings about to be erected on land not built on before, and not to*

buildings about to be erected on the site of old buildings, except where the owner of the old buildings has pulled them down without any intention of again building on the site.

THIS was an original hearing on motion for decree.

On the 21st Feb. 1871 the plaintiff purchased from the Metropolitan Railway Company a piece of vacant land on the south side of Buckingham-row, Westminster, which formed part of the surplus lands of the company.

The company had previously offered this piece of land together with other surplus lands for sale by public auction, and in the particulars of sale at the auction the piece of land afterwards bought by the plaintiff was described as "a plot of freehold building land."

This piece of land was conveyed to the plaintiff in fee by an indenture dated the 6th April 1871.

At the time when it was taken by the railway company this piece of land formed the site of three houses fronting Buckingham-row, and known as Nos. 1, 2, and 3, Buckingham-row.

The railway company pulled down these houses, and having constructed their railway underground, they restored the surface of the land and put it up for sale.

This piece of land abutted on the west on a passage about 5ft. wide, over the entrance of which part of the house No. 1, Buckingham-row, formerly extended. This passage led from Buckingham-row to Brewer's-row, past a row of small cottages, known as Nos. 13, 14, 15, 16, and 17, York-place, which were built at right angles, or nearly so, to the line of the houses in Buckingham-row. These cottages were set back about 20ft. from the passage, with gardens between them and the passage. Beyond the cottages the passage was continued in a straight line for a distance about equal in length to the frontage of the cottages; but beyond the cottages, buildings ran close up to the passage.

The plaintiff, who had a house in Queen's-square, Westminster, purchased the piece of land in question for the purpose of erecting his stables on it.

Plans of the intended stables were prepared and submitted to the Board of Works for the Westminster district, and on the 24th June 1871, in accordance with the provisions of the Metropolis Local Management Acts (18 & 19 Vict. c. 120, s. 76, and 25 & 26 Vict. c. 102, s. 63), due notice in writing of the intention to build was given to the board by the plaintiff's builder.

The 76th section of the 18 & 19 Vict., c. 120 provides that before beginning to lay or dig out the foundation of any new house or building within any parish or district mentioned in the schedules to the Act, or to rebuild any house or building therein, seven days' notice in writing shall be given to the vestry or board, by the person intending to build or rebuild such house or building; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with the Act, and as the vestry or board shall order; and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days' after the receipt of such notice; and in default of such notice, or if such house, building &c., be begun, erected, or made in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of the Act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to recover the expenses thereof from the owner thereof, in manner provided by the Act.

By the 63rd section of the 25 & 26 Vict. c. 102, it is enacted that where any notice shall have been given to any vestry or district board, pursuant to the 76th section of the 18 & 19 Vict. c. 120, it shall be lawful for the surveyor of such vestry or board, if he shall deem it necessary or proper so to do, within three days after the receipt of such notice by the vestry or district board, by writing under his hand directed to and served upon the person giving such notice, to require that the buildings or works referred to therein shall not be proceeded with until after the then next meeting of the said vestry or district board, and until their directions in reference thereto shall have been notified to such person, provided that the order of the said vestry or district board shall be made and notified to the said person at the latest within fifteen days after the receipt of such notice by the vestry or district board.

No order was made by the board upon the notice of the plaintiff's intention to build within the period of fifteen days prescribed by the Act.

Shortly afterwards the surveyor of the district board gave the plaintiff's builder verbal permission to commence operations, but the permission was revoked again in a few days, on the plea that the consent of the Metropolitan Board of Works was required.

The district board endeavoured to induce the plaintiff to apply to the Metropolitan Board, but having failed to persuade him to do so, they applied themselves to the Metropolitan Board.

On the 2nd Aug. 1871 Mr. Vulliamy, the superintendent architect of the Metropolitan Board, sent to the plaintiff's solicitors an order, purporting to be made by him under the 75th section of the Metropolis Local Management Amendment Act 1862 (25 & 26 Vict., c. 102).

The 74th section of that Act provides that in case any building situated within any of the parishes, districts, or places comprised in the schedules of the Act 18 & 19 Vict., c. 120, which shall in any part thereof project beyond the general line of the street in which the same may be situate, or beyond the front of the building, wall, or railing on either side thereof, shall at any time be taken down to an extent exceeding one half of such building, such half to be measured in cubic feet, or shall be destroyed by fire or other casualty, or demolished, pulled down, or removed from any other cause to the extent aforesaid, it shall be lawful for the Metropolitan Board of Works to require the same to be set back to such a line, and in such a manner for the improvement of any street as the board shall direct, provided that the said board shall make compensation to the owner of such building for any damage and expenses which he may sustain and incur thereby.

The 75th section of the same Act provides that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings

therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintendent architect to the Metropolitan Board of Works for the time being; and in case any building, &c., be erected, or be begun to be erected, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which the building, &c., is situate, to cause to be made complaint thereof to a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaints; and if the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder or person, directing the demolition of any such building, or so much thereof as may be beyond the said general line so fixed as aforesaid, &c.

Mr. Vulliamy's order, after reciting the 75th section of the Act, went on thus: "And whereas, Mr. James Rogers, solicitor to the Board of Works for the district of Westminster, and Mr. R. R. Arntz, surveyor to the said board (Messrs. Lambert and Son, of No. 30, Bedford-row, having had notice to attend the hearing before me on behalf of Lord Auckland, but they declined to do so), have severally appeared before me and been heard regarding the proposed erection of buildings on the vacant land at the corner of Buckingham-row and York-place, in the parish of St. Margaret, Westminster, and beyond the front or face of the buildings forming a row of houses on the eastern side of York-place aforesaid, such houses being Nos. 13 to 17 inclusive, and I have been required to decide the general line of buildings in such place as provided in the said statute. Now, therefore, having considered the several matters, I, the undersigned, being the superintending architect to the Metropolitan Board of Works, do hereby, pursuant to the said Act, decide that the main fronts of the buildings forming the row of houses aforesaid . . . is the general line of buildings on the eastern side of York-place aforesaid." And the order was signed, George Vulliamy.

The effect of this order would have been to deprive the plaintiff of the use of nearly one-half of the plot of land on which he was about to build.

On the 2nd Aug. 1871 the District Works and General Purposes Committee passed a resolution "that it be recommended to the board that should Lord Auckland, his agents, or any other person begin to erect, or raise, or erect, or raise any building, structure, or erection beyond the general line of buildings on the eastern side of York-place as decided by the superintending architect, the solicitors to the board have instructions to proceed against all persons so offending."

The plaintiff then asked the district board to purchase the land of him, but they declined to do so. He then appealed to the Metropolitan Board to review or correct Mr. Vulliamy's order; and having failed to obtain any redress in that way, he applied to them for compensation, but they replied that they had no intention of putting in force in the present case the provisions of the 74th section of the Act.

The plaintiff then filed his bill against the district board, praying for a declaration that no order having been given by the district board in relation to the matters contained in the notice given by the plaintiff's builder to the board on the 24th June 1871, within the period prescribed by the 63rd section of the Metropolis Management Act 1862, the power of the board to make any order in relation to those matters ceased and determined at the expiration of that period, and that the plans referred to in the notice were to be deemed and taken to have been approved by the board; it also prayed for a declaration that Mr. Vulliamy's order, dated the 2nd Aug. 1871, was invalid so far as it extended or operated to prevent the erection of buildings on any part of the site formerly occupied by the houses, Nos. 1, 2, and 3, Buckingham-row, and for an injunction to restrain the district board from taking any proceedings for the purpose of compelling the plaintiff or his builder to abstain from erecting buildings upon so much of the site of Nos. 1, 2, and 3, Buckingham-row as lies outside the line decided by Mr. Vulliamy to be the general line of buildings in York-place, and from taking any proceedings for the purpose of recovering from the plaintiff or his builder penalties under the 63rd section of the Metropolis Management Amendment Act 1862, and from interfering in any manner with the erection of the buildings proposed to be erected by the plaintiff on the site of those houses.

On a motion for an injunction, Malins, V.C. held that the district board had acted *ultra vires* in setting in motion the Metropolitan Board, which had no power where buildings had been taken down, and were about to be rebuilt, to require them to rebuild in a general line fixed by their architect, without compensating the owner of the land under the 74th section of the Act, and accordingly he granted the injunction prayed for.

From this order the defendants appealed, and, on the appeal motion coming on to be heard, it was arranged that it should stand over till the hearing, that the plaintiff should at once give notice of motion for decree, and that the hearing should be taken before the Lords Justices.

The cause now came on to be heard.

Glasse, Q.C. and *Macnaghten*, for the plaintiff. —We contend that the proceeding of the defendants is *ultra vires*, as they gave us no notice within fifteen days after the receipt of our notice that we intended to build, as required by the 63rd section of the 25 & 26 Vict. c. 102. Moreover the 75th section of the Act does not apply to this case at all. That section only applies to land which has not been built upon. It is only under the 74th section that we could ever have been required to set back our buildings to the general line of buildings, and then we should have been entitled to compensation. We contend that it makes no difference that the land in question was vacant when we purchased it, for we must stand in the shoes of the person from whom the railway company bought it, and we are in the same position, and have the same rights, as if we had pulled down the old buildings ourselves. We submit that we are entitled to the relief prayed for in our bill, and that the court has jurisdiction to grant that relief is clear from these authorities:

Prowin v. *Lewis*, 4 M. & C. 255;
Tinkler v. *The Wandsworth District Board of Works*, 2 De G. & J. 273;
Kerr on Injunctions, 295, 296;
Stone v. *The Commercial Railway Company*, 4 M. & C. 122;
The River Dun Navigation Company v. *The North Midland Railway Company*, 1 Rail. Cas. 153.

Bristowe, Q.C. and *Cracknell*, for the defendants.—We contend that this court has no jurisdiction in this matter. The plaintiff should have appealed from the order of the district board to the Metropolitan Board of Works, as provided by the 211th section of the 18 & 19 Vict. c. 120, or he should have applied to the Court of Queen's Bench for a *mandamus*, as was done in an unreported case of *Reg.* v. *Vulliamy*. But, assuming this court to have jurisdiction, we contend that our not having given notice within the 63rd section of the 25 & 26 Vict. c. 102, is immaterial. And we contend that the plaintiff having bought the land as vacant land, it must be subject to the provisions of the 75th section, for he must be held to have had notice of the powers of the district and metropolitan boards. They referred to

Bauman v. *The Vestry of St. Pancras*, L. Rep. 2 Q. B. 533;
The Vestry of St. George's, Hanover-square, v. *Sparrow*, 10 L. T. Rep. N. S. 271, 504; 16 C. B., N. S., 209.

Without calling for a reply,

Lord Justice JAMES said:—I am of opinion that the order of the Vice-Chancellor granting an injunction in this case is perfectly right. The plaintiff Lord Auckland comes to this court and says, "A public body have threatened, and do still threaten and intend to pull down some buildings which I have a right to erect, and which I am about to erect on my property. That being so, I am embarrassed by what they are doing or intend to do under colour of the very great powers given them by certain Acts of Parliament. First of all they embarrass me in the application of my property to the purpose I desire, and I am in fact prevented from erecting my buildings, because they tell me in plain terms that, if I do build, they will put in force the powers of their Act, and pull down my house, or stable, or whatever it may be." Those being the facts, it appears to me to be a plain case for the exercise of the jurisdiction of this court. What is the case? A man files his bill with regard to a grievous wrong which is threatened to be committed upon him, and he has a right to see whether this body have the power to inflict this wrong upon him, or at all events to try and relieve his title from the cloud which is cast upon it by this proceeding, which has been taken under a public Act of Parliament by public functionaries entrusted with great and arbitrary powers. It seems to me to be the same kind of case as those well known cases in which this court has constantly exercised its jurisdiction by restraining railway companies from proceeding to take land, which they had power to take for one purpose, for some other purpose for which they were not entitled to take it, or to take part of a house only when the owner says, "You must take the whole of it." In those cases the court granted an injunction and stopped the company at once, because they were about to exercise their powers in a manner that was oppressive, and in a manner that was illegal. I have no doubt, therefore, that this is a case within the jurisdiction of this court, and that it is a proper case for the exercise of the jurisdiction of the court so as to have the matter determined once for all, instead of leaving Lord Auckland to go before a magistrate and to discuss with him the question of jurisdiction and the construction of the Act of Parliament, which, it is said on the part of the defendants, involves some difficulty, and then to be obliged to take some other step, perhaps to go to the Court of Queen's Bench, and I know not where else, in order to have the thing tried by *certiorari*. Of course, some persons may object to this court; but it is not the habit of this court, at all events, to say that it is so bad a tribunal that people should go to all these different places rather than come here to have their grievances decided. I think, therefore, it is a case in which the jurisdiction of the court ought to be exercised. Then comes the question—Is what the board of works are about to do or threaten to do in any manner justified by the Act of Parliament? I am of opinion, on more grounds than one, that their whole proceeding is clearly *ultra vires*. It is beyond all question that Lord Auckland is the proprietor of the site of some lately existing buildings, which abuts upon York-place. The buildings upon that site were taken for some purpose or other in connection with the construction of the Metropolitan District Railway. I am of opinion that Lord Auckland, as the purchaser of that site from the Metropolitan District Railway Company, who were the purchasers from the former owners, has exactly the same rights in every respect as those owners had before their houses were taken down, and has exactly the same rights as he would have had if he had bought the ground with the houses standing upon it, and had taken them down himself for the purpose of building what he now intends to build upon the site of them, and that then this public body had interfered. The question is to be determined in the same way, in my opinion, as if Lord Auckland had, a day or two or a week before these proceedings begun, been the owner of the piece of land, with the buildings standing thereon. In that case it appears to me quite clear that his position would come exactly within the case which is provided for by the 74th section of the second Act, which enacts that, provided any part of a building which is demolished, pulled down, or removed had projected beyond the general line of the street in which the same was situated, it shall be lawful for the Metropolitan Board of Works when the owner is about to rebuild to direct him to put back his new building into such a line and in such a manner, for the improvement of the street, as the board should direct. The 74th section, to my mind, is clearly applicable to a case where any part of the building projects beyond the general line of the street. In that event the 74th section provides for taking away a man's property, giving him compensation for it; and then it is contended that after it has thus been provided that a man's property may be taken in a certain way upon giving him compensation for it, the very next section of the Act, the 75th section, goes on to enact that the property is to be taken away by the same body without any compensation at all. I am of opinion that having regard to the provisions in the former Acts, in lieu of which this 75th section was enacted, and having regard to the 74th section, which immediately precedes it, and to the whole context of the Act, and to the whole spirit of recent legislation with regard

to dealings with private property, that the meaning of the 75th section was that it should apply only to a new structure or erection being built on land which for the purposes of the Act would properly be described as vacant ground; and, therefore, I am of opinion that there was no jurisdiction in the district board to interfere with any building which Lord Auckland might erect on that land, except according to the provisions of the 74th section. I am of opinion that the 75th section does not apply at all to this case; and that Mr. Vulliamy's line, whether rightly or wrongly laid down by him as the general line of the street, would not authorise the board to interfere with Lord Auckland's property. But I am also of opinion that Mr. Vulliamy's order is, on the face of it, perfectly, monstrously, and shockingly wrong. One can see at once how the error came to arise. Mr. Vulliamy treated the site of the old buildings as being vacant ground. That appears upon the face of the order itself, which he has pronounced. He came to the decision of the question as to the general line of the street on the assumption that Lord Auckland's property was to be treated as vacant ground, and then he found what he supposed to be a general line—the line made by four or five houses, that being, as he then thought, the only general line that he could find there. The question was submitted to him in a very curious manner. The order says: "And whereas Mr. James Rogers, solicitor for the district of Westminster, and Mr. R. R. Arntz, surveyor to the said board (Messrs. Lambert and Son, of No. 30, Bedford-row, having had notice to attend the hearing before me on behalf of Lord Auckland, but they declining to do so), having personally appeared before me, and been heard regarding the proposed erection and buildings on vacant land at the corner of Buckingham-row and York-place, in the parish of St. Margaret's, Westminster, and beyond the face or front of York-place, forming a row of houses on the eastern side of York-place aforesaid, such houses being numbered from 13 to 17 inclusive" (the charge is that he is going to erect them beyond the face of that row), "and I have been required to decide the general line of buildings in such place, as provided in the said statute." It was assumed that there was no right to build beyond the front of that row of houses, and he dealt with that row of houses as being the only thing that he found standing there. I think if Mr. Vulliamy's attention had been drawn to this, that he was to ascertain what the general building line of York-place was as things stood before the old houses were taken down, he never could have made such an order as this, the effect of which is to say that the front of those five houses was the general line of building, not of a street, but of a small footway, which on the same side was bounded by a building or by a wall the greater part of the way, and was bounded by a building and a wall on the other side. It appears to me utterly impossible that any human being could ever have said that that line of houses in the middle of the whole thing was the general line of buildings, for the purpose of determining up to what point buildings might be erected on the property. It seems to me to be exactly the case which I suggested in the course of the argument. It is just the same thing as if a man had said that the old line of the front of Burlington House was the general line of building in Piccadilly. Mr. Vulliamy has fallen into a mistake, and I am, therefore, of opinion that he has not in fact ever determined the building line in the manner in which he ought to have determined it, namely, what as a matter of fact was the line of buildings before the old houses were taken down. It being clear to my mind that the defendants could not take this land, except under the 74th section, there will be an order for an injunction to restrain them from interfering with Lord Auckland's building, notwithstanding Mr. Vulliamy's order; and a declaration that, notwithstanding that order, they were not entitled to take any part of the site of the old buildings purchased by Lord Auckland, but that Lord Auckland is entitled to build on the whole of that site, and he must have the costs of the suit.

Lord Justice MELLISH.—I am of the same opinion. I think it is impossible to read with any care the 74th and 75th sections of the Metropolis Local Management Act 1862 without coming to the conclusion that no case can be intended to be within the 75th section, which is within the 74th section. The 74th section gives power to the Metropolitan Board, if any house which is beyond the general line of the street is pulled down to the extent of more than one half or is destroyed, to require that when it is built up again it shall be set back, paying compensation. Now, it is absurd to suppose that the Legislature could have intended that in that very same case the board might, instead of proceeding under sect. 74, proceed under sect. 75, and say, "You shall put your house back to the general line of the street without receiving any compensation whatever." To make the two sections consistent with each other, I think that one must construe the words "no building, structure, or erection" in the 75th section to mean "no building, structure, or erection built or erected for the first time." Then comes the question whether this present case, assuming against Lord Auckland that there may be a general line of building in York-place, is within the 74th section. Of course, if the same person who had pulled the buildings down was intending to erect them again, it would be expressly within the 74th section. But ought the 74th section to be confined to such a case as that? In my opinion it would be very absurd to confine it to such a case, because if a man pulls down his building, intending to erect a new one, why should he not be allowed to sell the site with the same power of erecting the building as he himself had? It appears to me that the purchaser must be in the same position as the vendor, and so the purchaser from the purchaser must be in the same position as the original purchaser. Then does it make any difference that a railway company was the first purchaser, that it was a railway company who bought the property from the original owner and pulled down the buildings? I do not think that that makes any difference. I do not mean to say that in every case after a building has been once erected, the site of that building is to remain for ever thereafter within sect. 74, and never to come within sect. 75. Suppose the case of a building being pulled down, and its site turned to a totally different purpose—made, for instance, into an open garden; or suppose the case of a man pulling down his building voluntarily, and setting it back to the general line of the street—I do not suppose that after he had done that, after some-

thing had taken place which would be evidence that the owner had abandoned the land as a site for building, and had devoted it to other purposes —I do not suppose that anyone who might subsequently acquire that land by purchase, or the original owner of it, could after that take advantage of its having been the site of old buildings, just as in questions which constantly occur when a house is pulled down and a new house is erected, whether the right to the ancient lights is gone. If a man pulls down a house, and it is left down for so many years that all supposed intention of rebuilding is gone, then all the right to the lights may be gone also. But if there is an intention to rebuild, though the building is put off for a year, or two years, or three years, the right to the lights would remain when the house was built up again; and I do not suppose that it would make any difference if when the owner had pulled down the house he had sold the land with the right of building upon the house again. The right which belonged to it as a house would still remain. So I think here, if the houses are pulled down under circumstances which would lead everyone to suppose as a matter of course that they were going to be rebuilt on the site, the site practically being of no value except for building purposes, it would be wrong to say that the rights formally attached to it as to the building line are gone by the mere circumstance that the house has been pulled down. In this case the railway company found it necessary for the purposes of constructing their railway to take down these houses, or, if they had not done so, the houses would probably have fallen down while the railway was being made. There is no doubt that there was a permanent intention on the part of the railway company, at some time or other, when their underground railway was built, to sell this land for the purpose of building, as they in fact afterwards did, the land being sold in the open market. I cannot help thinking that it would be a hard thing on the railway company, if, having purchased these houses at the full price as existing houses, and being obliged to pull them down for the purposes of their railway, they were not at liberty to sell the site for the purpose of being built upon. So far as appears, they did sell the site, and Lord Auckland bought it on the assumption that it might be built upon. If the Metropolitan Board are right in their contention, there was a defect in the railway company's title; because they would have had no power to sell it as building land, and it would have been right to know what the Metropolitan Board intended to do before the railway company attempted to sell the land as building land. Therefore, I am of opinion that the case is exactly the same as if the houses had been pulled down and were about to be rebuilt by the same persons; and therefore that, as regards the site of the old buildings, the case is clearly within the 74th section, and that there was no jurisdiction in the district board to proceed under the 75th section, and that being so, I am of opinion that this court has jurisdiction to grant relief in this case. What the district board are threatening to do is that, if Lord Auckland should erect stables on this land they will proceed to pull them down. It is true that they must first go before a magistrate, but when they get before a magistrate he will probably tell them he has no jurisdiction, because I think it is perfectly clear that he has no jurisdiction under this section. I think Lord Auckland is entitled to say, I will not wait to see whether a magistrate will decide rightly or wrongly, I will not go before a magistrate at all, but I will come into the Court of Chancery, and will have you restrained by injunction from pulling down my stables, as you have no right to do so. The only part of the case on which there can be any doubt at all is, whether there is any difference between the actual site of the old house and the bit of courtyard which was behind the house. In my opinion there is no difference. The front of the old house was not towards York-place, but the side of the house ran along York-place, and beyond that there was a continuous wall of some height which separated the courtyard from York-place. Even assuming that there was a general line of building in York-place, I do not think that courtyard would be an open space within the meaning of the 75th section. The owner had a house and a wall beyond his house, which separated his courtyard from the public road. His courtyard was as much a secret and private place as any other part of his property. It was not in any way dedicated to the use of the public. I entirely agree with what the Lord Justice has said, that, looking at the state of things, which ought to be looked at, existing before these buildings were pulled down, there really was no general line of building at all, except a line coming right up to the footpath itself. Here there was a house and a long wall, which, if I read the distance right, was by itself quite as long as the space of ground in front of the five cottages, and then at the other end there were buildings also coming down to the footway of York-place. Upon the whole I am of opinion that Lord Auckland is entitled in point of law to build upon the whole of this land, which he has purchased from the Metropolitan District Railway Company, and that he is entitled to have the relief which he prays for in this suit, and his costs of the suit.

Lord Justice JAMES.—I do not think we ought to say anything in our order about the 74th section, because we have not got the Metropolitan Board before us. We will make a declaration that, notwithstanding Mr. Vulliamy's order purporting to set out the general line of buildings, Lord Auckland is entitled to build on the whole of the land included in his purchase, and we will grant an injunction to restrain the defendants from interfering.

Solicitors for the plaintiff, *Lambert* and *Son*.

Solicitors for the defendants, *J. C.* and *W. Rogers*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Wednesday, May 29, 1872.

FEARON (app.) *v.* MITCHELL (resp.)

Market—Dwelling-place or shop—Selling or exposing for sale within limits of a market—Markets and Fairs Clauses Act 1847 (10 *Vict. c.* 14) *s.* 13 *—Rights or privileges—*21 & 22 *Vict. c.* 98, *s.* 50.

Sect. 13 *of the Markets and Fairs Clauses Act provides that "after the market-place is opened for public use, every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to*

be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.

M. had erected, in 1865, *on his own land, with the approval of the local board, a large hall capable of holding about* 100 *head of cattle; and adjoining the hall and communicating with it was a large open yard, with fixed pens capable of holding* 1400 *sheep, the sheep being penned there till required in the hall for sale. His dwelling-house adjoined and communicated with the yard, but not with the hall. M. advertised and held sales by public auction, of cattle, sheep, and horses, on one day each week, being the market day of the town; the average sale each day being about* 100 *cattle and* 1000 *sheep. The sheep and cattle sold, belonged to other persons; M. charging a commission on the sale. Market having been duly opened in the town in* 1871, *under the Markets and Fairs Clauses Act* 1847 (10 *Vict. c.* 14), *M. was charged under sect.* 13 *of that Act with having sold certain sheep in a place (the hall above mentioned) other than the market, not being his own dwelling-place or shop, but the magistrates dismissed the information.*

Held, that the place where the sheep were sold was not the dwelling-place or shop of M., and, therefore, the magistrates were wrong in not convicting him.

Sect. 50 *of the* 21 *&* 22 *Vict. c.* 98 *provides that "no market or slaughter-house shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, chartered, joint-stock, or incorporated company, without his or their consent."*

Held, that M. did not, before the establishment of the market in 1871, *enjoy any right, power, or privilege within the meaning of this section.*

CASE stated under 20 & 21 Vict. c. 43.

2. At a petty sessions holden at Cockermouth, in the division of Derwent Division, in the county of Cumberland, on the 10th July 1871, an information preferred by John Fearon, hereinafter called the appellant, against Robert Mitchell, hereinafter called the respondent, charging, for that the said respondent on the 15th May 1871, at the town of Cockermouth, in the parish of Brigham, in the said county, not then being a licensed hawker, unlawfully did sell and expose for sale, in a certain place there called the Agricultural Hall, within the district of the local board for the township of Cockermouth, in the said county, in which said township the Local Government Act 1858 has been duly adopted, but not within the market there, regulated by the said Local Government Act, and the bye-laws made by the said local board, in pursuance of the said Act, and the provisions of the Markets and Fairs Clauses Act 1847, with the first-mentioned Act incorporated; and there opened for public use within the said district, not within his own dwelling-place or shop there, certain marketable articles, to wit, twelve sheep, in respect of which toll was by the said Acts and the bye-laws made as aforesaid, authorised to be taken in the said market; contrary to sect. 13 of the Markets and Fairs Clauses Act 1847, was heard and determined by us, the said parties respectively being then present, and upon such hearing we dismissed the said information with costs.

3. The appellant, being dissatisfied with our determination upon the hearing of the said information, hath, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf.

4. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:

5. Upon the hearing of the information, the following facts were admitted and agreed to by both parties, that is to say:

(*a*) The Local Government Act 1858 was on the 26th Sept. 1863 adopted by the said township of Cockermouth, and has had the force of law within such township since the 1st Jan. 1864.

(*b*) The local board for the said township on the 20th March 1869, pursuant to the Local Government Act 1858, and the Markets and Fairs Clauses Act 1847, made bye-laws for the regulation of markets and fairs held within their district, and they were duly confirmed by the Right Hon. Henry Austin Bruce, one of Her Majesty's principal Secretaries of State, on the 29th April 1869, and the same, so far as is material to the question to be submitted to the court, are in the words and figures following, that is to say:

Bye-laws made by the local board of Cockermouth, in the county of Cumberland, for the regulations of markets and fairs held within the district of the said board, this 20th day of March, 1869.

i. That markets and fairs shall be held as hereinafter provided, except when otherwise specially appointed by the said local board.

ii. That the market and fair days throughout the year shall be held as follows:—

Every Monday—Cattle, corn, butcher, vegetable, and general markets.

iv. That the cattle markets and fairs, and annual show of entire horses heretofore held in the main street of Cockermouth, shall be held in a field situate near the railway station, and known by the name of Tarn Close, otherwise the New Fair Field, or elsewhere as the board may direct.

xv. That the following tolls and dues shall be payable in respect of horses, cattle, sheep, swine, or other animals brought into or exposed for sale in the cattle market:

For sheep, rams, lambs, or goats, per score, not exceeding tenpence;

For each sheep, ram, lamb, or goat, when in lots under half a score, not exceeding one penny.

(*c.*) The field specified in article 4 of the said bye-laws is the place prescribed by the said local board for holding the cattle and sheep market, and was on the said 15th day of May, 1871, open for public use.

(*d.*) That at the time of the adoption of the local government Act, 1858, by the said township of Cockermouth, and previously thereto from time immemorial, markets for the sale of cattle, sheep, grain, &c., were held in the town of Cockermouth, in the said township, on every Monday, and the said local boards are now the owners of such markets. No evidence was offered that tolls had been collected upon such sales.

(*e.*) The respondent, on Monday, the 15th day of May, 1871 (as charged in the said information), at the town of Cockermouth aforesaid, not then being a licensed hawker, in a certain place there,

called the Agricultural Hall, within the district of the said local board, but not within the field or space prescribed by the bye-laws of the said board for holding the markets for the sale of sheep, did sell 12 sheep, in respect of which toll was, by the said Local Government Act, 1858, and the Market and Fairs Clauses Act, 1847, and the bye-laws made by the said local board in pursuance thereof as aforesaid, authorised to be taken in the said market; but it was contended on behalf of the respondent that, inasmuch as the said sheep were not sold within the field or space prescribed by the bye-laws of the said board for holding the markets, but within the respondent's own private and exclusive premises, in the ordinary way of trade, they were not tollable under the bye-laws.

(*f.*) The Agricultural Hall was erected by the respondent in the year 1865, on plans submitted to and approved of by the said local board, with knowledge that it was the intention of the respondent to use the same as an auction mart for the sale of cattle, sheep, &c.

(*g.*) The Agricultural Hall is a large building of brick, stone, and mortar, and slated, and contains a large ring or area, in which the respondent sells, and stalls for the accommodation of about 100 head of cattle. On the east side and partly across the south end of the hall, and adjoining and communicating with it, is a large open yard with fixed pens, capable of holding 1400 sheep, and in which sheep are penned till required in the hall for sale.

(*h.*) The Agricultural Hall and yard are both the private property of the respondent, built on his own private land, at his own cost, and in his own occupation. The respondent's dwelling-house, which is also his own property, adjoins and communicates with the said yard, but not with the Agricultural Hall. The dwelling-house is separated from the Agricultural Hall by the respondent's harness room and stable, also in his own occupation.

(*i.*) The respondent advertises and holds sales by public auction in the Agricultural Hall every Monday of cattle, sheep, horses, &c. The average sale in the Agricultural Hall on each Monday amounts to about 100 cattle and 1000 sheep, much exceeding the sales in the market regulated by the board held on these days.

The respondent also holds many other sales of cattle, horses, and sheep, in the same place, on other specified days throughout the year. The respondent also uses the Agricultural Hall for furniture and other sales.

(*j.*) The cattle, sheep, horses, &c., so sold by the respondent in the Agricultural Hall as aforesaid, are the property of farmers and others, who take them there for sale from all parts of the county.

(*k.*) The respondent charges the vendors a commission on the sales, and guarantees payment to them of the amount of the sales.

(*l.*) The respondent has been an auctioneer for twenty-two years, and for sixteen years previous to erecting the Agricultural Hall was accustomed to hold sales by public auction at Cockermouth, on market and other days, in the streets and elsewhere in the town of Cockermouth, without molestation or interruption; and no toll was demanded or received by any person on account of such sales, save that the respondent paid tolls for pens for holding sheep which he put up upon the street on these occasions, the same as other persons who put up pens for the same purpose, or put up stalls on the said street for the sale of wares on market days.

6. The question of law arising on the above statements therefore is:

Whether the place where the sheep in question were sold was or was not the respondent's own dwelling-house, place, or shop, within the meaning of the exception in the 13th section of the Markets and Fairs Clauses Act 1847, which enacts that, "After the market place is opened for public use, every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40*s.*"

WM. WOOD.
RICHARD BELL.

Manisty, Q.C. (with him *C. Hutton*), for the appellant, contended that the justices were wrong in not convicting. The hall in which the respondent effected his sales of cattle, sheep, horses, &c., was neither a shop nor a dwelling-place, and therefore not within the exception contained in the 13th section of the Markets and Fairs Clauses Act, 1847 (10 and 11 Vic. c. 14), which provides that "After the market-place is opened for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40*s.*" *Pope* v. *Whalley* (6 B. & S. 303), and the *Llandaff Market* v. *Lindon* (8 C. B., N. S., 515), were cited. In the former case Blackburn, J., said: "Wherever a person is really selling in his own private shop, there he will not be liable to a penalty now, just as he would not have been liable to an action in olden times. But when parties are in reality setting up a market, this is not a private shop within the meaning of this Act, but is a market, for holding which they would be open to an action at common law." This is exactly what the respondent in the present case has done.

Sir *J. Karslake*, Q.C. (with him *Brown*, Q.C. and *C. Crompton*) for the respondent, contended that the place where his sales were effected was to be considered as his dwelling place or shop, and so within the exception made by the Act In *Ashworth* v. *Heyworth* (L. Rep. 4 Q. B. 316; 20 L. T. Rep. N. S. 439), the appellant was convicted for having exposed for sale under a wooden shed affixed to his house or shop and supported on wooden posts, which had been erected for a period of eighteen years. It was held that the wooden shed was part of the appellant's house or shop, and so came within the exception in the 13th section, and therefore, that the conviction was wrong. Cockburn, C.J., said: "I think that the magistrates have taken a narrow view of this matter, and that where a piece of ground or a shed, such as that in the present case, adjoins the dwelling-house or shop, and is used for the same purposes as the shop, it may be said to be substantially an accessory to the shop, and therefore within the meaning of the words 'dwelling-place or shop' in the Act of Parliament." The extent of the business carried on by the present respondent is not a matter which should influence the decision of the court;

neither ought the fact that he sells as auctioneer and not for himself. See *Wiltshire* v. *Willett* (11 C. B., N. S., 240), where it was held that a sale by auction in a shop attached to and being part of any dwelling-house was privileged. "I see no reason," said Erle, C. J., "why a man, selling goods in a shop, may not sell them by auction or on commission as agent for another; more especially as an auctioneer can maintain an action for the price of goods so sold by him." The same judge said, during the argument, that "The objects of the Act of Parliament were to get the highways cleared of obstruction, and to have all marketable commodities carried to the new market-place for sale. Are not these objects attained if the shop is in any dwelling-house?" [COCKBURN, C. J.—I take a shop to mean a place where goods are kept and sold by one person to another, as between buyer and seller, and not a place where anything is sold by auction.] Further, it is submitted that, after the establishment of his auction premises, the respondent had a right or privilege which could not be taken away from him. Sect. 50 of the Local Government Act (21 & 22 Vict. c. 98) provides that "no market or slaughter-house shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges, enjoyed within the district by any person, chartered, joint-stock, or incorporated company, without his or their consent." [COCKBURN, C. J.—What right had he different from that of the rest of Her Majesty's subjects? Those who had not already set up such a business had an equal right with him to do so. BLACKBURN, J.—He has merely used a right which was common to everybody; he has acquired none.] *Harris* v. *Mayor of Bridgnorth* (15 C. B., N. S., 89), was referred to.

COCKBURN, C. J.—I think our judgment must be in favour of the appellant, the case coming, I think within the 13th section of the 10 & 11 Vict. c. 13, which enacts that "After the market place is opened for public use, every person, other than a licensed hawker, who shall sell, or expose for sale in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40*s*." Now, there is no doubt that this was a market properly established by the local authority under an Act of Parliament, empowering them to do so. There is no doubt that the things sold, or exposed for sale, come within the 13th section of the Act, as things in respect of which tolls are authorised to be taken. Therefore, the only question remaining which requires consideration is, whether this case comes within the exception of "his own dwelling-place or shop." Now, I think it is impossible to say that these are things sold in his dwelling-house. The facts lie in the narrowest possible compass. The respondent has premises extending over a very considerable area; in the first place, a large building called the Agricultural Hall, and contiguous to it another building or yard communicating with the Hall, and adjoining and communicating with this yard is a third building, the respondent's own dwelling-house. That being so, I think it is impossible to say that the hall is the dwelling place of the respondent. We find that it is separated from his dwelling-house by something which entirely divides *the one place* from the other. It is not necessary to determine whether there is any distinction between dwelling-house and dwelling-place; I cannot think that any such distinction, if any exists, was here intended. If there is a distinction between the two, and dwelling-place has a more extended meaning than dwelling-house, I do not think that in any sense whatever of the term, can this Hall be said to be part of the dwelling-place of the respondent. Then is it a shop? I am of opinion that it cannot, in any proper sense of the term, be called a shop. I agree with Sir John Karslake that there may be cases in which the term "shop," in its popular sense, would not be applicable, under the Act, to the place where things are sold or exposed for sale, but where, under a rational and liberal construction of the case, it might come within the exceptions mentioned in the Act; for example, the case of a horsedealer who keeps premises where he exposes the horses which he sells. It would be a great deal too much to say that the horse dealer is not at liberty to sell horses on his premises, because he does not come within the exception in the Act. Such a place might be taken to come constructively within the meaning of the word shop. But in all these cases we must judge by the surrounding circumstances. The question may be one more or less of degree. But it is very different where we come to deal with an extensive case like this, an area as extensive as the market place itself. Here the sale is by auction; the action of the auctioneer takes place, it is true, in a building, but the sheep which are sold are exposed in this large yard and kept there. To say that that is a shop is out of the question. I own that my individual inclination is to doubt whether an auctioneer's premises are a shop at all, within the meaning of the Act of Parliament; but it is not necessary to determine that question now. It is enough to say that it is impossible to hold that the large premises used by the respondent can, in any sense of the term shop, come within the exception made by the Act. The only further question is whether the case does not come within the 50th section of 21 & 22 Vict. c. 98, which provides that "no market or slaughter-house shall be established in pursuance of this section, so as to interfere with any right, powers, or privileges, enjoyed within the district, by any person, &c., without his consent." Now the right which the respondent was enjoying at the time the market place was established, was not such a right as was contemplated by the Legislature in that section. It was a right which he enjoyed only in common with all Her Majesty's subjects. He had no greater right in that respect than anyone else. I think that the word "right" in that section, especially when taken in conjunction with the other words used in it, must mean a right acquired adversely to the rights of the rest of the world and peculiar to the individual. It never could have been intended that powers given for the benefit of the inhabitants of a particular place, should not be exercised, by reason of some person having, already existing, premises used for a similar purpose. Our judgment must, therefore, be for the appellant.

BLACKBURN, J.—I am of the same opinion. We must consider a little what was the reason and the motive with which the Markets and Fairs Clauses Act was passed. It was considered prudent to give in certain cases a market; and not only that, but prudent also to give that market

a monopoly; and the Crown had, and still has, a prerogative to grant such a market. Now upon this subject there has been, as I pointed out in the case of *Pope* v. *Whalley* (6 B. & S. 303), and there still is some doubt as to what is exactly the Sovereign's prerogative. There may be a grant of a market, prohibiting the sale elsewhere of any articles whatsoever, even in a shop. This was very clearly settled in the case of *Moseley* v. *Walker* (7 B. & C. 40.) But it was intimated in a case in 12 M. & W., that though that might be by ancient prescription, yet that it was extremely doubtful whether a modern grant of a market could be equally extensive. But I do not think there is any doubt that, however modern the franchise, if a person gets up a rival market that would be an infringement of the previous grant. The Markets and Fairs Clauses Act 1847 was passed as a code of the various clauses which the Legislature was desirous of putting into force. Amongst others, they inserted this 13th section, which enacts that, "after the market place is opened for public use, every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling place, or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40*s*." What the Legislature was then probably thinking of was this; that whereas there was a doubt as to the grant of a modern franchise having the effect of stopping sales in a private shop, such doubt should be put an end to. The Legislature says, "We do not prevent such sales, but we do prevent a sale anywhere else than in a shop." Then, to come to the present case. To say that the respondent was selling in his dwelling place, would be, I think, an absurdity. The only question is whether he sold in a shop. Though a sale by an auctioneer might, in some conceivable cases, be said to be a sale in a shop, yet, *primâ facie*, such a sale is not what one is thinking of, when one speaks of selling in a shop. The case states that "the respondent advertises and holds sales by public auction in the Agricultural Hall every Monday of cattle, sheep, horses, &c. The average sale in the Agricultural Hall on each Monday amounts to about 100 cattle and 1000 sheep; much exceeding the sales in the market regulated by the board, held on these days." When I read that, I must consider whether that is keeping up a market in rivalry to and disturbance of the market authorised to be set up, or whether it comes within the exception made by the Act in the case of a man selling in his own shop. I do not pretend to be able to define precisely where market begins and where shop ends. But in the present case, I think no one can doubt that the respondent has been keeping up a disturbing market, and therefore that the case does not come within the exception of a person selling in his own shop. But it is said that the 50th section of the 21 & 22 Vict. c. 98 gives the respondent a privilege or right. [His Lordship read the section above set out.] Now I think that the respondent having furnished the town with a very good market, this would have been a very good reason why he should ask the authorities of the place when they were discussing the question whether they should set up another, not to do so. He might have had a very strong case in urging that upon them. That is a different matter however. He is still keeping up a market in rivalry to theirs. If he had any privilege or right, such as has been contended for, they could not have set up that market without his consent; but he had not any such privilege or right. Being one of the public, and having the right which the public in general has, of selling anywhere, provided no nuisance is created by the mode of sale, he simply used that right. But he had neither right, power, nor privilege peculiar to himself; and no other would give him, I think, any right to prevent the establishment of a market. The Legislature gives the protection of the Markets and Fairs Clauses Act wherever the local board chooses to set up such a market as this, and it seems to me that the respondent in the present case was doing the very thing which the Legislature intended to prevent. Our judgment, therefore, must be for the appellant.

MELLOR, J.—I am of the same opinion. I do not propose at all to determine or to express any opinion upon the question whether an auctioneer selling by auction in his auction rooms, sells in a shop within the meaning of the Act. I should be unwilling to say that he does not. In determining whether the premises used in the present case were a shop or not, it is necessary to regard the nature and character of the premises, and the circumstances under which the sales were carried on. Now the respondent, who, it seems, used to sell cattle and sheep in the streets, before building these premises, built a large hall in the year 1865, and a large open yard with pens in which the sheep were penned till required in the hall for sale. He advertises periodical sales of cattle, sheep, and horses, besides other things. I find it stated that there are pens capable of holding 1,400 sheep; and I take it that when penned they are exposed there for sale, though the actual knocking down to the purchaser takes place in the hall. We find here a business carried on, not in a shop, but in a field, though it is more convenient to have many of the things sold under cover. This latter circumstance does not, however, make a difference when we are considering what is the nature of a shop, and it would be a large rendering, indeed, of that word, to hold it applicable to such a concern as this. It seems to me much more like a rival market.

LUSH, J.—I am of the same opinion. The 13th section of the Markets and Fairs Clauses Act 1847 was intended to provide a summary remedy for preventing the infringement of the rights of a market; and I think it ought to be read with reference to what would be an infringement of a grant of a market at common law. The doubt existing about this matter has been referred to by my brother Blackburn. It appears to me to be the better opinion that the grantee of a modern grant of a market would not have the right to prevent persons carrying on sales in their own dwellings or shops. Is the respondent's business carried on in his own dwelling-place or shop? It clearly is not. What the respondent does is to take advantage of the market days, when the people of the neighbourhood are collected, and to advertise his sales for those days. I think that if an action had been brought, on a charter by the Crown, and the facts stated in the present case were proved, the defendant would clearly be held to have been guilty of an infringement of the grant from the Crown. *Judgment for the appellant.*

COURT OF COMMON PLEAS (IRELAND).

(Collated by F. O. CRUMP, Esq., Barrister-at-Law.)

GALWAY COUNTY ELECTION PETITION.

June 6, 7, *and* 11, 1872.

(Before MONAHAN, C. J., KEOGH, MORRIS and LAWSON, JJ.)

TRENCH v. NOLAN.

Election petition—Spiritual intimidation—Disqualification of candidate—Status—Notice to electors—Claim of candidate in minority to the seat—31 & 32 *Vict. c.* 125 *s.* 12.

N. and T. were candidates for G. county. N. before the nomination day had been adopted as the candidate of the Roman Catholic clergy, who individually and collectively, by threats of spiritual chastisement and temporal injury, coerced the electors to promise their votes for N. A petition was presented against the return of N., and the election judge found that the exercise of such intimidation and undue influence had become publicly known amongst the electors previous to the day of nomination; that on the day of nomination T., the petitioner, had caused a notice to be posted at and in the immediate vicinity of the place of nomination for the said county, and to be advertised in several of the newspapers published in the county, and to be extensively posted in the different polling places for such county, cautioning the electors that N. was disqualified from being elected; that notices were served at each of the polling places (with one exception) on some of the electors previous to their voting, the aggregate of such personal services not amounting to more than a few hundreds; and that numbers of the notices were scattered about the floors of the polling booths, but were all in the English language, whilst many of the electors could not speak English.

Held (*Monahan, C.J., dissentiente*), *that the status of N. was destroyed the moment that he or his agents were guilty of undue influence, and that sufficient notice of his disqualification had been conveyed to the electors to cause all the votes given for him to be thrown away.*

Held further (*Monahan, C.J., dissentiente*), *that T., who obtained* 658 *votes only, and was in a minority of* 2165, *was entitled to the seat.*

THE following case was stated by Keogh, J., under the Parliamentary Elections Act 1868 for the determination of the court:

1. I hereby certify that the above petition, to which I refer, came on for trial before me at Galway on the 1st April last, and that, said trial having been continued from day to day, at the conclusion thereof, on the 27th May inst., it appeared to me requisite that, before finally determining as to that portion of the petition which prayed that the said petitioner might be declared duly elected, and that he should have been returned, I should, under the 12th section of said Act, reserve certain questions of law for the consideration of the Court of Common Pleas, and that I should accordingly postpone the granting the certificate directed by the said Act, until the determination of such questions by the said court.

2. I came to the conclusion, as a matter of fact, that the said respondent had, previously to the said election, by himself and his agents, committed the offence of undue influence upon the electors in order to induce and compel such electors to give their votes for him or to refrain from voting against him at said election, contrary to law, and against the provisions of the statutes against such practices made and provided, and especially against the provisions of the statute 17 & 18 Vict. c. 102, s. 5.

3. It was proved before me that the number of electors on the registry for such county was 5346; but that, making allowance for double entries and deaths, the real number of electors available to vote at the time of such election, which took place on 6th Feb. in this year, did not exceed 4686. Of them 2823 voted for respondent, and 658 for the petitioner. The respondent was declared by the sheriff duly elected.

4. It was further proved before me that such undue influence had been practised upon the electors of the county, and had been carried out in pursuance of arrangements made by the said respondent and his agents previous to such election, and especially during the months of November and December of the last year, and the month of January of the present year.

5. It was also proved that certain of the prelates of the Roman Catholic Church had, by letters written to and read at public meetings, and by resolutions adopted at meetings and conferences of the Roman Catholic clergy, at which they presided, and which resolutions were printed, published, and made known throughout the county by the respondent and his agents, aided and assisted in the exercise of such undue influence. It was also proved that many of the Roman Catholic clergy, discharging ecclesiastical duties in such county, by their speeches at public meetings, held in various parts of the county, commencing on 19th Dec. of last year, and continued through the month of January in the present year, and by denunciations and threats of temporal injury and spiritual punishment, uttered during and after divine service, and in the presence of their congregations, had intimidated and unduly influenced the electors of such county; and that the said respondent had made himself liable for their acts.

6. It was also admitted upon both sides, on such trial, that at least nine-tenths of the electors were members of the Roman Catholic Church.

7. I was satisfied that, by reason of the foregoing and other acts of intimidation proved against the respondent and his agents, the status of the said respondent as a candidate qualified to be elected was destroyed, and that he was disqualified to be elected for the said county by such acts, committed by him and his agents, as hereinbefore described, and that such disqualification existed previous to the day of nomination for such election; and that the knowledge of such acts, and especially of such intimidation and undue influence, had become generally known through and amongst the great body of the electors throughout the county, and especially amongst those who afterwards voted for the said respondent.

8. It was further proved before me that large numbers of the electors, who had previously declared their intention to vote for said petitioner, had been compelled to vote for said respondent, or to refrain from voting for the said petitioner, and had avowed that they were so compelled by such intimidation and undue influence.

9. It was proved that the exercise of such intimidation and undue influence had become publicly known amongst the electors of such county, previous to the day of nomination.

10. It was further proved before me that, on Feb. 3, being the day of nomination, the said petitioner caused a notice to be posted at, and in the immediate vicinity of the place of nomination for said county, and to be advertised in several of the newspapers published in the county, and to be extensively posted in the different polling places for such county, cautioning the electors that said respondent was disqualified from being elected for the said county, as set forth in the petition.

11. It was further proved that, at each of the different polling places, and of the respective polling booths, the said petitioner had persons stationed with copies of such notice, with the view of serving them on the electors previous to their recording their votes at the poll.

12. It was further proved that these notices were served at each of the polling places (with one exception), on some of the electors previous to their voting, the numbers of such services varying considerably in different polling places, but not amounting in the aggregate of personal services to more than a few hundreds; and furthermore, it was proved that attempts were made to serve numbers of such notices on the voters as they came to the poll, who either refused to receive them or were prevented receiving them by the confusion in the booths, sometimes by the agents of the respondent, and frequently by the members of the Roman Catholic clergy, who were engaged conducting the electors to the poll. In the excepted booth to which I have referred, the person placed to serve the notices did not do so until after the electors had polled, having been told by one of the agents of the petitioner that was the proper time to do so.

13. It was further proved that numbers of these notices were scattered about on the floors and tables of the polling booths. They were all in the English language, and it was proved that many of the electors could not speak English.

14. It was, on the foregoing facts, contended before me on behalf of the petitioner, that, the status of the said respondent being destroyed thereby, the petitioner was the only candidate before the constituency eligible to receive their votes and be declared elected; and that I should, accordingly, declare him duly elected.

15. It was, however, contended on the part of the respondent, that, notwithstanding the said respondent being found ineligible, yet the votes given to him were not thrown away, as the electors were not bound to act upon his ineligibility, even though made known to them by sufficient notice, until so declared by some competent legal tribunal; and, furthermore, that, even if they were bound to act upon such ineligibility, though not so previously bound, knowledge thereof was not sufficiently brought home to a sufficient number of electors to displace the majority of the said respondent, and to justify me in declaring said petitioner duly elected.

16. I, therefore, request the opinion and determination of the Court of Common Pleas upon the following questions: First, were the electors who constituted the majority of said respondent fixed with sufficient knowledge of the disqualification of the said respondent, and should they have acted upon such disqualification and refrained from voting for said respondent? secondly, was the petitioner (there being no disqualification on his part) entitled to be declared elected for said county?

Armstrong, Serjt. (with him *Murphy*, Q.C., and *Persse*), on behalf of the petitioner, contended that the disqualification was complete before the election took place; the notice of that disqualification given was such as reason demanded, and the nature of the case allowed; and that notice had been brought home to the electors who constituted the respondent's majority, before a single vote had been recorded: consequently, votes then given in wilful perverseness against the law were as absolute nullities as if given for a dead man, and the only candidate existing in the eye of the law should be returned.

Macdonogh, Q.C. (*MacDermot* with him), *contra*. —We contend that the case does not show that the 2165 voters constituting the respondent's majority had knowledge of his being disqualified at the time they voted; that, even if they had notice of acts which a judge would hold amounted to the statutable offence of undue influence, previous to the passing of the Corrupt Practices Prevention Act 1854, such notice would not cause the votes to be thrown away in the sense of the reservation, and that, since that Act, there must be a declaration by a committee or a report by a judge before a candidate is disqualified in the sense mentioned. The notice stated not a proved or specific fact, but a mere general assertion. Actual knowledge of undue influence is not brought home, and it cannot be held that the electors had even constructive knowledge of the disqualification or of agency. Notoriety and notice are only evidence of knowledge, and knowledge has not been found as a fact by the judge. There should have been a direct finding; and if found, it should have been on the allegations in the petition, but those allegations are either unproved or disproved, and there is no power to draw an inference of notoriety not suggested by the petition. The incapacity rests upon the statute law, and by a provision of the Corrupt Practices Act, introduced in consequence of the report in the *Clitheroe* case, an express declaration of disqualification, or a report by a judge is necessary as a condition precedent to notice of disqualification; while here, the judge's report is still incomplete. There is no case since the passing of that Act in which the election was declared otherwise than void; and void this election should be held.

The following cases were cited:

Doe d. Taylor v. *Crisp*, 8 Ad. & E. 779, 787;
R. v. *Hiorns*, 7 ib. 960;
R. v. *Hawkins*, 10 East, 211, 218;
Kenrick v. *Beauclerk*, 11 ib. 657;
Claridge v. *Evelyn*, 2 B. & Ald. 81;
King v. *Bridge*, 1 M. & S. 76;
R. v. *Monday*, 2 Cowp. 530;
Malloon v. *Fitzgerald*, 3 Mod. 29;
Gosling v. *Veley*, 7 Q. B. 406, 436; 12 ib. 387; 4 H. of L. Cas. 679, 801, 814;
Reg. v. *Blizard*, L. Rep. 2 Q. B. 55; 15 L. T. Rep. N. S. 242;
Reg. v. *Mayor of Tewkesbury*, L. Rep. 3 Q. B. 629, 631, *et seq.*; 18 L. T. Rep. N. S. 851;
Nicholson v. *Tanham*, 4 Ir. C. L. Rep. 185;
Bewdly, *Mitchell*, 1 Lud. 65;
Fife, ib. 455;
Kirkudbright, ib. 72; 1 Peck. 439;
Flint, 1 Peck. 526;
Dublin, ib. 496;

Southampton, ib. 500; Hey. E. C. 535;
Southwark, Hey. E. C. 544; Cliff. 1;
Radnorshire, 1 Peck. 496, 498; Cor. & D. 22;
Leominster, Cor. & D. 21; Hey. E. C. 551;
Penrhyn, Cor. & D. 55;
Beverley, 1 Wol. & D. 219, 221;
Abingdon, 1 Doug. E. C. 419; 1 Peck. 499;
Eversham, Fal. & Fits. 504;
2nd *Cheltenham*, 1 P. R. & D. 225, 233;
1st *Horsham*, ib. 107;
2nd *Horsham*, ib. 240;
Tavistock, 2 ib. 5, 11;
1st *Clitheroe*, ib. 30;
2nd *Clitheroe*, ib. 276, 280-5; Wol. on Elec. 125;
1st *Norwich*, Wol. & Bris. 145; Cliff. 1;
2nd *Norwich*, 19 L. T. Rep. N. S. 615, 619; O'M. & H. 8; Par. El. Cas. 1, 123;
Westminster, 20 L. T. Rep. N. S. 17, 22; Par. E. Cas. 2, 269;
Norfolk, 21 L. T. Rep. N. S. 426; Par. E. C. 2;
Drogheda, 21 L. T. Rep. N. S. 402; Par. E. C. 2, 321-2;
York, O'M. & H. 213; Par. E. C. 2, 303;
4 Coke Inst 47;
L. & Le Mar. E. L. 64;
Wol. Par. L. 124-5-8;
1 Glad. 147;
May Par. Pr. 58-9;
Rogers El. L. 212, 248;
31 & 32 Vict. c. 125, ss. 12, 16, 26, 46;
25 & 26 Vict. c. 62, s. 4;
17 & 18 Vict. c. 102, ss. 5, 36;
13 & 14 Vict. c. 68;
49 Geo. 3, c. 118;
2 Geo. 3, c. 24;
7 & 8 Will. 3, c. 4;
7 G. R., 1868.

Cur. adv. vult.

LAWSON, J.—In this case two questions have been submitted by my brother Keogh to the court for its determination, arising out of the Galway County Election Petition, in pursuance of the 12th section of 31 & 32 Vict. c. 125. [His Lordship read same.] The questions so reserved for our consideration are as follows: First. Were the electors who constituted the majority of said respondent fixed with sufficient knowledge of the disqualification of the said respondent, and should they have acted upon such disqualification and refrained from voting for such respondent? Second. Was the petitioner, there being no disqualification on his part, entitled to be elected for said county? It was contended by Mr. Macdonogh in his argument that the first of these questions was one of fact, not of law, and that the court could therefore return to it no answer. It is, however, very clear to my mind that it involves a serious and important question of law, namely, whether the facts as found in the case are sufficient, in point of law, to affect the electors with sufficient knowledge of the disqualification of the respondent, and whether votes recorded for him after such notice are thrown away. Mr. MacDermot, in arguing on the same side, admitted that a difficult question of law was saved by the case. His logical intellect recognised that question, and upon it he addressed to the court an argument distinguished by singular ability and acumen. Now, the propositions contended for before us, on behalf of the petitioner, who seeks the seat, were—first, that the respondent was disqualified for being elected for the county, and that the disqualification was complete before the election took place; secondly, that, before a single vote was recorded at the election, sufficient knowledge of such disqualification was brought home to the electors who constituted the majority of the respondent; third, that the petitioner, a duly qualified candidate, was entitled to be seated. Before I approach the special facts of the case, it is absolutely necessary to consider what the rule of law is which is applicable to cases of this kind. We are directed by the 26th section of the Act to pursue, as far as may be, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions. So far as these principles fail to guide us we are, according to the second section, to have the same powers as we would possess if the petition were an ordinary cause within our jurisdiction, and we must then be governed by the principles of the common law. I have, therefore, approached the consideration of this case as if it were a new trial motion or a case reserved from Nisi Prius, endeavouring to ascertain, in a manner to us somewhat novel, what are the principles of law which govern this case, and then to apply them to the facts. In the first place then, it is necessary to ascertain whether there are any principles to be deduced from the decisions of committees of the House of Commons, upon the question whether a duly qualified candidate is entitled, although in a minority, to be seated, should the other candidate be proved to have been disqualified at the time of the election, and should the electors have been duly apprised of such disqualification. The research and assiduity of counsel have referred us to nearly all the cases upon the point, from the earliest time before committees of the House of Commons. I need not travel through them in detail, but the result is this—that in very many cases the candidate in the minority has been seated, upon proof of his opponent's disqualification to the knowledge of the electors, while in many other cases, upon a state of facts apparently similar, the committees have simply unseated the disqualified candidate, and declared the election void. Two remarkable instances of apparently contradictory decisions are the *Cheltenham* and *Horsham* cases, decided about the same time. In the *Horsham* case, the committee seated the other candidate; in the *Cheltenham* case they declined to do so; in both there was a divided opinion among the members of the committees. The result of the decisions therefore appears to be that the jurisdiction to seat the candidate in the minority was undoubtedly possessed by committees; that they frequently exercised, and in many other instances refused to exercise that jurisdiction. Failing in this chaos of decisions to discover any settled principle which should absolutely govern us, we must have recourse to our common law for rules and analogies to guide our judgment, an alternative to which, for my part, I turn with pleasure, because there we shall find, though often intermixed and obscured by much that is technical, or that perhaps may be deemed narrow, principles of the soundest sense, the truest wisdom, and, above all, a power of expansiveness and adaptation, which when properly applied is adequate to the solution of the novel questions that, in the complex relations grown out of an advanced civilisation, are continually coming to the surface. That power of expansion is well stated by Coleridge, J., in *Gosling* v. *Veley* (4 H. L. Cas. 768), and in the language of Eyre, C.J., in *Ilderton* v. *Ilderton* (2 H. Bl.), where he says that when one mode of trial is obsolete or inapplicable the common law, "out of its own inexhaustible fountain of justice," will devise another. The first case then

to which I shall refer is *Rex* v. *Hawkins* (10 East, 211). That is a case of the very highest authority. The judgment of the Court of Queen's Bench is delivered by Lord Ellenborough, and the case was carried to the House of Lords, where the decision was affirmed (2 Dow. P. C. 124). The question there discussed was, whether the notice of the other candidate's incapacity was given too late, not having been given until after two persons had voted. At page 217, Lord Ellenborough says, "The general proposition that votes given for a candidate after notice of his being ineligible are to be considered the same as if the persons had not voted at all is supported by the cases of the *Queen* v. *Boscawen* (East, 13 Anne); *Rex* v. *Withers* (East. 8 G. II.); *Taylor* v. *Mayor of Bath* (M. 15 G. II.), all of which are cited in Cowper 537, in *Rex* v. *Monday*. In the first, Boscawen and Roberts, the two candidates, had an equal number of votes, but because Boscawen was incapable the votes given for him were considered as thrown away, and the other duly elected. In the second case, Withers had five votes out of eleven, and the other six refusing to vote at all, the court held Withers duly elected, and that the six who refused to vote were virtually consenting to the election of Withers. In the third case, Taylor, Bigg, and Kingston were candidates. Bigg was objected to as a disqualified person, notwithstanding which Bigg had fourteen votes, Taylor thirteen, and Kingston only one. There Lee, C.J., at Nisi Prius, directed the jury that, if they were satisfied that the electors had notice of Bigg's want of qualification, they should find for Taylor, because Bigg not being qualified, should be considered as a person not *in esse*, and the voting for him a mere nullity. The jury found for Taylor, and the court on motion for a new trial agreed with the law as laid down by Lee, C.J., and refused a new trial. And in *Rex* v. *Monday* and *Rex* v. *Coe* this doctrine was not denied, although the cases then before the court went off on other points." Lord Eldon, in giving the judgment of the House of Lords, puts it upon the ground that "the majority knowingly voted for this dead man." It is quite true that, as has been stated in the argument, the candidate in that case admitted his own incapacity, but in later cases it will be found that that circumstance is immaterial, and that if the elector votes after he knows of the disqualification, he does so at the peril of losing his vote. Again, in *Rex.* v. *Parry* (14 East, 549), this rule is recognised. And in *Gosling* v. *Veley* (7 Q. B. 406), Lord Denman, a great constitutional lawyer, expressly lays down the rule as applicable to elections to the House of Commons. At p. 436 he says—"Upon the argument of this case the counsel for the defendant did not shrink from meeting his opponent on the principle. Majority he truly asserted to be legal majority, and he contended that though there might be numerically more vestrymen present who were in intention adverse to the rate, than those who voted for it, yet the majority of votes legally expressed was in its favour. This position he sought to establish by showing that the vestrymen who were so adverse had thrown away their votes, and he likened this case to those which have been decided in regard to corporate assemblies for corporate elections, or the meetings of freeholders or burgesses in the elections to the House of Commons. It may be convenient, therefore, in the first place, to examine into the principle on which this rule as to corporate and other elections appears to have been established, and then, after stating the facts which these pleadings disclose, with regard to the proceedings now in question, to see whether it is properly applicable to those facts, so as to be the groundwork of our decision. First, the cases in which the rule has been either stated or applied in regard to corporate elections are very numerous. It may be sufficient to refer to four of the most important, either for the arguments or the judgments—*Oldknow* v. *Wainwright*, *Rex* v. *Monday*, *Rex* v. *Hawkins*, and *Rex* v. *Parry*. The result of the decisions appears to be this—when the majority of electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable, or in the latter case, may be capable of being made good, according to the nature of the disqualification; the objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available, or it may be such as to place the elected candidate on the same footing as if he never had existed, and the votes for him were a nullity. But in no such case are the electors who vote for him deprived of their votes, if the fact becomes known and is declared while the election is still incomplete. They may instantly proceed to another nomination, and vote for another candidate. If it be disclosed afterwards, the party elected may be declared ousted, and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector before voting receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise, and therefore, however strongly he may in fact dissent and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate, for he will not take the only course by which it can be resisted, that is, the helping to the election of some other person. He is present as an elector; his presence counts as such to make up the requisite number of electors, where a certain number is necessary; but he attends only as an elector, to perform the duty which is cast on him by the franchise he enjoys as an elector; he can only speak in a particular language; he can do only certain acts; any other language means nothing, any other act is merely null; his duty is to assist in making an election. If he dissents from the choice of A. who is qualified, he must say so by voting for some other also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only, and but for this rule the interest of the public and the purpose of the meeting might both be defeated by the perverseness or the corruption of electors, who may seek some unfair advantage by postponement. If then the elector will not oppose the election of A. in the only legal way, he throws away his vote, by directing it where it has no legal force, and in so doing he voluntarily leaves A. unopposed, *i.e.*, assents to the voices of the other electors. When the disqualification depends upon a fact which may be known

to the elector, he is entitled to notice, for without that the inference of assent could not be fairly drawn, nor would the consequence as to the vote be just. But if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given; no one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in Parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact." This decision was reversed in the House of Lords upon a collateral point, but the principles laid down by Lord Denman have never been questioned. The last proposition of Lord Denman, that a person having notice of the facts is presumed to know the law has been qualified by a recent decision in the Court of Queen's Bench in England, which has been much relied on in argument on both sides. I refer to *Reg.* v. *Mayor of Tewkesbury* (L Rep. 3 Q. B. 634; 18 L. T. Rep. N. S. 851), which decides that notice of the facts creating the disqualification is not necessarily notice of the disqualification. The general rule, however, is there thus laid down by Blackburn, J.—"The candidate for the office of town councillor is duly elected if he has an actual majority of valid votes. This was decided in *Rex* v. *Hawkins*, and it was also decided that if an elector, having notice of the disqualification of a candidate, chooses to vote for that candidate, it is the same thing as if he did not vote at all. From the illustrations in the cases it is plain that if an elector knows as a fact that the candidate for whom he is about to vote is disqualified, and yet persists in voting for him, the elector's vote is as utterly thrown away as if he had voted for a dead person or for the Man in the Moon. In the case of *Reg.* v. *Coaks*, Lord Campbell, C.J., says—'Blake was in fact a candidate, but he was an alderman, and therefore ineligible, and that fact was known to the electors. Now it is the law, both the common law and the Parliamentary law, and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person, as it has been said, as if he gave his vote for the Man in the Moon.'" Here we have Lord Campbell, another great master of the common law, laying down this rule as explicit. Such being the undoubted rule of the common law, applicable to Parliamentary as well as to other elections, let us see what are the special facts stated in this case (out of which I shall not travel), in order to ascertain whether that rule is applicable to them, so as to form the groundwork of decision. First, then, was there a disqualification of the respondent before the election took place? It appears by the case that he was personally guilty of acts of intimidation and undue influence, before the election; that he entered into a combination to procure his own return by undue influence, long before the election took place. [His Lordship read paragraphs 2 and 4 of case.] These are the findings on which the fact of disqualification depends. The question is, do these acts amount to a disqualification? Mr. MacDermot argued with great ingenuity that such acts do not amount to a disqualification unless they had been adjudicated upon by a committee or by the report of a judge; that there was no such disqualification at common law; that the several statutes before the passing of the Corrupt Practices Prevention Act (1854) created such disqualification, upon the commission of one of these offences, but that the Corrupt Practices Prevention Act repealed all those earlier Acts, and creates no disqualification except that contained in sect. 36. [His Lordship read the section.] This construction of the Act would lead to some very startling consequences. If the earlier sections, two, four, and five, defining the offences of bribery, treating, and undue influence, and making them misdemeanours, do not destroy the status of the candidate who is guilty of them, upon what ground is a judge to unseat him? He cannot be unseated, because he has committed a misdemeanour; and it would seem, therefore, to follow in strictness from this argument that the judge could not unseat him unless he had been already found guilty. This is an absurd consequence, and I think that the true construction of the statute is, that the commission of any one of these offences *ipso facto* disqualifies the candidate from being elected, or, to use the language of Martin, B., in the *Norwich* case, annihilates his status as a candidate. Sect. 36, then, imposes an additional disqualification by rendering the candidate, once reported guilty, incapable of being elected for the same constituency during the then existing Parliament, and in such case the mere production of the report is sufficient, without going into the facts, so to disqualify him. This was obviously intended in order to prevent what might otherwise happen, that if a candidate were unseated and a new election ordered he might renew his candidature for the same constituency. Therefore, were sect. 36 unenacted, I should hold that the commission of any of such offences specially disqualified the candidate from the moment of its commission. I do not think that sect. 36 which imposes this disability can be held, as was argued, by implication to alter the rule of law to which I have referred, and to enact that no previous disqualification of a candidate, unless evidenced by a report of a judge, shall have the effect, no matter how clear it may be, of destroying his status, so that votes given for him after notice of the disqualification to the electors would be thrown away. The Legislature has not said so, and the result, were we to accede to this argument, would be that a candidate might appear upon the nomination day publicly with a bag of sovereigns, and in the presence of every elector promise a certain sum to every one who voted for him; and yet he could be merely unseated, and although the electors had personal knowledge of his disqualification, the seat could not be transferred to the qualified candidate next him on the poll. Nay, according to this doctrine, it is manifest that the process might be repeated from time to time, and a series of disqualified candidates brought forward one after another, and no matter how open notorious and palpable were the corrupt practices used by them, they could only be unseated, and the candidate seeking the seat by fair means and a free election would be placed in a position which the law never contemplated. I think, therefore, in this case, that the disqualification of the respondent before the day of nomination was complete. The next question and the important one is, whether such knowledge of that disqualification was brought home to the electors so as to let in the application of the rule of law to which I have adverted. I turn again to the

case. [His Lordship read paragraphs 9, 10, 11, 12, and 13.] From the statement it appears that the electors knew, and must have known by reason of the very nature of the case that this undue influence was practised before the election by the respondent. This is a case very special indeed in its circumstances. The candidate entered into a combination—not a secret one, but open and avowed—to obtain his return by bringing undue influence to bear upon the body of the electors. That was carried out publicly for months before the election. Its success depended upon its universality, upon its being brought to operate upon and to control the volition of the electors. I cannot therefore doubt, upon these findings, that every elector must be held to have known, as a matter of fact, that the respondent was guilty of practising undue influence and intimidation upon the electors. Therefore, the only question, as it appears to me, is whether, knowing all these facts, the electors must be taken also to have known the legal consequence—that the commission of these offences created a disqualification in the respondent to be a candidate, or to be elected as a member of Parliament. Now, in order to arrive at a sound conclusion upon this question, it is absolutely necessary to consider what, in point of law, is the character of the acts done by the respondent and his agents, to the electors' knowledge. I emphatically say that they were criminal acts. I am not at liberty, sitting here as a judge, to gloss over these acts—to say that they were the results of indiscreet zeal or mere breaches of decorum. I feel myself bound, even at the peril of giving offence, to designate them by their name—crimes; and to pronounce those, whether lay or clerical, engaged in them criminally engaged in an unlawful combination. In *Reg.* v. *Conway* (7 C. L. Rep. 519), which was a prosecution against the Rev. Peter Conway for offences like the present, at the Mayo election, Perrin, J.—a judge whose authority will not be controverted—says: "One of the charges is for using what is called spiritual intimidation, and calling down and using imprecations of a very shocking nature, to prevent persons from the due exercise of the elective franchise. The charges laid in the information are grave and serious offences—offences which require suppression, and, if necessary, punishment." When it appears then that this system of intimidation was carried on throughout the country, publicly and openly by the candidate himself, seen and known by the electors—when denunciations were ringing from the altars, am I, sitting here as a judge, at liberty to presume that the electors who saw these offences committed did not know that they were offences, and that their commission created a disqualification? I cannot lay down any such principle. I hold that every man must be presumed to know the criminal law, and to be aware when he sees or knows an offence to have been committed that it is an offence, and that it entails penal consequences upon the offenders." I do not think that *Reg.* v. *Mayor of Tewkesbury* at all applies to a case like the present. There the disqualification was that the candidate was mayor and returning-officer, and as such was disqualified for being a candidate, according to the decision of the Queen's Bench in *Reg.* v. *Owens*. Blackburn, J. says: "It is, therefore, necessary to decide whether the mere knowledge of the fact that Blizard was the mayor and the returning-officer must be taken to involve knowledge of his being disqualified for election. Every elector in the borough must have known that Blizard was the mayor, and every elector who saw him presiding at the election must have known as a fact that he was the returning-officer, and every elector who was a lawyer, and had read the case of *Reg.* v. *Owens*, would know that he was disqualified. From the knowledge of the fact that Blizard was mayor and returning-officer, was every elector bound to know as a matter of law that he was disqualified? I think that when a voter is informed that a certain circumstance in point of law disqualifies a candidate, even although he may hold a different opinion, yet if he afterwards vote for that candidate his vote is thrown away." That has a very important bearing upon the argument that an elector is not bound to notice the disqualification unless it has been the subject of adjudication. He proceeds to ask, "In the present election, a voter may possibly have been told by the one party that Blizard, being returning-officer, could not be elected, by the other party that he could be; if this could be shown, the vote would be thrown away; but the case merely shows as a fact that Blizard was returning-officer, from which a lawyer would be aware he was disqualified; and, in my opinion, the knowledge that Blizard was returning-officer does not, in law, necessarily involve the knowledge that he was disqualified." Now, does that apply to the present case? Can any elector be assumed to be ignorant that a candidate, openly practising intimidation and undue influence, was not by law disqualified to be elected? I think not. It is quite true that a man cannot be presumed to know legal technicalities, or, as Maule, J. says in a case there cited: "It would be too much to hold that ordinary people are bound to know in what particular court such and such a practice does or does not prevail." In *Cooper* v. *Phibbs* (L. Rep. 2 H. L. Cas. 170) Lord Westbury says:—"It is said '*ignorantia juris haud excusat*,' but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country." That I believe to be the true distinction. In *Reg.* v. *Mayor of Tewkesbury*, Lush, J. says:—"For the reasons given by my brother Blackburn, I am of opinion that it is not enough to show that the voter knew the fact only, but that it is necessary to show sufficient to raise a reasonable inference that he knew the fact amounted to a disqualification. It cannot be said, in all cases, that the mere knowledge of a fact, which in law disqualifies a candidate, must be taken to be knowledge of all the accompanying circumstances." Now, taking the rule to be as thus laid down, I am clearly of opinion that it is not only a reasonable but a legal inference from the facts stated which I am bound to draw, that the electors who knew of the exercise of these acts of undue influence—spiritual intimidation—knew that those acts disqualified the candidate. But the case does not rest upon the general notoriety and publicity of this intimidation. It was provided that, on the day of nomination, two days before the polling, a notice was posted at and in the immediate vicinity of the place of nomination. That notice is signed by a responsible person, the conducting agent for the petitioner. It is very accurately prepared, and substantially informed the electors that the respondent was disqualified by acts of treating and undue influence, and that votes given for him would be thrown away. That notice was also published

in the local newspapers, and extensively posted at the different polling places in the county. The case further states that the petitioner had persons stationed at each of the polling places and booths in order to serve the electors previous to their coming to the poll. It states that these notices were served at each of the polling places, except one, on some of the electors previous to their voting—the number of such services varying considerably in different polling places, but not amounting in the aggregate of personal services to more than a few hundreds—and that attempts were made to serve numbers of such notices on the voters as they came to the poll, who either refused to receive them or were prevented from receiving them by the confusion of the booths, sometimes by the agents of the respondent, and frequently by the members of the Roman Catholic clergy who were engaged in conducting the electors to the poll. It appears that in the excepted booth, the person employed to serve the notices did not do so until after the electors had polled, having been told by an agent of the petitioner's that was the proper time to do so. And it is further stated that these notices were scattered about on the floors and tables of the polling booths; that they were all in English, and that many of the electors could not speak English. Upon these facts it is clear that notice was not served personally upon all the electors; but I think that the petitioner did all that could be reasonably done in order to apprise the electors of the disqualification by posting, publishing, and serving these notices. The question is, were they fixed with knowledge? Notice is only one mode of bringing home knowledge, and, taking the facts as stated regarding these notices with the facts of previous knowledge on the part of the electors stated in the case, I cannot avoid drawing the conclusion that sufficient knowledge of the respondent's disqualification is brought home to the electors who constituted the majority of the respondent. It is said that no case has occurred since the Corrupt Practices Prevention Act, in which a candidate in a minority has been seated. The point does not appear to have arisen. It could not arise unless the disqualification existed before the election, and was brought home to the knowledge of the electors. In the case of the *Norwich* election petition, before Martin, B., the bribery relied on in order to disqualify the candidate did not take place until three o'clock on the day of polling, and the candidate was not personally implicated, therefore the question could not have arisen. The case, however, now arises and calls for a decision. I decide it upon its own special facts—facts which I hope are of rare occurrence. I find existing, as reported in this case, a system of spiritual intimidation, organized by the candidate, and successfully carried out through the county for months before the election. It is found that large numbers of the electors who had previously declared their intention to vote for the petitioner had been compelled to vote for the respondent, or to refrain from voting for the petitioner, and had avowed that they were compelled to do so by such intimidation and undue influence. How jealously the law regards the exercise of spiritual influence in the various transactions of life every lawyer knows. Just in proportion as it is powerful and all-prevading so are the safeguards *which the law* interposes for the protection of those on whom it is exercised. Not only does the law of the land condemn its undue exercise, it is contrary to the moral law, and the best interests of our nature revolt against it. It is an application to base purposes of an influence accorded for a pure and holy purpose. If it is inhibited when exercised in the private affairs of men, what judgment should the law pronounce when a minister of religion, robed in the sacred vestments of his order, surrounded by the most sacred mysteries of his creed, claiming the power to bind and to loose, misuses that position to denounce and expose to public odium those who dare to exercise their civil rights and franchises in a way that he disapproves, and to threaten them with temporal injury and spiritual punishment? When such words fall from the lips that should only utter the message of love and mercy to sinners, the words of the great Catholic epistle of St. James recur to my mind—"Out of the same mouth proceedeth blessing and cursing. These things ought not so to be. Does a fountain send forth at the same place sweet water and bitter?" We have been told in the argument of the constitutional rights of the electors. Their rights are to be protected, so far as we by our decisions can protect them, against undue influences. The qualified candidate also, against whom such influences have been exerted, has a right to be protected against them as far as the rules of law will admit. I believe that the conclusion at which I have arrived, after careful consideration, is in strict conformity with the rules of the common law, in harmony with the principles of our free constitution, and calculated to promote that which, in the preamble of the Act we are administering, is declared to be expedient—the freedom of elections; for a candidate may henceforth hesitate to invoke to his aid spiritual influence and altar denunciations, if it be decided that the effect of introducing into a contest such tremendous weapons will be, not merely to cause the ultimate defeat of the person who resorts to them, but further, to render probable the success of the candidate against whom they have been employed. For these reasons I am of opinion that both the questions reserved should be answered in the affirmative.

MORRIS, J.—In this case the judgment pronounced so well and ably by my brother Lawson upon the questions reserved for the determination of the court obviously leaves to me nothing to add, nor is there anything to alter. In fact, I have but to express my concurrence.

MONAHAN, C.J.—I regret that I feel obliged to differ from my learned brethren, but in my opinion an opposite reply should be returned to the question submitted in the present case for our determination. For my part, I should be disposed to answer in effect that the petitioner should not be seated. The case is one of serious difficulty, and as it has required so it has received our calm and careful consideration. I shall refer to the facts in so far as they appear to me to be material. Making allowance for deaths and for double entries on the registry, the number of electors found competent to vote at the election was 4686. Of these, 2823 voted for the respondent and 655 for the petitioner, leaving 1205 voters unpolled, and giving a majority of 2165 votes in favour of the respondent. To me it appears that these figures have a very material bearing upon the question to be resolved. According to the statement next presented—and let me observe that I do not desire to question any

statement of fact reported in the case—it appears that the respondent by himself, his agents, and by persons for whose acts as detailed he had rendered himself responsible, was guilty of that which the law defines as undue influence, which was practised upon the electors and carried out in pursuance of some arrangements made previous to the election, and especially during the months of November, December, and January preceding the election; and therefore, that he ought not to have been elected. Accepting the accuracy of that statement, I have no doubt whatever that, so far as the respondent is concerned, the consequent decision by which he is declared to have been disqualified to be elected was a correct and right decision. But there remains the question, whether the facts were such as to justify us in replying upon the case reserved in the manner stated by my brother Lawson, and upon that question I entertain an opposite opinion. The case affirms that certain prelates, their numbers undisclosed, and that certain other members of the Catholic priesthood, how many not specified, had combined or entered into an arrangement with the respondent, in consequence of which undue influence was exercised, and that the respondent being responsible could not properly have been returned. And accordingly, as properly stated by the case, the respondent was disqualified. But that which appears to me the most material is the statement that the knowledge of such acts and especially of such intimidation and undue influence had become generally known to and among the great body of the electors throughout the county, and especially amongst those who afterwards voted for the respondent. Now what is found by the case is the fact that undue influence existed, and was known to have existed; but not so that the electors had become aware that, as the consequence of its exercise, the candidate was disqualified. [His Lordship read paragraphs 8 and 9 of the case.] What number of electors were compelled to vote for the respondent, or voted for him, having promised their suffrages to the petitioner, what proportion or how many of them became aware of the acts which disqualified the respondent, we find unspecified. [His Lordship read paragraphs 10 and 11 of the case.] We find that the notice relied upon was not duly served at all the polling booths; there was one exception, for, owing to a mistake of an agent of the petitioner, it appears that at one of the booths the notice was not served until after the votes had been recorded, and that is of no avail. However, it is found that, with this exception, copies of the notice were served at each booth, so far as was allowed, upon some of the electors previous to their voting, such personal services not amounting in the aggregate to more than a few hundreds—whether two, three, or five hundred is not specified, nor can I determine. How many services were attempted but frustrated, even an approximate number, is not specified, neither have we any means of ascertaining. In conclusion, the learned judge who tried the petition correctly states the questions arising. [His Lordship read paragraphs 14 and 15.] It has been contended, on the part of the respondent, that, notwithstanding that he was found disqualified the votes recorded for him were not thrown away in the sense of the reservation. Now, were the electors fixed with notice of the respondent's disqualification? From the case, as presented, I infer that the learned judge who heard the petition has not, as a fact, found, nor has he stated to us that the existence of the respondent's disqualification was brought home to the actual knowledge of any number of electors. We have it that a few hundreds were served with a certain notice; we are told that there was a general knowledge throughout the county amongst the electors of acts that would constitute a disqualification; but it is not found as a fact that those whom now it is intended to disfranchise for the purpose of the late election had actual knowledge of the existence, as a matter of fact, of such disqualification. There being no finding that the fact of disqualification was known to the body of the electors, are we to draw an inference that in point of fact it was known to them? I should have some hesitation in saying that it ever was intended that, presiding and dealing with this case under the Elections Petitions' Act, we could draw inferences of fact. That which we are to determine is—what is the law that should govern a given state of facts. Were this case being tried with the assistance of a jury, it would be one question whether there was evidence enough to go to them of knowledge, on the part of the great body of the electors, that the respondent was *de facto* disqualified so as to reduce the respondent's large majority of 2165, and to seat the petitioner. We are placed here instead of a jury, and assuming, as I do, that we are bound to reply as best we can, the question is this: Upon the state of facts given should we come to the conclusion that a number of votes were disqualified sufficient to reduce the respondent's majority so far as to justify us in declaring the petitioner entitled to be elected? Let us then consider the facts so found. It is found in fact that, through the county, the commission of the acts which amount to undue influence was known to the general body of the electors; it is not found in fact how many of the electors knew of the commission of those acts, or that they amounted to a disqualification. In my opinion, in order to justify us in reducing the respondent's majority, it should be found how many voters knew both the fact of the commission of undue influence and its consequence as a disqualification. Did the course taken at the trial admit of a scrutiny, it would be necessary, in order that the votes should be struck off the poll, to prove that notice was given to a certain number of the voters. In some of the recent cases, in which the question arose before committees of the House of Common, the course pursued was, if objection were taken to a particular voter, his name was struck off the poll on proof of service of the notice upon him; a similar ruling was applied to others; and so the votes were reduced until the petitioner was left in a clear majority. But here, there was no attempt at anything of that description; and there is no finding to enable us now to strike off any one or any number of the respondent's votes, so as to leave his opponent in the majority. Even supposing for a moment that knowledge of the facts could be established as against a number of those electors by reason of their having seen the notices in the halls of the polling places, nay, even were they aware that the clergymen acted as has been alleged in this case, would it be possible fairly to infer as a matter of fact, and not as a mere legal presumption, that these country people knew that the respondent's status was destroyed, and that he

was disqualified for election? Anyone who knows the class of voters in those country districts must be aware that a great many are illiterate, that a great many, as found by the case itself, speak only the Irish tongue. They know that the Catholic priest exercises considerable influence, and that it is not illegal to exercise that influence; for the Catholic priest has as much as any elector in the community, a constitutional right to exercise his legitimate influence. If, indeed, clergymen will act as by the findings in this case they are stated to have acted, the same law applies to them as to others, and such acts would amount to the offence of using undue influence, for the purpose of procuring the return of the candidate whom they supported. But it is a wholly different thing to ascribe to the electors a knowledge of the illegality of the acts exercised, and of their effect to vitiate the election. To all it is a very difficult matter to know with anything like certainty where fair influence ends, and where undue influence begins; and though I am satisfied that as a matter of fact, a great number of the electors were aware of the influence practised by the priesthood, I do not believe, and cannot persuade my own mind that, as a matter of fact, they knew that influence was such as to be illegal and to vitiate the election. As to the question of legal presumption, I do not think that the maxim, *ignorantia juris haud excusat*, applies exactly as it has been laid down by my brother Lawson. If a person is accused of a crime, he cannot himself be excused by his ignorance of the law which rendered the particular act illegal; but I am unaware that it has ever been decided that a third person, no party to the illegal act, is to be presumed to know that the act is illegal, or that being so it would involve the effect sought to be attached to the commission of the offence here in question. Now, by sect. 26 of the statute we are administering, we are directed to have regard to the law as laid down in decisions pronounced by committees of the House of Commons, and, should that course prove inadequate, we are then to resort to the law as dispensed in analogous cases by the ordinary tribunals. It happens that the cases before committees, which in respect of time and circumstance invite attention, are but few in number. The second *Horsham* and second *Cheltenham* cases appear to have been decided contemporaneously. In the former it was proved that the elected candidate had been guilty of treating; notice had been given to each elector; and the committee, holding that the election was at his peril, seated his adversary. But in the latter the committee refused to act upon the supposition of knowledge of guilt, and there, although notice had been given and the candidate was declared disqualified, they ordered a new election. In the *Tavistock* case subsequently it had been publicly intimated that the candidate had not the necessary qualification; he came forward and made a solemn declaration that he possessed the necessary qualification; yet, although no actual personal service of notice that he was disqualified had been proved, his opponent was seated. I confess that I cannot understand the propriety of that decision. Later occurred the *Clitheroe* case. It there appearing that the successful candidate had been guilty of bribery at a former election, the question arose whether that fact and notice of it given should vitiate his present election and entitle his antagonist to be seated. The committee unanimously held that the defeated candidate should not be seated, and they merely held the election void. On that petition it was resolved—"That from the proceedings before the committee they think it right to draw the attention of the House to the unsatisfactory state of the law with regard to the effect of a notice to electors, in the case of a candidate who is returned by a majority of votes. By the common law the principle seems to be firmly established, that when a candidate is in point of fact disqualified at the time of an election, all votes given for him, with knowledge of the fact upon which such disqualification is founded, must be thrown away. This knowledge may be established either by distinct notice or by notoriety, and it will in all cases be inferred that when the voter is aware of the facts he is aware of the legal deduction from those facts, however intricate and doubtful such deduction may be. It is obvious that on these principles it may be contended that in all cases without exception, where notice of disqualification is served on a sufficient number of voters of the majority, and where the fact of such disqualification existing at the time of the election is subsequently established, the candidate who was in a minority on the poll is entitled to the seat, and some cases before election committees appear to have been decided on principles which lead directly to this conclusion. On the other hand, other cases point to the conclusion that to give effect to the notice the disqualification must be founded on some specific and definite fact existing and established at the time of polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified persons." And here I may be permitted to express that, as the Act under which we sit will expire at the end of the present Parliament unless renewed by the Legislature, I do sincerely hope that the report of the committee in the *Clitheroe* case will be taken into consideration, and that some enactment may be passed declaring a rule fixed and definite to be administered in cases of this description. The *Clitheroe* is the last case in which the question arose, but it certainly is not conclusive. Yet it is a circumstance not unworthy of consideration that, from the period of that report up to the time of the passing of the statute under which we are now proceeding, there is not a single instance to be found in which a committee of the House of Commons in cases of treating, bribery, or undue influence, have done more than unseat the sitting member—in none have they seated the unsuccessful candidate. But failing to discover any settled principle or assured rule in the conflicting decisions of the Parliamentary committees, I am bound as best I can to ascertain and apply the rule of the common law adapted to this case. But in the common law again changes from day to day are brought to pass by the adjudications of competent tribunals, and neither does it supply a sufficing substitute for a determinate statutory enactment. Nevertheless, if I too am to adopt the common law, I confess that for my part I am unable in principle to distinguish this case from that of *Reg.* v. *The Mayor of Tewkesbury*, which was decided so recently as 1868, a case which has never been questioned. There Blizard, one of the candidates for the office of town councillor in a borough, was elected, notwithstanding that, inasmuch as he was mayor and acted as returning

officer, he was incapable of being elected. The question arose whether another candidate should be declared elected. It appears that on the morning of the election notices stating that Blizard was so disqualified, and that votes for him would be thrown away, were served upon the deputy mayor and his assessors, and posted on the town hall, public market-place, and in other conspicuous places. Others were carried on boards through the public streets, or distributed at various shops and houses throughout the borough. Blackburn, J., says: "There were five candidates, and four vacancies in the office of town councillor. Amongst the candidates were one Blizard, who was the mayor, and Moore. Blizard, as mayor of the borough, was the returning officer, and, as such, presided at the election. It is quite clear, on the authority of *Reg.* v. *Owens*, that a returning officer cannot return himself, and consequently Blizard was disqualified, and therefore could not be elected, although he had an actual majority of votes; and in *Reg.* v. *Blizard* we granted a *quo warranto* to oust him. The question now is whether Moore, who had the smallest number of votes, has been elected. The candidate for the office of town councillor is duly elected if he has an actual majority of valid votes. This was decided in *Rex* v. *Hawkins*, and it was also decided that if an elector, having notice of the disqualification of a candidate, chooses to vote for that candidate, it is the same thing as if he did not vote at all. From the illustrations in the cases it is plain that, if an elector knows as a fact that the candidate for whom he is about to vote is disqualified and yet persists in voting for him, the elector's vote is as utterly thrown away as if he had voted for a dead person or for the Man in the Moon. Does it appear in this case that those who voted for Blizard without knowing of his disqualification were a smaller number than those who voted for Moore? If it does, Moore is entitled to be declared duly elected; if it does not, then the election is void. It is, therefore, necessary to decide whether the mere knowledge of the fact that Blizard was the mayor and returning officer must be taken to involve knowledge of his being disqualified for election. Every elector in the borough must have known that Blizard was the mayor, and every elector who saw him presiding at the election must have known as a fact that he was the returning officer, and every elector who was a lawyer and had read the case of *Reg.* v. *Owens*, would know that he was disqualified. From the knowledge of the fact that Blizard was mayor and returning officer, was every elector bound to know, as matter of law, that he was disqualified? I agree that ignorance of the law does not excuse. But I think that in *Martindale* v. *Falkner*, Maule, J., correctly explains the rule of law. He says:—"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." In *Jones* v. *Randall*, Dunning, *arguendo*, says:—"The laws of this country are clear, evident, and certain; all the judges know the laws, and, knowing them, administer justice with uprightness and integrity." But Lord Mansfield, in delivering the judgment of the court, says:—"As to the certainty of law mentioned by Mr. Dunning, it would be very hard upon the Profession if the law was so certain that everybody knew it; the misfortune is, that it is so uncertain that it costs much money to know what it is even in the last resort." It was a necessary ground of decision, in that case, that a party may be ignorant of the law. The rule is, that ignorance of the law shall not excuse a man, or relieve him from the consequence, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money. Numerous other instances might be cited to show that there may be such a thing as a doubtful point of law. If there were not, there would be no need of courts of appeal, the existence of which shows that judges may be ignorant of the law. That being so, it would be too much to hold that ordinary people are bound to know in what particular court such and such a practice does or does not prevail. I take this to be the rule of law applicable to this case. And, accordingly, it was in that case held that, although the electors had knowledge of the facts which created the disqualification, there was no inference of law that they knew that these facts amounted to a disqualification. I regret very much that in this case my opinion differs from that of the other members of the court, and it may be that I have come to a wrong conclusion; but, in my own mind, I am satisfied that, as a matter of fact, the respondent's majority did not know, at the time they were voting, that they were voting for a disqualified candidate. I am of opinion that there was not sufficient evidence that the notice was known to a majority of the electors who polled—for there is no mode of taking any distinction between the entire number and the number who voted for the respondent. The case, if it does anything, disqualifies every man who gave his vote, to the number of 2823. I cannot come to the conclusion that all these voters, many of whom—I do not know how many—did not speak English, and several of whom, I am satisfied—but there is no finding on the matter—were not at all in the town of Galway during the election proceedings, were aware of the legal disqualification of the candidate for whom the majority voted. And I may add that it is stated in the case that there were eight polling places; and the county is a very extensive one. It seems to me it would be going a long way in this case, the first of its kind, to make a precedent such as will be made by the present decision, upon the idea that the legal disqualification was generally known, without a finding and without any means of ascertaining to how many it was known. That conclusion strikes off the poll the 2823 who voted for the respondent. In the propriety of that conclusion I cannot concur, and neither, upon the facts stated, can I declare that the petitioner is entitled to be seated. I am decidedly of opinion that he is not. That the respondent was properly unseated, I entertain no doubt upon the facts reported; but my opinion is that the electors had not sufficient notice of his disqualification. The judgment of the court, however, will be that the electors who constituted the majority of the respondent were fixed with sufficient knowledge of the respondent's disqualification; and, there being no disqualification on his part, that the petitioner is entitled to be elected for the county.

KEOGH, J.—It now becomes my duty to express my opinion on this case—the first time I have done so since the questions involved came before me. I gave no opinion upon the matter in the court at Galway, though there the questions

were most ably argued by counsel, and especially so, there as here, by the junior counsel for the respondent, Mr. Mac Dermot. I have not given any opinion upon the questions since, but I have heard and concur in the judgment delivered by my brother Lawson, and in a grave constitutional question, such as this undoubtedly is, involving the knowledge not only of the law, but of the history and constitution of England, unfettered by small legal technicalities, I with confidence rest my judgment on that which my brother Lawson has delivered, supported and sustained as it is by that of my brother Morris. I regret that there should be any division of opinion in the court, but I cannot discern this momentous case by the lights or authorities which my Lord Chief Justice has brought to bear upon it; and I rejoice that the conclusion at which the court has arrived is fortified by the authority of that great jurist and magistrate, Lord Denman, Chief Justice of England, who, when he believed that the liberties of his country were in danger, knew how to use words fit for the occasion and calculated to arrest the attention of the people of England. I stated, in the case submitted to this court, and for the purpose of the questions I reserved, that the electors of the county of Galway had been intimidated by threats and denunciations of temporal injury and of spiritual punishment. I stated that in the case which now rests before us. I now, sitting on this bench, which I am warned that I occupy at the will and in subordination to powers other than my Sovereign, here declare that I have been obliged to consider this case and to deliver this judgment, namely, that Capt. William Le Poer Trench is entitled to be declared the representative of the county of Galway,—under many terrible threats and denunciations, public and private.

Order accordingly, adjudging in the affirmative on the questions reserved, respectively.

Agent for the petitioner, *J. B. Concannon.*
Agent for the respondent, *T. Higgins.*

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, H. F. POOLEY, and R. A. KINGLAKE, Esqrs., Barristers-at-Law.

June 4, 5, *and* 6, *and July* 5, 1872.

WINCH *v.* CONSERVATORS OF THAMES.

Negligence—Towing path—Taking toll—Liability to repair.

The defendants were incorporated under private Acts of Parliament for the purpose of maintaining and protecting the navigation of the river Thames. They had power to acquire, for the public use, the towing paths along the river, and also to maintain and repair the same. In the exercise of their powers, they had provided a towing-path for the use of the public, they invited the public to use it, and took toll, as they were authorised to do by their Acts, for the use of it.

Held, that the defendants were bound to take reasonable care that the towing path was in a reasonably fit condition to be used as a towing path, and that an action lay against them for neglecting this duty, whereby the horses of the plaintiff, who was lawfully using the towing path with his horses, and had paid them toll in respect thereof, fell into the river and were drowned.

THIS was an action to recover damages in respect of three horses which slipped into the river Thames and were drowned while towing a barge up the river. It was contended by the plaintiff that the accident happened owing to the rotten state of the banks of the river at a part where the towing-path ran close to the water's edge.

The defendants were a corporation constituted by 29 & 30 Vict. c. 89 for the purpose of maintaining and protecting the navigation of the part of the river Thames where the accident happened. The plaintiff had paid the defendants toll for the use of the towing-path with his horses.

At the trial, before Cockburn, C.J., at the spring assizes at Kingston, it was urged by the defendants as a matter of law that they were not bound to repair and maintain the towing path, so as to be responsible to the plaintiff for a loss sustained by him through a default on their part to perform this duty.

The learned judge left the questions of fact to the jury, who found for the plaintiff, that the towing path and banks were not in a proper condition relatively to the purpose and proper use of them as a towing path; that this was the cause of the accident to the plaintiff's horses, and that there was no neglect in the navigation of the barge or in the management of the horses. They assessed the damages at 100*l.*, whereupon a verdict for the plaintiff for that amount was entered, leave being reserved to the defendants to move to have this verdict set aside, and a nonsuit or verdict for the defendants entered, if the court should be of opinion that the defendants were under no legal liability to repair and maintain the towing path. A rule having been obtained accordingly.

Denman, Q.C. and *Macleod* showed cause.

Hawkins, Q.C. and *Joyce* supported the rule.

The arguments sufficiently appear in the judgment. They turned for the most part on the provisions of the Acts under which the defendants were incorporated.

Cur. adv vult.

July 5.—BOVILL, C. J., delivered the judgment of the court, (Bovill, C. J., Byles and Brett, JJ.)—The defendants in this action were charged with negligence in the management and control of a portion of the banks and towing paths of the river Thames, and in not keeping and maintaining them in a reasonably safe and proper condition for the purpose of towing barges, whereby certain horses of the plaintiff employed upon the towing path in towing a barge and for the use of which towing path toll had been paid to the defendants, fell into the river and were drowned. The principal question of law which arose at the trial and was reserved for the consideration of the court, was, whether, under the Acts of Parliament which regulate the upper navigation or by force of those Acts and the application of the common law, the defendants were under any legal liability with respect to the maintenance and repairs of the towing path on the river bank. The defendants are a corporation constituted for the purposes of the upper navigation of the Thames by the Thames Navigation Act 1866, having been originally incorporated for other purposes by the Thames Conservancy Act 1857. By the Act of 1866, sect. 26, the previous Acts relating to the upper navigation were to remain in force and to be construed as if the present body of conservators had been named therein instead of the former commis-

sioners, and it therefore becomes necessary to examine the provisions and the language of the earlier statutes. The first statute which appointed Commissioners, the 24 Geo. 2, c. 8, in the preamble refers to abuses by the *owners of the towing paths* and other passages on the banks of the river. Sect. 2 gives powers to the commissioners to settle amongst other things the rates to be taken by the *tenants or occupiers of the towing paths, locks, &c.*, and to *regulate* the *towing paths, &c.*, for the benefit and safety of the navigation, making compensation to owners or occupiers of mills or lands, and they were also to give such reparation, satisfactions and damages to persons grieved as to them should seem meet, but with an express proviso by sect. 3 that they should not change the towing paths or landing places without consent of the land owners. The 4th section provided for the mode of proceeding by the commissioners in making orders. By sect. 8 power was given to the commissioners to view the *towing paths, &c., to inquire into their state and condition and to make orders thereupon*, giving notice to the persons concerned of their intended orders. Sect. 9 imposed a penalty on persons disobeying the orders of the commissioners, and by sec. 11 parties aggrieved by any such orders might within eight months appeal against them to the Judges of Assize or of Nisi Prius in Middlesex. The next Act was the 11 Geo. 3, c. 45, the title of which was for improving and completing the navigation, and it refers to the *abuses and exactions of the owners of several towing paths* and other passages on the banks of the river and of the locks, &c.; it also refers to an estimate which had been made of the expense of (*inter alia*) embanking divers parts of the river, and for purchasing land for the making of towing paths in order to complete the navigation; and by sect. 7 power is given to the commissioners to purchase and make towing paths, &c., for towing with horses or otherwise; to settle the *rates to be taken for the use of the towing paths, &c., by the tenants or occupiers of the same*, and they were to have regard (amongst other things) to the *expense of repairing and supporting the towing paths, &c.*, and to make orders as to the towing paths, &c., making satisfaction to the owners of mills and lands, and giving reparation, satisfaction, and damages to parties aggrieved in the same terms as in the former Act. By sect. 19 they had power to view the towing paths, &c., and *the state*, condition, reparation, and circumstances thereof, and to make orders as in the previous statute, giving notice of their intention to do so to the persons concerned, and by sects. 28, 29, and 31, the commissioners acquired compulsory powers to purchase property necessary for the purposes of the Act, subject to certain consents in the cases specially mentioned in sects. 31 and 33, and such purchases by sect. 28 might be made in consideration of a sum *in gross* or of an *annual rent* to be secured as mentioned in the Act, and the contracts, conveyances and assurances were to be enrolled with the clerk of the peace. The commissioners had very large powers conferred upon them for regulating not only the navigation but also the tolls and lock dues as well as the rates for carriage of goods and hire of horses upon the river, and they were invested with authority to determine all complaints subject to appeal. It also appears from the 24th section, as well as from the 7th section, that in some places there were at that time no horse towing paths, and that the towing had there been done by men, but that the extension of the horse towing path was then contemplated. There are powers given to the commissioners to borrow money on the security of the tolls, and by sect. 55 there is a general power to appeal to the quarter sessions against any orders of the commissioners. The next Act which is material is the 28 Geo. 3 c. 51. The preamble refers to money having been raised and expended in making horse towing paths, &c., and by sect. 2 the *tolls* and moneys to be raised or paid under that Act or the former Acts and the property in the lands and works erected or purchased by the commissioners *were vested* in them, and they were empowered to sue and prosecute for injury to any of the towing paths, &c., by virtue of the Acts, *purchased*, rented, *hired*, or used for the benefit of the navigation. By sect. 5 they had further borrowing powers conferred upon them, and by sect. 6 it is enacted that for providing *a fund* for securing the money borrowed with interest and for *repairing and maintaining the navigation the* commissioners shall have full power to settle and direct the taking of such tolls and rates as they shall think necessary within certain limits for barges and also for horses used in towing *for the use of* (*inter alia*) the towing paths and ways then or to be thereafter made, purchased, or hired by the commissioners on the navigation. The commissioners by sect. 18 had power to make bye-laws as to the rates for towing, for the use of any towing paths and for carrying or repairing and regulating the navigation subject to the general power of appeal given by sect. 24. By the 35 Geo. 3. c. 106, s. 18, further powers were given to five of the committee to survey and view the river and to hear and examine evidence as to the *state and condition of the navigation and the wants* of repairs, amendments, alterations and improvements therein and to make reports to the general meetings of the commissioners of all alterations, improvements, repairs, and other works which they should think needful or proper to be done at any place or places for the benefit and improvement of the navigation, and to cause estimates to be made of the expense of doing such works; and when the commissioners ordered any works, the committee of five of them might take on themselves the management, direction, and execution of them, and give orders to the surveyors and others to proceed in the execution of such works, and the expenses after having been reported and allowed by a general meeting of the commissioners were to be paid out of the moneys raised under the Acts. By sect. 22 the commissioners were to make satisfaction to parties aggrieved, damaged, or injured by the works, and with a power of appeal as there provided. The 23rd section authorised the purchasing and making by the commissioners of a *free continued* uninterrupted and public horse towing path throughout the whole of the navigation without interruption or impediment; the commissioners making compensation for the lands taken, and for all losses and damages by reason of the taking of lands or grounds for making a towing path, way, or road for the use of the navigation. The next and last Act was that by which the powers, rights and duties of the commissioners were transferred to the present defendants, viz: The Thames Navigation Act, 1866. The title of that Act is for vesting in the Conservators of the river Thames the conservancy of the upper part of the river, and

some of the objects for which the defendants were thereby incorporated as mentioned in the preamble were, "The preservation and improvement of the streams, bed and banks of the upper part of the Thames as a matter of great local and public importance." The Act recites that the locks and works under the previous control of the commissioners were in a very bad and dangerous condition, and that their income had long been insufficient to defray the *necessary expenses of the repair and maintenance of the locks and works*, and that considerable debts had been incurred by the former commissioners. By sections 25, 26 and 30 the powers, authorities, rights and interests, duties and obligations of the former commissioners were transferred to the defendants. As to certain locks, dams and weirs existing on the navigation before the passing of the Act of 1866, the owners of them were entitled to take toll and were bound to repair them, but by this Act the traffic was relieved from the tolls payable to these private owners, the property in these locks, dams and weirs was transferred to and vested in the defendants, and the obligation to maintain and repair them was by express words imposed upon the defendants. By sect. 55 the defendants were authorised to take tolls and charges for the navigation, and under sect. 70 to borrow money on the security of the tolls, and their funds were to be applied by the defendants under sect. 88 (1) *inter alia* in defraying the expenses of the *repair and maintenance of the works* vested in, or acquired, or constructed by them by or under that Act, and (6) in carrying into execution the purposes of that Act. There are no words directly imposing the obligation to repair the banks and towing paths upon the defendants, as is the case with respect to the locks, dams and weirs by the 43rd section, but then the towing paths and the right to take tolls for passing along them are not absolutely transferred to the defendants in the same manner as the locks, dams and weirs, so that there was no necessity for any such express enactment with respect to the towing paths, and the powers, rights, duties, obligation and liability of the defendants with respect to the towing paths and banks must be ascertained by reference to the provisions of the former Acts as well as to the general scope and language of this Act. It appears from the earlier Acts already mentioned that originally there were *owners* and by subsequent Acts *tenants or occupiers* of *towing paths* who took toll for horses passing along them, and that *such persons were bound to keep the towing paths in repair*, and by those statutes the commissioners had extensive powers of supervision and control over the towing paths, and power to make orders respecting them, and to regulate the toll to be taken by the persons entitled to take it. They subsequently acquired power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation, and by the Act of the 28 Geo. 3, c. 51, sect. 6, were authorised themselves to *take tolls for* (amongst other things) the towing paths purchased *or hired* by them, and there are similar expressions in the next section as to towing paths purchased or hired by the commissioners. By the later Act of the 35 Geo. 3, c. 106, sects. 18 and 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a *continued* horse towing path throughout the navigation, and to purchase land for that pupose. And by the last Act of 1866 the present defendants are authorised to take the tolls, and by sect. 88 are bound to apply their funds, first, in defraying the expenses of the repair and maintenance of the works vested in, acquired, or constructed by them under that Act, and secondly, in carrying into execution the purposes of that Act which, as it incorporates, necessarily includes, the purposes of the former Acts. Those purposes, as stated in the preamble of the last Act, as well as in the former Acts, are the preservation, repair, maintenance and improvement of the navigation, and which would we think include the banks and towing paths. The defendants in pursuance of the powers vested in them, made arrangements in 1866 to secure the use of the towing path at the place in question for the purpose of the navigation, and it was agreed on the argument that the defendants under that arrangement now pay an annual rent per rod to the owner of the soil of the towing path and take an aggregate toll in one sum at Teddington Lock for the use of the entire navigation and towing paths, and it is to be taken as a fact that the defendants have under the provisions of the statute acquired and have the use of the whole of the towing paths along the river, and the right to take toll in respect of the use of them as well as for the use of the navigation generally. Somewhat similar Acts of Parliament were under consideration in the case of *Badger* v. *The South Yorkshire and River Dunn Company* (1 El. & El. 349), and the Navigation Company there, as in this case, appeared to have paid an annual sum to the owner of the towing path in order to secure the use of it for the public. It was considered by the Court of Exchequer that the company had thereby acquired the soil in the towing path, but this decision was afterwards reversed by the Exchequer Chamber, and that court decided that the company had acquired only an easement over the towing path such as was necessary for the purposes of the undertaking, and that the arrangement for the payment of an annual sum was a purchase within the meaning of the statutes. The Court of Exchequer Chamber also laid down that generally speaking in the absence of express words the courts were not inclined to infer that statutes of this kind gave more than such an use of the soil as was necessary for the purposes of the navigation, and a similar view was taken by the Court of Exchequer in the case of *Stracey* v. *Nelson* (12 M. & W.) with respect to commissioners of sewers. It is quite true that the arrangement in the present case between the commissioners and the owner of the towing path was by parol only, but the owner of the land letting the right to use the towing path and receiving a rent for it must be taken to know the powers of the conservators and to have assented that they might do that which was necessary to enable the public to have and enjoy the use of the towing paths, including the power to repair them, upon the same principle that when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use (*Pomfret* v. *Ricroft* 1 Wms. Saund. 322), and with respect to a question which was raised as to what is to be deemed the towing path, it seems to us that it is impossible to confine it to the mere beaten track which is described to have been made principally by single horses towing down stream, for in towing up stream the

horses cannot always be in a direct line, and there must be space for them as well as for the driver and for the proper use of the tow line, and we think the towing path must be taken to include so much of the bank as is necessary and proper for the purposes of towing barges, and is reasonably and properly used as such, and which in this case would include that part of the bank which gave way. The defendants having acquired the towing path in the manner before mentioned for the use of the public subject to the payment by the public of the toll to them, they invited the public to use the towing paths and to pay them the tolls. They have also employed their superintendent and their engineer from time to time to inspect and report on the banks and towing paths, and it was proved to be part of the duties of the engineer to see if the banks were being washed away. The plaintiff in this case was lawfully using the towing path with his horses in towing a barge for which the proper toll had been paid to the defendants and for the purpose of the navigation. It was alleged by the plaintiff that the towing path was in an unsafe and dangerous state and that in consequence his horses fell into the river and were drowned; whilst the defendants alleged that the bank was in a safe and proper condition and that the accident arose from the sole fault of the driver of the horses or of the man who had charge of the barge. No question was raised (indeed upon the evidence there was no ground for contending) that if the bank was in a dangerous state and it was the defendants' duty 'to maintain it, they had been guilty of negligence in that respect. The case having been left to the jury, they found that the towing path and banks were not in a proper condition relatively to the purpose and proper use of them as a towing path; that this was the cause of the accident to the plaintiff's horses; and that there was no neglect in the navigation of the barge or in the management of the horses. The verdict was thereupon entered for the plaintiff for 100*l*., the value of the horses, subject to the point, which was reserved, as to the liability of the defendants in point of law, and this question was to be raised without reference to the particular form of the pleadings. A rule was accordingly obtained by the defendants to enter the verdict in their favour, and upon the argument the plaintiff contended that the case fell within the principle which was established by the case of the *Mersey Docks* v. *Gibbs* (L. Rep. 1 Eng. & Ir. App. 93). In that case it was laid down that the general rule of construction of statutes like the present was that, in the absence of something to show a contrary intention, the Legislature intends that the body created by the statutes shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights, and that the trustees in that case were bound to take reasonable care that their works were in such a state that the public might use them without danger. In the case of *Nicholl* v. *Allen* (1 B. & S. 916 and in error 934) it was held that a person being authorised to make a bridge and to take toll upon it was liable to repair it, upon the principle that taking the benefit of the tolls he must bear the burthen of the repairs, and it was considered that the statutes in that case contemplated that both the tolls and the liability to repair should go together. This was also in accordance with the decision in the earlier case of *The Mayor of Lyme Regis* v. *Henley* in the House of Lords (reported in 1 Bing. N. C. 222 & 2 Cl. & Fin. 331), and was confirmed by the case of *Parnaby* v. *The Lancaster Canal Company* (11 Ad. & El. 230) and the decision of the House of Lords in the *Mersey Dock* case. Upon the true construction of the statutes in this case, construed according to the rule laid down in the cases cited, we are of opinion that the defendants had power to maintain and repair the towing paths; they had provided that towing path under the Acts of Parliament for the use of the public; they invited the public to use it; and they took a toll as they are authorised to do for the use of it, and it appears to us therefore that they were bound to take reasonable care that the towing path was in a reasonably fit condition to be used as a towing path, and that the present case does fall within the principle of the decision in *The Mersey Docks* v. *Gibbs* and the other cases to which we have referred, and must be governed by them. It is also to be observed that after having acquired the right to use the towing path from the owner of the soil, and having the power themselves to repair and maintain it, it would be very strange if they were at liberty to make orders upon the owners to do the repairs whilst they received the toll from the public. It was contended for the defendants that there was no public right of towing on the banks of the river, and the case of *Bell* v. *Herbert* (2 T. R. 253) was relied upon by the defendants in support of this view, but that case only decided that there was no such right *merely at common law*, and the decision in fact affirmed that there may be and in fact is, on most navigable rivers such a public right by custom, and that slight evidence of usage would generally be sufficient to support it on the ground of the public convenience. We see no objection to a dedication of a way to the public for such a limited purpose and in *Rex* v. *The Severn and Wye Navigation* (2 B. & A. 648) Holroyd and Bayley, JJ. both laid it down, and we think correctly, that a towing path may be a highway to be used only for the purpose of towing barges or vessels. It was further contended that if a public right of way existed for the purpose of towing, that the parish alone had the power, and were liable to the duty of repairing it, but we can find no sufficient grounds in fact or law under the circumstances of this case, and upon the proper construction of these statutes, for supporting that contention; nor is this case like some which were suggested, such as that of a road washed away by the sea, where no person or body may be liable to repair or restore it. The authorities to which we have already referred seem effectually to dispose of this point. It was further contended that if there was a public right of towing upon the river banks, and the defendants were bound to repair them, the only remedy for breach of that duty was by indictment, and that no action could be maintained by an individual; but if the duty of keeping the towing paths and banks in repair be imposed upon the defendants, and they have neglected that duty, we are at a loss to understand upon what principle it can be said that a person who has sustained a particular injury from such neglect, and which is not common to the public at large, is precluded from maintaining an action to recover damages for the injury which he has thus individually sustained. The cases before referred to are direct

authorities in favour of the plaintiff upon this point also. It was further contended that the defendants did not collect the tolls for their own advantage, but merely as trustees for the benefit of the public; but in the *Mersey Dock* case that circumstance was held not to make any difference in principle with respect to the liability in such cases, and all the grounds upon which it was sought to distinguish the case from the previous cases have in our judgment entirely failed. Some questions were raised as to the sufficiency of the declaration, and which are material only for the purpose of the demurrers, but as the defendants denied their liability altogether under any form of declaration it was arranged that the plaintiff should be at liberty to make any such amendments as he might be advised *consistently with the facts of the case and the finding of the jury*, and which he is still at liberty to make if he thinks fit. Our decision upon the main point in the case is in favour of the plaintiff, and the rule obtained by the defendants to enter the verdict for them under the leave reserved at the trial will therefore be discharged, and judgment will be entered for the plaintiff on the demurrers, upon the present or the amended form of the declaration, at the option of the plaintiff. The remaining point argued before us was that the verdict was against the weight of the evidence, and that there ought to be a new trial on that ground. Upon reading the notes of the evidence we have not been able to satisfy ourselves that the verdict is so clearly against the weight of evidence that it ought to be set aside, but at the same time the Lord Chief Justice before whom the case was tried has certified to us that he is dissatisfied with the verdict, and under any other circumstances than those which have occurred we should almost certainly have thought it right in deference to such an opinion, that the case should undergo further investigation before another jury. But it must be remembered that this was a second verdict obtained by the plaintiff, and after the first verdict in his favour had been set aside; the questions left to the jury were peculiarly matters within their province, the evidence upon them was contradictory, and two special juries having, after the summing up of the presiding judge, found their verdict upon all the points submitted to them in favor of the plaintiff, and as we see little or no probability that another jury would be likely to come to a different conclusion upon a third trial, we think we ought not to send the case down for trial again, and that the rule so far as it relates to a new trial should also be discharged.

Rule discharged.

Attorneys for plaintiff, *Wilkinson and Howlett.*
Attorney for defendants, *Hall* for *Frecr and Co.*

Tuesday, June 4, 1872.

POWER *v.* WIGMORE.

Metropolitan Building Act (18 *&* 19 *Vict. c.* 122)—*Surveyor's fees—Inspecting arches or stone floors —Power for justice to state case,*

The Metropolitan Building Act (18 *&* 19 *Vict. c.* 122, *s.* 49) *enacts there shall be paid to the district surveyors in respect of the several matters in the second schedule the fees therein specified, or such other fees as may from time to time be directed by the Metropolitan Board of Works, but one fee only shall be chargeable with respect to any such works done in, to, or upon any building as are included in one notice. The second schedule, as far as is material, is as follows: "Fees for additions or alterations. For inspecting the arches or stone floors over or under public ways,* 10*s.*"

The 106*th section provides that for every case, except in reepect of fees of a district surveyor in which jurisdiction is hereinbefore given to a justice of the peace, if either party is dissatisfied with the determination of the justice so convicting, such party may appeal to any of the Superior Courts of Common Law at Westminster.*

The appellant having received notice from the respondent of his intention to build fifty-two arches, inspected and measured them on several occasions. The arches were built on a vacant space of ground under what was and is a public highway, and were built on the four sides of a parallelogram.

The appellant claimed 26*l., being* 10*s. per arch, while the respondent refused to pay more than* 10*s. altogether.*

Upon appeal to the alderman, he was of opinion that 10*s. was all that the appellant was entitled to, but stated a case for the opinion of the Court of Common Pleas.*

It was objected on the part of the respondent that the alderman had no power to state a case, which was taken away by the 106*th section of the Metropolitan Building Act:*

Held, that the appellant was entitled to a fee of 10*s. for every building; and that the alderman must say how many buildings there were:*

Held, also, that the power of the alderman to state a case under 20 *&* 21 *Vict. c.* 43, *was not taken away by the* 106*th section of the Metropolitan Building Act.*

CASE stated under 20 & 21 Vict. c. 43.

1. Upon hearing of a summons obtained by the appellant against the respondent under sects. 25, 31, 49, 51, and schedule 2 of the Metropolitan Building Act (18 & 19 Vict. c. 122), whereby the respondent was summoned for that on the 26th July 1870, certain arches under the public way, situate in Newgate Market and within the limits of the Metropolitan Building Act 1855, and within the district of the southern division of the City of London, of which the appellant was district surveyor under the said Act, were completed, and that at the expiration of fourteen days after such completion on the 10th Aug. 1870, the appellant became entitled to receive from the respondent, as the builder employed in erecting such arches, the amount of fees due to him, specified in the second schedule of the Act, to wit, 25*l.* 10*s.*, and that on the 29th Aug. 1870, the appellants caused a proper bill specifying the amount of such fees to be sent to the respondent in a registered letter, but the respondent had, contrary to the form of the statute, refused to pay the same. The respondent was ordered to pay to the appellant the sum of 10*s.* and costs.

2. The following facts were proved and admitted by both parties.

3. (1.) The appellant was and still is the District Surveyor for the Southern Division of the city of London, and his district includes the old Newgate Market.

(2.) On 8th June 1870 he received a notice from the respondent that he intended to build fifty-two

arches under a public highway in old Newgate Market.

(3) The appellant went to the place described on 12th June, and measured and surveyed the place where these arches were intended to be built.

(4) About ten or twelve days afterwards he found one or two of the arches completed.

(5) By 26th July fifty-one of the arches were completed, and in the time between 12th July and 26th July he was obliged to go, and went fifteen, or sixteen times to inspect them while they were in progress.

(6) In the discharge of his duties under the above mentioned statutes he was obliged to measure the said arches from time to time to see that the walls were of a proper thickness, and that the arches were of a proper width and span, and constructed in accordance with the statute.

(7) The arches varied in size, and he was therefore obliged to measure and examine every one of them separately.

(8) They were not arches attached to houses, but were built on a vacant piece of ground, under what was, and is a public highway. The arches were built on the four sides of a parallelogram.

(9) Each arch or vault was separated by a pier in brickwork and open in front, and there was no internal communication or mode of access whatever from one vault to another.

4. On the part of the appellant it was contended that each arch was a separate structure, and that he was entitled to a fee of 10*s.* for each, amounting in the whole to a sum of 25*l.* 10*s.*

5. On the part of the respondent it was contended that the words in the schedule "for inspecting the arches or stone floors over or under public ways, 10*s.*," meant that the appellant was only entitled to one sum of 10*s.* for inspecting any number of arches under or over any public way, and that no greater fee could be demanded. It was also contended on the part of respondent that under the 106th section of the Act the decision of the justices is final, and that no appeal can be made.

6. The magistrate being of opinion that the contention of the respondent was correct, and that the appellant was only entitled to a sum of 10*s.*, gave his determination against the larger claim of the appellant. The question of law upon which this case is stated for the opinion of the court is, first, whether the justices have any power under the 106th section to state a case when the subject matter of dispute is in respect of district surveyor's fees; and secondly, whether, under the circumstances above stated, the appellant is entitled to any and what larger fee than the fee of 10*s.*

8. If the court should be of opinion that an appeal can be made, and that the appellant is only entitled to the fee of 10*s.*, then our determination is to stand.

9. If the court should be of opinion that the appellant is entitled to a larger sum, the case to be remitted to the justices with the opinion of the court thereon, or to make such other order as to the court shall seem fit.

Geary, for the appellant.—The Metropolitan Building Act renders it compulsory on the district surveyor to inspect all buildings within his district, for the purpose of ascertaining whether the dimensions and requirements of the Act have been carried out. The 25th section enacts what are to be the span and thickness of the arches. He is entitled to a fee of 10*s.* for inspecting the arches or stone floors over or under any public way, but the Act says that one fee only shall be chargeable with respect to any such works done in, to, or upon any building, as are in pursuance of the provisions included in one notice. This clearly means that he is entitled to one fee of 10*s.* for inspecting each arch, or else in an extreme case the surveyor might be entitled to only one fee of 10*s.* for inspecting all the arches in London. The Act does not define the word building. Secondly, the magistrate is not prevented by the 106th section from stating a case for the opinion of the court. Under 20 & 21 Vict. c. 43, the 106th section only refers to the powers of appeal of the parties themselves.

Grove Chapman for the respondent.—The schedule clearly states the sum to be paid to the surveyor for inspecting the arches or stone floors over or under public ways in 10*s.* It is as easy to inspect several arches as one, and in the case of some hundreds of contiguous arches the costs would be very heavy if 10*s.* was to be paid for each arch. The decision of the alderman was conclusive in this case, and the case having been settled by him there is an end of it. The 106th section enacts that in every case, except in respect of fees of a district surveyor, in which jurisdiction is hereinbefore given to a justice of the peace, if either party to any such case is dissatisfied with the determination of the justice so convicting in respect of any point of law, or of the admission or rejection of any evidence, such party may, upon giving notice within seven days to the other party of his intention to appeal, appeal therefrom to any of the Superior Courts of Common Law at Westminster, subject to this restriction, that no such appeal shall be made by any district surveyor, except with the consent of the justice before whom the case is tried, and that no such appeal shall be made by any other party to the case except upon giving such undertaking as the justice thinks fit.

Geary in reply.

WILLES J.—This case was reserved for our opinion by the alderman under the 20 & 21 Vict. c. 43. The appeal was by his leave under this section; for it is not the sort of appeal which the parties are allowed under the 106th section of the Metropolitan Building Act (18 & 19 Vict. c. 122). That section explicitly gives jurisdiction to the justices, and justices alone in respect of the fees payable to the district surveyor, where such jurisdiction has been given by a former section of the Act; but the fact is that the alderman has power to allow the parties to appeal, by his stating a case under the 20 & 21 Vict. c. 43, and the two are consistent, for the Metropolitan Building Act does not take away the power the alderman possesses under that Act. This appeal, therefore, as far as it relates to a point of law, comes before this court for our decision, and the point of law may be stated thus: whether, if a number of arches are made under a public highway, of some miles in length, or surrounding a square, whatever be the number of arches built, as long as the arches are in one continuous way, is the surveyor to be satisfied with 10*s.*? Under the second schedule to the Act, Part I., but one fee is given. It is obvious that the alderman has decided the point of law against the appellant, for he has adopted the

rule in favour of the respondent, that the surveyor is entitled to 10*s.*, and that no greater fee can be demanded; the facts are not found specially, and as the case has been sent up in so bare a manner, this is all we have to decide, viz., whether under any state of circumstances, the surveyor is only entitled to one fee. The 49th section contains the whole thing; it says there shall be paid to the district surveyor, in respect of the several matters specified in the first part of the second schedule hereto, the fees therein specified, or other such fees not exceeding the amounts therein specified as may from time to time be directed by the Metropolitan Board of Works, but one fee only shall be chargeable with respect to any such works done in, to, or upon, any building as are in pursuance of the provisions hereinbefore contained, included in one notice. On construction of this section it would appear that 10*s.* is all that is to be paid for inspecting arches; but, on referring to sects. 24 and 25, each arch is referred to separately, and the section is seen to distinguish arches from works. If a builder constructed one arch under and one arch over the same highway, and the surveyor inspected the two, could it be said that entitled him only to 10s., or would not the more reasonable conclusion to draw be, that the schedule is dealing with a genus, and that the 10*s.* deals with each individual class? I think 10*s.* per arch would be the reasonable interpretation of such a case. The 49th section deals with the payment to be made in respect of one heavy building, but even then the surveyor may charge 10*s.* for arches under that building by virtue of that section. It is necessary to inquire whether these are arches belonging to one building or to several? If they are in a direct line joining one another, they may be one building, but if houses which stand upon them are in a square, then they would be several buildings. These illustrations show what we mean. It is for the alderman to determine how many buildings there ought to be. He has jurisdiction alone over the question of fact, and the case must be remitted to the alderman for him to say whether in his opinion there was one or several buildings. If there are several buildings, then the decision of the alderman was wrong.

KEATING, J., concurred.

Case to be remitted to the alderman to say how many buildings there were; if more than one, judgment for the appellant.

Attorneys for the appellant, *Chapman, Clarke,* and *Turner.*

Attorney for the respondent, *Charles Thomas.*

Friday, June 7, 1872.

CORY *v.* THE CHURCHWARDENS OF GREENWICH.

Poor rate—Occupation—Rateability of moorings—Easement—Bed of river—Floating derrick.

The Conservators of the Thames, who are the owners of the soil and bed of the river, gave permission to one C. to lay down moorings in the river for the purpose of mooring a derrick coal hulk, it was expressly agreed between them that if at any time it should be found inexpedient to permit the moorings for the derrick to remain in that position assigned to it or in any other, that it should at once be removed.

The derrick was moored by two single fluke anchors, and two heavy stones, which were simply dropped into the bed of the river, and not fastened to the soil in any way.

Held, that the derrick was enjoying a mere easement in her occupation of the bed of the river.

Held also that there was no occupation of the soil, and that therefore the occupier was not rateable.

SPECIAL case stated for the opinion of the court.

The appellant was summoned before the Greenwich police magistrate for that he being possessed of property within the parish of Greenwich, in the county of Kent, rateable to the relief of the poor ain the said parish, and duly charged, rated, and aassessed in respect of the houses, buildings, land, tenements, or hereditaments, or other property, by law rateable to the relief of the poor, had neglected or refused to pay the same to the collector of the rates, notwithstanding that the same had been duly and respectively demanded. The appellant having duly appeared before a magistrate, contended that he was not possessed of property, and did not occupy or possess houses, lands, or tenements chargeable or rateable to the relief of the poor within the said parish, as alleged in the said summons, and the magistrate having duly considered the appellants' objection gave his decision against them, and in support of the said summons.

1. The following are the facts of the case, and the question for the opinion of the court is as to the rateability of the appellants to the poor rate for the parish of Greenwich.

2. In the rate made under the local Acts relating to Greenwich, viz., the 4 Geo. 4, c. lxx, and the 9 Geo. 4, c. xliii, the appellants are rated, and the following is a copy of the appellant's rating in the said rate-book, so far as is material:

Name of occupier.	Name of owner.	Description of property rated.	Name and extent of property.	Gross estimated rental.	Rateable value.	Poor rate at 2s 2d. in the pound.
Cory.	Cory.	Land and coal hulk thereon.	Derrick coal haulk.	£600.	£480.	

3. The coal derrick mentioned in the list is similar to a very large coal barge, and is about 250ft. long and 90ft. wide. It is fitted up with the necessary machinery for the purpose of unloading coal from the colliers and reloading into vessels and barges brought alongside. No coals are deposited or stored in the derrick.

4. The derrick is the property of the appellant, and rides afloat on the River Thames within the boundary of the parish of Greenwich. It has been anchored at the same place for some years, but daily changes its position slightly with the ebb and flow of the tide.

5. The derrick is retained at the spot where she floats in the following way, *i.e.*, by two single fluke anchors on the side nearest the shore, by two stones on the channel side and by two stream anchors, one at the head and the other at the stern; the anchors and stones were merely dropped into the river, no force being used for the purpose of fastening either anchors or stones. Before dropping the stones a small quantity of ballast was removed in the bed of the river, so that the

stones might lie flat and securely. These stones served only the purpose of anchors, and are used in this as well as many other instances on the channel side only for the avoidance of accidents, there being danger of vessels when passing in mid channel at low water damaging themselves against anchors, if anchors were used.

6. These anchors and stones can be hauled on board by the machinery thereon, and the derrick moved to any other part of the river, and she was in fact formerly stationed at another part of the river, and was moved from thence to her present position, bringing with her her present anchor and stones which were dropped down as stated in the preceding paragraph.

7. The soil and bed of the river Thames are, by the Thames Conservancy Acts ,rested in the conservators of the river, and they have the management of the river.

8. The derrick is stationed at the place where she now rides under the following resolution passed by the conservators on the 6th Dec. 1861, "Resolved that permission be given to Messrs. Cory and Sons to lay down moorings (at which they may place the derrick hulk) immediately opposite the sluice next eastward of Angerstein's wharf, East Greenwich, and 510 feet from the river wall at the said sluice, the work to be done to the satisfaction of the Conservators of the river Thames, and under the inspection of the harbour-master, and to remain on the following conditions being agreed to and observed by Messrs. Cory, viz.: That the accommodation be assessed, and the rent paid thereon; that the hulk be not used for the purpose of storing coals; that it be for the general use of the coal trade, but the cargo to or from the hulk be in all cases towed by a steam tug to or from the Custom house, London; that all vessels leave the hulk immediately after being discharged; and that sailing colliers when discharged be towed away to such parts of the river as the harbour master may direct; and in all other respects to be worked to the satisfaction of the conservators, under the inspection of the harbour master, and with the full understanding on the part of Messrs. Cory that if at any time hereafter it shall be found by the conservators inexpedient to permit moorings for the derrick hulk to remain in that or any other part of the river, the conservators will, under the powers vested in them by the 9th section of the Thames Conservancy Act, cause the same to be removed.

9. The rent paid by the appellants to the said conservators under the document aforesaid has been assessed, and now stands at the sum of 600*l.* per annum.

10. Reference was made upon the hearing of the summons to the case of *Watkins* v. *The Overseers of Milton-next-Gravesend* (L. Rep. 3 Q. B. 350), and the learned magistrate found as a fact that the appellants were occupiers of the soil in the bed of the river on which the moorings were placed, and therefore decided against the present appellants, and that they were liable to be rated.

11. The appellants have given due notice of appeal against this decision. It is agreed that neither party shall raise any technical difficulties or objections, and that the case shall be decided upon the merits, the court to be at liberty to draw any inferences of fact if it should think fit.

12. The question for the opinion of the court is, whether the appellants are liable to be rated to the relief of the poor of the parish of Greenwich in respect of their occupation of moorings under the circumstances stated.

The following were the points relied on by the plaintiff appellant in the argument of the case:

That the rate-book does not show any property in respect of which the appellants are liable to be rated to the relief of the poor; that by the rate-book it appears that moorings are proposed to be rated, but moorings being merely appliances for staying a vessel stem and stern are not the subject of a rate; that by the case it appears that the appellants have no legal interest or exclusive right in the soil or bed of the river, but only a licence to use, which, like an easement, is not the subject of a rate.

The respondents contended that under the circumstances set forth in the case, the appellants were rateable in respect of the occupation by them of the soil of the River Thames within the parish of Greenwich.

Patchett for the appellant. — The derrick was capable at any time of moving from her moorings, and only remained in her position upon the sufferance of the Conservators of the Thames. The stones which held her were practically anchors; they only rested on the surface of the soil, and were used for the purpose of avoiding an accident which might have occurred if the fluke of her anchors had at low tide touched the bottom of any ship going up the channel of the river. When persons are rated it is for the occupation of the land, and the magistrate must find that there was an occupation by the appellant of the bed of the river before he is liable to be rated. The rule is that there must be a sufficient occupation for the party occupying to maintain trespass, which the appellant could not do, for the permission granted to him by the conservators was to lay down moorings, not to occupy the soil. Unless the casting of an anchor in the bed of the river is a sufficient occupation of the soil, the appellant cannot be rated:

Grant v. *The Local Board for the District of Oxford*, 19 L. T. Rep. N. S. 378; L. Rep. 4. Q. B. 9;
Forrest v. *Churchwardens of Greenwich*, 8 El. & Bl. 890; 27 L. J. 96, M. C.

Barrow for the respondent.—The question is, whether the mooring is meant only for a temporary or for a fixed and permanent position for the derrick to occupy? If the latter, she is rateable. The agreement between the conservators and the appellant is more than a mere licence, it is a right to occupy the moorings exclusively, and there is such an occupation by the appellant as renders him liable to be rated. The stones were placed instead of anchors, but it is found by the case that the soil of the river bed was disturbed for the purpose of laying them down. *Watkins* v. *The Overseers of Milton-next-Gravesend* (L. Rep. 3 Q. B. 350; 18 L. T. Rep. N. S. 601) is in point. There it was decided that the conservators who had placed two large iron fan-shaped screws in the bed of the river were the occupiers, and would be rateable; the value of the occupation being measured by the amount paid to them for their licence to attach vessels and barges to the moorings, and in that case the appellant was held not liable to be rated as occupier, being a person having a mere licence to use the moorings which could be determined by the conservators at a brief notice, and did not prevent

other parties making use of the same moorings if the conservators had thought fit to give permission.

WILLES, J.—I am of opinion that the decision of the magistrate ought to be reversed. The magistrate found that the appellant was the occupier of the bed of the river, but it is not found in the case that the stones to which the derrick was attached were fixtures, nor were they secured as they were in *Watkins* v. *Overseers of Milton-next-Gravesend* (L. Rep. 3 Q. B. 350; 18 L. T. Rep. N. S. 601) where the screws were fixed in the soil with bricks and mortar. The magistrate has not found that the stones were fixtures, he has found them to be moorings. It is found by the case that the vessel was retained in her position by two single fluke anchors, and two single stone anchors; that the latter were not fastened to the soil in any way, but were dropped into the river without force, and were used for the purpose of anchors, because, at low water, the fluke anchors were likely to occasion damage to the bottom of any ship which might happen to come against it; the stones could be hauled on board if necessary, so that the derrick was anchored, not to an immovable, but to a movable thing, which was quite separate from the soil. Although the stones were not often moved from their resting place, and in consequence were silted over by the ebb and flow of the tide, they were still moveable, and one tide may wash away the soil which the former tide had covered them with. The derrick was therefore no more occupying the bed of the river than any vessel which casts anchor for a temporary purpose. It is only because she had remained there a long time that it is contended that she is rateable; but if such were the case, every vessel which loiters in the river might be rated. The derrick was enjoying a mere easement in her occupation of the bed of the river. On reviewing the other cases which show when a vessel is rateable for the occupation of the soil, I find that they are all distinguishable. This derrick is moveable, and assuming that Mr. Barrow is correct in his statement, there is reserved to the Conservators of the Thames a power to compel the derrick to change her position whenever they think proper, or when they think her position interferes with the navigation of the river. In one case cited by the learned counsel, the derrick floated with the rise and fall of the tide; there were blocks fixed in the ground for her to rest upon at low water, until she was floated off by the tide, and there was consequently an occupation of the ground at low water twice every day. That case is distinguishable from this. I have already observed that in *Forest* v. *The Overseers of Greenwich* (8 El. & Bl. 890), relied upon by the other side, that the moorings were secured in the soil with bricks and mortar, and the moorings were no part of the vessel; here they are part of the vessel, and can be put on board and carried away at a few minutes' notice. The judgment must therefore be for the appellant.

KEATING J.—I am of the same opinion; and for the reasons given by my brother Willes. This was a case practically of nothing more than a floating barge; and I think we should be interfering with the decision of the Court of Queen's Bench, in *Grant* v. *The Local Board of Oxford* (19 L. T. Rep. N. S. 378) if we were to decide otherwise.

Judgment for the appellant.

Attorneys: *M. Shephard* and *W. Bristow.*

June 3 and July 5, 1872.

JOHNSON v. BARNES.

Trespass to land—Rights of common—Grant by a corporate body—Common appurtenant and common in gross.

To an action of trespass to land, the defendant justified as grantee under a conveyance from the corporation of Colchester, and also as a burgess of the borough of Colchester, and claimed right of common in the lands.

The corporation has from time immemorial exercised an exclusive right of pasturage upon certain lands round the walls of the town, for cattle levant and couchant within the borough, from Lammas to Candlemas; and they have conveyed the common rights to persons at various times, who have subsequently exercised commonable rights over the lands. The plaintiff's land was conveyed to him "subject to any rights or privileges which the corporation or any person claiming under them might possess over the same."

It was contended on behalf of the plaintiff, that the right of common was appurtenant, and therefore inalienable, and that a release of part was a release of the whole commonable lands.

Held, that, admitting the plaintiff's contention to be correct, yet that the conclusions to be drawn from the repeated grants by the corporation, were that they were made in pursuance of a legal right, which, in the absence of proof that it was modern, must be deemed to have originated before the time of legal memory; and that the court would assume therefore, that the common was originally granted in gross, with power to release any portions without releasing any other part of the commonable lands.

THIS was an action brought to try the existence of an exclusive or other right of common claimed by the defendant over part of certain land, called Drury Farm, within the borough of Colchester, in the county of Essex, and by consent of the parties, and by the order of Byles, J. dated the 3rd Nov. 1871, according to the Common Law Procedure Act 1852, the following case has been stated for the opinion of the court, without any pleadings.

1. The plaintiff is the tenant in possession of Drury Farm, consisting of 115a. 1r. 31p., or thereabouts, in the parish of St. Mary at the Walls, in the borough of Colchester aforesaid, and 11a. 3r. 24p., or thereabouts, in the adjoining parish of Lexden, in the said borough. The plaintiff is the lessee of the Drury Farm from Adam Rivers Steele, and others, who claim title to the said farm under a deed of conveyance, dated the 29th Nov. 1838, from the trustees under the will of Richard Bradstreet, Esq., and which farm was by that deed conveyed subject to any right or privileges which the mayor and burgesses of Colchester, or any person claiming under them, might possess over the same. The title deeds of the said farm go back so far as the year 1583, and in none of them other than in the said conveyance is there any reservation of any rights or privilege which the mayor and burgesses of Colchester, or any person claiming under them, might possess over the said farm, or any mention of any rights of common as existing upon the same.

2. The defendant is a free burgess of the borough of Colchester, and he is and for many years has been resident within that borough.

3. The borough of Colchester is an ancient borough, whereof the free burgesses are and have been from time immemorial a body politic and corporate by divers different names.

4. The said body politic and corporate for themselves and the resident free burgesses claimed from time immemorial to have exercised and to be entitled to exercise an exclusive right of commoning in certain lands round the walls of the town, including 110a. 2r. 35p. of that portion of Drury Farm which is situated within the parish of St. Mary at the walls aforesaid.

5. The right as claimed is for common of pasture for all cattle, sheep, and other commonable animals levant and couchant within the borough from Lammas-day, the 1st August in every year, till the Feast of the Purification of the Virgin, being the 2nd February in the succeeding year, on the said lands, save as to any part thereof sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested, or otherwise removed in a due course of husbandry; but the plaintiff does not admit that the right as claimed ever existed.

A book entitled Morant's History may be considered on the argument of this case to set forth such portions of documents correctly, and also to state accurately the fact as to the exercise of such alleged right by the corporation, and the free burgesses up to the time of such publication, but this admission is not to extend to any deductions or inferences of law or fact drawn or expressed by the author of the work, or to contradict or qualify any statement of fact in this case.

6. In the year 1807 a survey and plans were made by the corporation of the contents and extent of the common lands, which were thereby stated to be 1023a. 3r. 38p., including the 110a. 2r. 35p., part of Drury Farm.

7. It is admitted for the purpose of this case that the common rights of the corporation of Colchester over the said lands commenced, and were continuously exercised from time immemorial down to and inclusive of the year 1807, and that from the year 1807 down to the year 1830 the account books of the conservators of the said half years' lands appointed by the corporation as hereinafter appearing, show that an annual sum had been paid to them by the occupiers of the said Drury Farm, in lieu of the exercise of the right of common until the sale of such right hereinafter mentioned, to Robert Skitter, who was then the occupier of such lands, and from the time of the conveyance hereinafter mentioned to George Henry Errington, Elizabeth Skitter, the wife of the said Robert Skitter, Robert Maitland Savill, and William Gooday, the respective occupier next before the plaintiff of the said Drury Farm, paid an annual sum for such right of common to the said George Henry Errington.

8. These Lammas lands do not lie together.

9. From the fourteenth year of the reign of Henry II. down to the reign of Queen Elizabeth there are no extant orders or regulations by the corporation concerning the said Lammas lands. A constitution or bye-law was made by the corporation on 2nd Aug. 1573, that the number of cattle which each burgess was to put on should be three head of great cattle, or in lieu of the said three head ten sheep.

10. The constitutions or bye-laws made by the corporation for regulating the enjoyment of the rights of common as between the free burgesses as to the said Lammas lands down to the year 1768 are set out in Morant's book at page 92 to 94 inclusive, and page 4 of appendix thereto, and are to form part of this case.

11. Prior to the publication in 1768 of Morant's history, parcels of the Lammas land had by the corporation, and by way of release to the owners of such lands, been at divers times made several or whole year lands, and at page 29 of Morant there is set out an entry on the court rolls of the corporation in the time of Henry VIII. upon the occassion of certain of the said Lammas lands as so being made several or whole year lands.

12. Prior to the same year 1768 certain others of the said lands had been also exonerated by the corporation from their right of common of pasture in consideration of small quit rents paid to the towns.

13. In or prior to the year 1549 certain commissioners are directed by the King's writ to hear, examine, and determine certain matters of controversy then depending in Parliament amongst the bailiffs, aldermen, common council, and commonalty of the corporation of the Borough of Colchester, and by certain original articles settled by the said commissioners in the said last-mentioned year, it was ordered that the bailiffs, aldermen, and common council, being the name of the incorporation of the free burgesses, should not at any time thereafter alienate or sell any lands, tenements, or hereditaments appertaining to the said borough or corporation, or make several, or sell any common or commons, &c., without the whole assent, consent, and agreement of the bailiffs, aldermen, and common council of the said town or borough, or the most part of them.

14. On the 10th Aug. 1807, at an assembly of the mayor and free burgesses of the borough of Colchester (being a legal assembly of the governing body thereof), a constitution relating to the common lands belonging to the said borough was made and ordered to be acted on immediately, by which constitution certain officers, called conservators, were chosen out of the free burgesses of the borough for the purpose of surveying and managing the common land and selling and releasing the rights of common over them, and doing other things in relation thereto, as specified in the said constitution.

15. After this constitution was passed, the alleged right of common over these lands for the season was sold by auction by the corporation annually both to persons who were, and to persons who were not owners of the commonable lands and not free burgesses, and such right was exercised accordingly by the said purchasers.

16. From time to time the common rights of the burgesses over divers of the land included in the said 1023a. 3r. 38p. have been by the corporation conveyed and released. The following are instances of such conveyance and release:—In the year 1816 the corporation released the right of common over certain of the said lands to John Killingworth Bowland, who was the owner of the said lands. In the year 1819, the corporation conveyed the right of common over other of the said lands, to Samuel Phillips, who was not the owner of the same lands, or a free burgess. On 26th July 1834, other rights of common over certain of the said lands were conveyed by the

corporation to Charles Gray Round, who was not the owner of the lands; and in the year 1855, the corporation in like manner conveyed their right of common over other parts of the said commonable lands, to Samuel Puplett Carr, who was not the owner of the same, or a free burgess. Subsequently to the said respective sales to the said John Killingworth Bowland, Samuel Phillips, Charles Gray Round, and Samuel Puplett Carr, the said rights of common were never exercised by the corporation, or the free burgesses, or any of them, over the lands, or any of the lands, the rights of common over which had been so conveyed, and the respective grantees thereof enjoyed the full benefit of such, several grants by themselves, or their respective licencees.

17. In the year 1834 the position of the said lands was as follows, that is to say, the right of common over 831a. 0r. 33p. of the said lands, including the aforesaid 110a. 2r. 35p., part of Drury Farm, had been sold or released, and the produce thereof, so far as the same land had been received, had been invested in the purchase of 10,479*l.* 4*s.* 4*d.* in the Three per Cent. Consols, the dividends whereof have been hitherto divided annually amongst the resident free burgesses. 151a. 1r. 2p. were said to remain subject to the rights of common, and produced from payments made by the owners or occupiers, to prevent such right of feeding being exercised annually, about 52*l.*, which has been divided in the same way, and 44a. 2r. 3p. were disputed, and said not to be subject to common, making a total of 1026a. 3r. 38p.

18. Copies of the assembly books of the Corporation of Colchester, the plans, account books, conveyance, and other documents relating to the said lammas lands were set forth in the appendix, and formed part of this case.

19. In Sept. 1830, in pursuance of a resolution of the mayor and free burgesses of Colchester, at an assembly held on the 7th July 1830, the then conservators, one of whom was the defendant, contracted with the said Robert Skitter, who was then lessee of Drury Farm, for a term of years expiring on the 29th Sept. 1854, and who was not a free burgess, for the sale by the corporation to him of their alleged right of common over that farm for 700*l.*, of which sum 100*l.* only was then paid by the said Robert Skitter.

20. The said Robert Skitter died in 1837, leaving a will, by which his widow, Elizabeth Skitter, was constituted sole devisee in fee of his real estate.

21. On the 27th July 1840, by a deed of that date, the corporation, at the request of the said Elizabeth Skitter, and in consideration of 600*l.* paid by her, being the residue of the above-mentioned sum of 700*l.*, conveyed, or purported to convey, to Henry Wittey, his heirs, and assigns, the same right of common, in trust for the said Elizabeth Skitter, her heirs, and assigns.

22. On the 30th Dec. 1841, by a deed of even date, the same Henry Wittey, by directions of the said Elizabeth Skitter, conveyed, or purported to convey, the said right of common lastly hereinbefore mentioned to George Henry Errington, his heirs, and assigns. After this conveyance, Mr. Errington, by indenture dated 31st Dec. 1841, demised, or purported to demise, such right to the said Henry Wittey, in trust for the said Elizabeth Skitter and her assigns, for the term of fifty years, if the said Elizabeth Skitter should so long live, at the rent of 1*d.* only, and the said George Henry Errington covenanted with the said Elizabeth Skitter that in case she died before 29th Sept. 1854, when the lease under which she then held the farm called the Drury Farm would expire, then he, the said George Henry Errington, would, at the request of the executors, administrators, or assigns of the said Elizabeth Skitter, or of the person or persons for the time being entitled to the remainder of the term then expired in the farm then called Drury Farm, grant unto him, her, or them a further lease of the said right of common from the day of decease of the said Elizabeth Skitter for all the then residue of the existing term in the lease of the said farm at the rent of 40*l.* for the same right of common payable half yearly. On the 19th Nov. 1844 Mrs. Skitter and her trustee, Mr. Wittey, by indenture then dated, assigned, or purported to assign unto Robert Maitland Saville, all her estate and interest in the said right of common, in the event of her departing this life on or before 29th Sept. 1854, subject to the yearly rent of 40*l.* during the said term. Mrs. Skitter died about the year 1848, and from her death the said Robert Maitland Saville and Mr. William Goodday, the subsequent tenants and assignees of the said lease of the Drury Farm, paid, until the 29th Sept. 1854, the annual sum of 40*l.* per annum to the said George Henry Errington, and since that period, until the occupation of the said farm by the plaintiff, an annual sum was paid by the said Mr. William Godday to the said George Henry Errington for the said alleged right of common.

23. The said George Henry Errington, who was not a free burgess of the borough of Colchester on the 1st. Jan. 1870, by a deed of that date conveyed or purported to convey the right of common to the defendant, his heirs, and assigns.

24. Copies of the contract and deeds in this case mentioned accompanied and formed part of this case.

25. On the 10th Jan. 1870, the defendant, for the purpose of asserting the right of common which he claimed to exercise either under the said conveyance to him from Mr. Errington, or as a burgess, entered with a horse and one sheep being levant and couchant within the borough, and the sole property of the said defendant upon one of the fields comprised in Drury Farm aforesaid, such fields not being sown with corn or grain, and depastured the said field.

26. The court is requested to draw inferences of fact. The questions for the opinion of the court are firstly whether at the time of his said entry the defendant was entitled under the deed of 1st Jan. 1870, to the right of common purporting to have been conveyed to him by that deed over such parts of the said 110a. 2r. 35p., part of Drury Farm as had not been sown with corn or grain at or before the 1st Aug. preceding the said entry, and, if so, for what period and to what extent? secondly, whether, if not entitled under that deed to the said right of common, he was entitled to such right of common as a free burgess, and as against the tenant and owner of the land? If the court shall be of opinion in the affirmative on either of the above questions, judgment is to be entered for the defendant, with costs of defence. If the court shall be of opinion in the negative on both the above questions, judgment is to be entered for the plaintiff, with costs of suit.

The following were the plaintiff's points of argument:—First, that the right of common as claimed by the defendant never existed over the plaintiff's land; secondly, that the facts set out in the case show no justification for the defendant's trespass upon the plaintiff's land; thirdly, that the defendant is not entitled to the right of common claimed by him, either as a free burgess of the borough of Colchester or as the grantee of G. H. Errington; fourthly, that the said right as claimed, being identical with the entire right exercised over all the Lammas land, became extinguished by the release of the right over part of such lands; fifthly, that the facts set out in the case show an extinguishment of the right of common over the plaintiff's land; sixthly, that the said right is not and never was exercisable by any other than a free burgess of the said borough.

The defendant's points were, first, that the case shows that an exclusive right of pasturage over Drury Farm existed in the corporation from time immemorial; secondly, that this right was assigned by the corporation to Wittey, and is now vested in the defendant; thirdly, that if such right was not assigned to Wittey, and is not vested in the defendant, then, that the defendant, as a burgess, is entitled to common over Drury Farm.

Joshua Williams, Q.C., *Prentice*, Q.C., and the Hon. *Alfred Thesiger* for the plaintiff.—I contend this is common appurtenant, and that when there is a release of part, there is necessarily a release of the whole. The burgesses of Colchester were entitled to the right of commoning their cattle on these lands, but they ought not to have released any part of them if they desired to retain their commonable rights over the remainder. The question here is whether the defendant is entitled to a right of common over such parts of Drury Farm as have not been sown with corn, but a release of part of the lands is a release of the whole. Neither common appendant nor common appurtenant can be aliened as to be converted into common in gross. In *Tyrringham's case* (4 Rep. Fol. 36b), T. S. was seised of a house, meadow, and pasture, to which he and those whose estate he had agreed to have common of pasture for oxen, cows, and heifers, levant and couchant upon the house, meadow, and pasture, as well in thirty acres in the same town of which one A. was seised in fee, as in forty acres of land whereof B. was seised in fee to the house, meadow, and land appertaining. Afterwards B. purchased the house, meadow and pasture, and demised the same to the plaintiff, who put his cattle into the thirty acres to common, and they were driven out by defendant, farmer to A., with his dog. It was held that prescription does not make a thing appendant to another, unless it agree in nature and quality with it. Secondly, common appendant, being of common right, is apportionable by the commoners purchasing part of the land to which the common is appendant and cannot be extinguished by the acts of the parties; but common appurtenant, being against common right, by the said purchase all the common was extinguished. So in *Rotherham* v. *Green* (Croke Eliz. 592), where the defendant's father released part of his right to the plaintiff's ancestors, in an action of trespass for commoning the land by the defendant, judgment was given for the plaintiff, for it was said, by release of the common in part of the land the whole common is gone and extinct; for otherwise the tenant of the residue of the land should be charged with all the common, which is not reasonable, and thereupon it is that if a lord releaseth his signiory in one acre all is gone. [WILLES, J.—That is the real reason; it burthens the rest of the land.] Also in *Miles* v. *Etheridge* (1 Shaw 326) it is clearly settled. There the whole case is contained in those words. A release of common in one acre is an extinguishment of the common. He referred to Co. Lit. 122a, to powers of alienation, and to Co. Lit. 476b. If a man have common appurtenant to a messuage and land for a certain number of beasts, he may alien the same; *aliter*, if it be common for all his beasts, levant and couchant upon the land, he cannot by his alienation sever that from the land. He referred also to

Rivis v. *Watson*, 5 M. & W. 255;
Dennett v. *Pass*, 1 Bing. N. C. 388.

Hon. *G. Denman*, Q. C. (with whom was *Turner*), for the defendant.—The right of common set up has been exercised for a very long period, and has been constantly dealt with by the Corporation of Colchester. It is a peculiar right which might be the subject of a grant, the owners of the lands having formerly granted the common rights to the free burgesses on certain conditions, to be exercised by them, and their cattle levant and couchant within the borough. [WILLES, J.—Is the borough within any manor?] It is a manor of itself, and these lands are within the precincts of the borough, and this is a common of which the Corporation were the lords of the manor. We must not look at the statement of the rights of common alone, but together with the manner in which the rights have been exercised, and dealt with by the Corporation; and we shall then see that it is a right which is capable of being granted. [KEATING, J.—In fact that the land having been severed, we are to attribute some legal origin enabling the corporation to release the lands.] There might have been a grant to enable such to have been done, and such grant would immediately account for all dealings with the lands which are stated to have occurred. In Co. Lit. 122a. it is stated that if a man purchase part of the land, wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but not so of common appurtenant, or of any other common of what nature soever. Common in gross appertaineth to no land, and must be by prescription or by writing. This may be common in gross for cattle levant and couchant in certain places; and my contention is that the original grantor gave the right of common to the Corporation of Colchester with a right to alien portions of their commonable lands, and still so as not to destroy their right to the remainder of the land. The continuous practice of the corporation to exercise these rights of alienation from the earliest times show this right of existence. [WILLES, J.—The question then would be whether a common in gross with such a limitation could be the subject of a valid grant.] The lands are so separated that it would seem as if the original grant to the corporation had been made by several owners.

Joshua Williams, Q.C. in reply.—This is not a common in gross; the same reason that applies to a common appurtenant applies to a common in gross: (*Attorney-General* v. *Matthews*, 4 K. & J.)

Cur. adv. vult.

July 5.—The judgment of the court was delivered by WILLES, J.—This was an action for

putting horses and sheep upon a field of the plaintiff. The defendant justifies under a right of common; and the question is whether such a right of common exists. The defendant claimed either as a burgess of the borough of Colchester or as grantee under a conveyance of the 10th June 1870 from a person claiming under a grant from the corporation of Colchester of the 29th Sept. 1830, by which the common, once the farm in question, was sold for 700*l*. The corporation claims, and has from time immemorial exercised, either by actual enjoyment or by receipt of rent or acknowledgment, an exclusive right of common of pasture in certain lands round the walls of the town, including the place in question, and containing in all 1023a. 3r. 38p., for all cattle, sheep, or other commonable animals, levant and couchant, within the borough, from Lammas to Candlemas, on the said lands, save as to any part thereof sown at or before the commencement of such period with corn or other grain, and in that case only after such crop should be harvested or otherwise removed in a due course of husbandry. The "Lammas lands," as they are called, do not lie together; the corporation from time to time commencing, as far as we are informed, in the reign of Henry VIII., exercised the right of releasing for valuable consideration their rights of common over certain of the lands subject thereto, still continuing to exercise their rights over the rest as before, without any resistance thereto upon the ground that the release of part of the land extinguished the whole. The first instance of this is to be found in Morant's History of Colchester, p. 94. A variety of other instances in which this was done appear in the special case. Parcels of the land had been at divers times so exonerated before 1768, and many such in respect of small quit rents paid to the town. In many instances, also, the common rights of the corporation had been conveyed to various persons, and those persons, and not the corporation, had thereupon exercised the rights of common. Between 1807 and 1820 releases were made to more than thirty persons for sums amounting to more than 4000*l*. In 1834 the common over 831a. 0r. 33p. had been sold or re-leased, producing the sum of 10,470*l*. 4*s*. 4*d*. in the Three per Cent. Consols; 151 acres remained subject to the rights of common, and 50*l*. a year in all was paid in lieu of the right of feeding there, and as to 44a. 2r. 3p. (not including the place in question) the right was disputed. The plaintiff is the lessee of the place in question under Mr. Steele, who purchased the property in 1838. In the previous title deeds, which go back to 1583, there is no mention of the right of common, therefore it is admitted to have been exercised. The conveyance of 1838 was made "subject to any rights or privileges which the corporation or any person claiming under them might possess over the same." Upon the argument for the plaintiff it was insisted that the right of common was appurtenant, and not alienable, and that it had been lost by the first release of part of the land; and the subsequent enjoyment was said to be immaterial as being bad under a mistake of law; and Mr. Denman, in his forcible argument for the defendant, did not dispute these propositions as applicable to an ordinary common appurtenant, but he insisted that the proved exercise of the right was reconcilable with, and only to be legally accounted for, by concluding that the common was originally granted in gross out of the land, and each atom thereof, with power to grant or release any part, as in the case of a several pasture. To this it was replied that no such conclusion ought to be drawn from the facts. We are therefore to pronounce upon the mixed question of law and fact, whether the evidence establishes the grant of a common in gross with power of severance, or only a common appurtenant, inseparable from the land, and destroyed by the first release. In dealing with this question we must bear in mind the cardinal rules of prescription; first, that no length of enjoyment can establish a title which could have no legal origin, as, for instance, of an estate or interest which the law does not recognise: (*Bailey* v. *Stephens* 12 C. B., N. S., 91; 6 L. T. Rep. N. S. 356; *Attorney-General* v. *Matthews*, 4 K. & J.). And next that the "antiquity of time justifies all titles, and supposeth the best beginning the law can give them." So that, if evidence be given after long enjoyment of a property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory. In the present case there is nothing improbable in the grant having been in gross. There are instances in the books in which such presumptions as to corporations appear, of which *Mellor* v. *Spateman* furnished one. The fact that the common is claimed for cattle levant and couchant, may be thought to indicate appurtenancy; but it is far from conclusive. Levant and couchant, as pointed out in many cases (see *Carr* v. *Lambert*, 16 L. T. Rep. N. S. 255; 35 L. J. 121, Ex.) is an expression commonly used, and understood to express a measure of the number of cattle that may be put in, and it does not necessarily refer to cattle actually fed upon the particular land. There could be no objection to a grant in gross of common for so many cattle as a certain known farm, not in the possession of the grantee, could sustain by its natural and artificial products, with the assistance of the common, which is the description of the number of cattle, levant and couchant, upon a given place, and is considered certain enough to be granted. The right of common being "exclusive" tends to show that it was common in gross. All the other evidence in the case goes to show that the right was in gross, and not defeated by a grant or release of part. The recognition and repetition of such releases from the early part of the sixteenth century downwards, without any questioning of the right of common, is strong evidence that the right admitted of such severance as in law the original grant might well have expressly allowed, supposing such an express allowance to be needful in the case of an exclusive right of common in gross. We took time to consider the evidence in this case, which we have carefully examined without finding a single circumstance to interfere with the conclusion, that a right so long exercised did originate in the legal origin suggested, and that it ought to be sustained. Nor can the plaintiff justly complain, because the person under whom he claims had ample notice of the right at the time of his purchase. We answer the first question in the affirmative, and give judgment for the defendant.

Judgment for the defendant.

Attorney for the plaintiff, *Steele*, Bloomsbury-square.

Attorney for defendant, *W. J. Childs*, Doctor's-commons.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs., Barristers-at-Law.

June 21 *and* 26, 1872.

SECOND DIVISION OF THE COURT.

THE SHEFFIELD WATERWORKS COMPANY v. BENNETT.

Water company—Power to charge water-rates according to the amount of rent—Water rates, poor rates, and district rates paid by owner—Tenements under 10*l. a year—Rent or annual value—What deduction to be allowed from rent—Meaning of word "rent" in Sheffield Waterworks Act* 1853 (16 *&* 17 *Vict. c.* xciii.), *sect.* 79—*The Waterworks Clauses Act* 1847 (10 *&* 11 *Vict. c.* 17), *sects.* 68-72.

By sect. 79 *of the Sheffield Waterworks Act of* 1853 (16 *&* 17 *Vict. c.* xciii., *local and personal*), *the company are empowered to charge for the supply of water to the inhabitants at a rate per annum, according to the rent of the dwelling house supplied, as follows, viz.:—"Where the* rent *shall not amount to* 7*l. per annum, at a rate not exceeding* 6*l. per cent. per annum on such rent; where such rent shall amount to* 7*l., but not to* 8*l. per annum, at a rate not exceeding* 8*s. per annum; where such rent shall amount to* 8*l. but not to* 10*l. per annum, at a rate not exceeding* 10*s. per annum; where such rent shall amount to* 10*l. but not to* 12*l. per annum, at a rate not exceeding* 12*s. per annum;" and so on in a graduated ascending scale up to a rent of* 100*l. and upwards per annum.*

The Waterworks Clauses Act 1847 (10 *&* 11 *Vict. c.* 17), *which is incorporated with the above-mentioned special Act, enacts by sect.* 72 *that the* owners *of all dwelling houses, or parts of dwelling houses, occupied as separate tenements, the annual value of which houses shall not exceed the sum of* 10*l., shall be liable to the payment of the rates instead of the* occupiers.

The defendant being the owner of several dwelling houses in Sheffield let to tenants at weekly or monthly rents, the yearly aggregate amount of such rents respectively not exceeding the sum of 10*l. by the year, the tenants of which dwelling houses were supplied by the company with water at the defendant's request, the company claimed to charge the water rates, in respect of the houses so supplied, upon the rents or sums at which the same respectively were let, without making any deduction therefrom; the defendant, on the other hand, contending that the charge should be upon the annual value of the dwelling houses free of all tenants' rates and taxes, and that in ascertaining such value a deduction should be made from the rents or sums at which the same houses were respectively let, in respect of the amounts allowed or paid by him for poor's rates, district rates, and water rates, in respect of the said dwelling houses respectively.*

Held, by the Court of Exchequer (Bramwell and Cleasby, BB.), upon a special case stated for the opinion of the court, that the word "rent" in sect. 79 *of the Company's Act of* 1853 *meant the proper rent to a tenant paying the rates and charges regularly paid by the tenant, of which the actual rent, when the tenant does pay those rates and charges is in general the proper criterion; and that, therefore, the contention of the defendant was right, and he was entitled, before charging the water rates on the rent, to deduct, from the actual amount of rent paid to him, the sums allowed or paid by him for poor's rates, district rates, and water rates.*

Rook *v.* The Mayor, &c., of Liverpool, 7 *C. B., N. S.*, 240, *discussed and distinguished.*

THIS is an action brought to recover the sum of 31*l.* for water rates claimed to be due from the defendant to the plaintiffs, for water supplied by the plaintiffs to the occupiers of ninety-two dwelling houses or tenements, situate in the townships of Sheffield and Brightside Bierlow, in the parish of Sheffield, in the County of York.

The defendant pleaded to the declaration in the action; first, except as to 24*l.* 10*s.*, parcel of the plaintiffs claim, never indebted; secondly, except as to the said excepted parcel, payment before action; and, thirdly, as to the said excepted parcel, payment into court of 24*l.* 10*s.*

The plaintiffs joined issue upon the first and second pleas; and as to the third plea, accepted the sum paid into court in satisfaction and discharge of the cause of action, in respect of which it was paid in. The cause came on to be tried at York, at the Spring Assizes 1872, before Quain, J., when a verdict was found for the plaintiffs, for the amount claimed in the declaration, subject to the following.

SPECIAL CASE.

1. The plaintiffs (hereinafter called the company) were incorporated by an Act of Parliament passed in the year 1830, intituled "An Act for better supplying with Water the Town and Parish of Sheffield." And thereby powers were given to the company for supplying the town and parish of Sheffield with water.

2. In the year 1845, another Act was passed, intituled, "An Act for better supplying with water the Town and Parish of Sheffield in the County of York, and for amending the Act relating thereto," and thereby powers were given to the company to raise further capital, and construct additional works.

3. In 1853, The Sheffield Waterworks Act 1853, was passed, whereby, after reciting the said Acts of 1830 and 1845, such last mentioned Acts were repealed, subject to the provisions contained in the said Act of 1853.

4. By the 6th section of the said Act of 1853, the company was reincorporated as from the passing of the said Act of 1830, and the said Act of 1853 contained the following provisions.

Sect. 3.—That The Companies Clauses Consolidation Act 1845, and The Lands Clauses Consolidation Act 1845, and The Water Works Clauses Act 1847, except sect. 54 of the said last-mentioned Act, and save so far as any of the clauses in any of the said Acts may be expressly varied or excepted by this Act, shall be and the same are hereby incorporated with this Act.

Sect. 9.—That notwithstanding the repeal of the respective recited Acts, the several clauses and provisions whatsoever in favour of the company respectively contained in any Act or Acts (other than the said recited Acts respectively), and which immediately before the passing of this Act are in force, shall continue and be in full force accordingly; and the company and their directors, officers, and servants may and shall accordingly, and for the purposes of this Act, be entitled to, and have, exercise, and enjoy, under or by virtue of those claims and provisions respectively, all such rights, interests, powers,

authorities, and privileges whatsoever, as if this Act had not passed.

Sect. 79.—That the company shall, and they are hereby required to furnish a sufficient supply of water to every inhabitant occupying a private dwelling house, or part of a dwelling house, in any square, street, close, or lane of the town and borough of Sheffield aforesaid, and in any other place or places within the limits of this Act, where the pipes of the company are now, or hereafter shall be laid, for the use of his or her family, at the following rate per annum (that is to say):

Where the rent of such dwelling house, or part of a dwelling house, shall not amount to 7*l.* per annum, at a rate not exceeding 6*l.* per cent. per annum on such rent, but not in any such case to exceed the sum of 7*s.* 2*d.* per annum.

Where such rent shall amount to 7*l.*, but not to 8*l.* per annum, at a rate not exceeding 8*s.* per annum,

Where such rent shall amount to 8*l.*, but not to 10*l.* per annum, at a rate not exceeding 10*s.* per annum.

Where such rent shall amount to 10*l.*, but not to 12*l.* per annum, at a rate not exceeding 12*s.* per annum.

And so on in a graduated ascending scale, according to the amount of rent, up to a rent of 100*l.* or upwards per annum.

Provided, nevertheless, that the company shall not be entitled to receive from any such inhabitant more than the sum of 6*l.* in any one year for such supply, nor shall such company be obliged to furnish such supply to any inhabitant for less than 7*s.* 2*d.* in any one year, unless they shall think fit so do do.

Sect. 80.—That in cases where the landlord or owner of a number of houses, let at rents not exceeding 7*l.* a year respectively, shall agree with the said company to pay the water rent for the same, the company shall not in such case charge more than 6*s.* 4*d.* a year for each house for such supply, anything to the contrary in this Act contained notwithstanding.

5. In 1860, the Sheffield Water Works Act 1860 was passed, whereby the limits of the Act of 1853 were extended to include the parish of Ecclesfield, as well as the town and borough of Sheffield.

6. In 1864, the Sheffield Water Works Act 1864 was passed, the 105th section of which was as follows:

The provisions of the Company's Act of 1853, relative to the water rents or rates to be taken by the company shall, from and after the time for the first half yearly collection of the company's water rents after the passing of this Act, and thenceforth for a period of twenty-five years, have effect as if the several *maximum* water rents or rates, in those provisions specified, were increased in each instance by 25 per centum: Provided always that all water rents or rates authorised to be taken by this Act, or the Company's Act of 1853, for any purposes whatever, shall be charged to all persons impartially and without favour, according to the scale of rents or rates specified as aforesaid, for the several purposes respectively, except that such rates may by agreement be reduced for the sanitary purposes of the town.

7. In 1867, the Sheffield Water Works (Amendment) Act 1867 was passed, whereby the limits of the company's former Acts were further extended, to include the township of Tinsley, in the parish of Rotherham and the parish of Handsworth, all in the West Riding of the county of York, and the parish of Norton, the townships of Dore and Totley, in the parish of Dronfield, and the liberty or extraparochial place of Beauclief, all in the county of Derby.

8. Copies of the said Acts of 1830, 1845, 1853, 1860, 1864, and 1867 accompany, and are to form part of this case.

9. Under the powers conferred by the several special Acts before mentioned, the company is authorised to supply water within the following thirteen townships and places, namely the townships of Upper Hallam, Nether Hallam, Ecclesall Bierlow, Sheffield, Brightside Bierlow, and Attercliffe, all in the parish of Sheffield, the parish of Ecclesfield, the township of Tinsley, in the parish of Rotherham, and the parish of Handsworth, all in the West Riding of the county of York, and the parish of Norton, the townships of Dore and Totley, in the parish of Dronfield, and the liberty or extra-parochial place of Beauclief, all in the county of Derby.

10. The company are now supplying water in all the said townships and places, except in the townships of Dore and Totley, and the liberty or extra parochial place of Beauclief.

11. The dwelling-houses or tenements at present supplied by the company with water, within the limits of their district, are about 48,400 in number, of which about 30,000 are of an annual value not exceeding 10*l.* Of these houses some are occupied by the owners thereof.

12. The water rates payable to the company are due quarterly—on the 25th March, the 24th June, the 29th Sept., and the 25th Dec. in each year.

13. A separate poors' rate is levied in each of the townships, parishes, and places included within the limits of the company's district. The poor rates in the said several townships, parishes, and places respectively, vary in amount from time to time, and at the same periods of time are larger in some of the said townships, parishes, and places than in others.

14. The mode of ascertaining the rateable value of premises rateable to the poors' rate is not the same in the said several townships, parishes, and places, the consequence of which is that the sums at which similar premises are rated are relatively lower in some of such townships, parishes, and places than in others.

15. The borough of Sheffield is co-extensive with the parish of Sheffield, and comprises the several townships of Upper Hallam, Nether Hallam, Ecclesall Bierlow, Sheffield, Brightside Bierlow, and Attercliffe.

16. The Local Government Acts have been applied to, and are in force within, the said borough of Sheffield, but not to or within any other of the townships, parishes, or places included within the limits of the company's district. General district rates, which may vary in amount from time to time, are levied under these Acts in the borough of Sheffield.

17. On the 20th Sept. 1865, after the Local Government Acts had been applied to the borough of Sheffield, the town council of Sheffield, which is the local board for the said borough, passed a resolution in the following words: "It was ordered that the general district rate be laid and levied upon the owners, instead of the occupiers, in cases where the rateable value of any premises liable to assessment under the Local Government Act 1858, does not exceed the sum of 7*l.*, and that the same be assessed at the reduced estimate of three-fourths of the net annual value of such premises."

18. The defendant was, at Christmas Day 1870, and during the two quarters of a year then next following, the owner of ninety-two dwelling-houses or tenements, specified and described in the schedule marked A, which accompanies, and is to form part of this case; and the same were let by him, during such period, at the rents or sums, and in the manner specified in the said schedule.

19. The occupiers of the said respective dwelling-houses or tenements were, at the request of the defendant, supplied with water by the company during the said two quarters of a year.

20. Sixteen of the said dwelling houses or tenements are situated in the township of Sheffield, and the remainder of them are situated in the adjoining township of Brightside Bierlow.

21. During the two quarters of a year for which the water rates in question are claimed, the poors' rate levied in the township of Sheffield was after the rate of 2*s.* 10*d.* in the pound, and in the township of Brightside Bierlow after the rate of 2*s.* 6*d.* in the pound.

22. During the same period the general district rate, in the borough of Sheffield, under the Local Government Acts, was after the rate of 2*s.* in the pound, subject to the deduction mentioned in the aforesaid resolution of 20th Sept. 1865.

23. The company claim to charge the water rates, in respect of the dwelling houses or tenements in question, upon the rents or sums at which the said dwelling houses or tenements respectively were let, without making any deduction therefrom.

24. The defendant on the other hand, contends that the water rates ought to be charged upon the annual value of the said dwelling houses or tenements, free of all tenant's rates and taxes, and that, in ascertaining such annual value, a deduction should be made from the rents or sums at which the said dwelling houses or tenements are respectively let as aforesaid, in respect of the amounts allowed or paid by him for poors' rates, district rates, and water rates, in respect of the said dwelling houses or tenements respectively (whether such allowance or payment is made by him by virtue of statutory obligations imposed upon him in that behalf, or by reason of agreements voluntarily entered into between himself and his tenants).

25. The schedule hereinbefore referred to specifies and describes the dwelling houses or tenements in question, and, in addition to the matter before referred to, the gross estimated rental of the said dwelling houses or tenements for the purposes of the poor rate, the sums at which the said dwelling houses or tenements were respectively rated for poors' rate; the rates claimed to be deducted by the defendant from the rents or sums at which the said dwelling houses or tenements respectively were let, as hereinbefore mentioned, and other particulars relative to the question in dispute. The matters stated in, or appearing from, the said schedule are to be taken as correct, and it is admitted that, if the defendant is entitled to make the deductions he claims, the amounts mentioned in the said schedule, under the respective heads of poors' rate, district rate, and water rate, are the amounts proper to be deducted from the said rents or sums at which the said dwelling houses or tenements are respectively let as aforesaid.

26. The sums, in respect of which the above mentioned deductions are claimed by the defendant, were allowed or paid by the defendant, as specified in the said schedule, for poors' rates, district rates, and water rates, respectively, either by virtue of statutory obligations imposed upon him in that behalf, or by reason of the terms (voluntarily agreed to between himself and his tenants) on which the said respective dwelling houses or tenements were let by him. The statutory obligations above referred are, as regards poors' rates, sect. 1 of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), as regards district rates sect. 55 of the Local Government Act 1858 (21 & 22 Vict. c. 98), and as regards water rates, sect. 72 of the Water Works Clauses Act 1847 (10 & 11 Vict. c. 17).

27. All the said dwelling houses or tenements, in respect of which the water rates in question are claimed, were, during the period for which they are claimed, respectively let for terms not exceeding three months, within the meaning of the 1st section of the Poor Rate Assessment and Collection Act 1869. The 4th section of the last mentioned Act has not been adopted in either of the townships of Sheffield and Brightside Bierlow.

28. The tenants of several of the said dwelling houses or tenements for which the water rates in question are claimed (namely those numbered in the said schedule 11, 17, 18, 19, 20, and 21), held their respective dwelling houses or tenements of the defendant, on the terms that they should not take advantage of the 1st section of the last mentioned Act, and should pay their respective rents for the same, without deducting the sums paid by them for poors' rates.

29. The water rates in respect of all the said ninety-two dwelling houses or tenements for the quarter of the year next following Christmas 1870, became due on the 25th March 1871, and the water rates for the same dwelling houses or tenements for the next quarter of a year became due on the 24th June 1871.

30. The water rates in respect of the said dwelling houses or tenements for the said two quarters of a year amounted, according to the mode of computation adopted by the company, to 31*l.*; and, according to the mode of computation contended for by the defendant, to 24*l.* 7*s.* 6*d.*

31. The rents or sums at which the said dwelling houses or tenements are respectively let as aforesaid, are to be taken to be the full rents or sums obtainable for the said dwelling houses or tenements respectively upon the terms upon which the same are respectively let as aforesaid.

The question for the opinion of the court is,

Whether, in calculating the water rates, any deductions should be made from the rents or sums at which the said dwelling houses or tenements are respectively let as aforesaid, in respect of the payments made or allowed by the defendant, for poors' rates, district rates, and water rates, or any and which of them, in either and which of the following cases, namely:

(A.) In cases where the poors' rates, district rates, and water rates respectively were allowed or paid by the defendant by virtue of statutory obligations in that behalf.

(B.) In cases where the poors' rates, district rates, and water rates respectively, were allowed or paid by the defendant by reason of the terms (voluntarily agreed to between himself and his tenants) on which the respective dwelling houses or tenements were let by him.

If the court shall be of opinion that none of the aforesaid deductions ought to be made, the judgment is to be entered for the plaintiffs, with costs of suit, for the sum of 6*l.* 10*s.*, over and above the 24*l.* 10*s.* paid into court.

If the court shall be of opinion that all of the deductions claimed by the defendant, as appearing in the said schedule, ought to be made, then judgment is to be entered for the defendant, with costs of suit.

If the court shall be of opinion that some, but not all, of the deductions claimed by the defendant,

as last aforesaid, ought to be made, then judgment is to be entered for the plaintiffs, with costs of suit, for such sum, over and above the 24*l.* 10*s.* paid into court, as, according to the judgment of the court, in that case remain due to the plaintiffs; such sum, in case of difference, to be settled by one of the masters of the court.

In deciding the above question, the court is to be at liberty to draw inferences of fact:

Points for argument on the part of the plaintiffs. The plaintiffs, upon the argument of this special case, will contend, That the water rates payable by the defendant to the plaintiffs, in respect of the water supplied by them to the several dwelling houses or tenements specified in the schedule A to the said case, should be calculated upon the full rents or sums at which such dwelling houses or tenements were respectively let, and for which the defendant, as landlord, was legally entitled to distrain, without making any deductions therefrom for poors' rates, district rates, and water rates, or any of them, whether such poors' rates, district rates, and water rates, or any of them, were respectively allowed or paid by the defendant, by virtue of statutory obligations in that behalf, or by reason of the terms (voluntarily agreed to between the defendant and his tenants) on which the respective dwelling houses or tenements were let by him.

Points for argument on the part of the defendant:—First, that the word "rent" in the 79th section of the Sheffield Water Works Act of 1853 is synonymous with the words "annual value" in the Water Works Clauses Act 1847; secondly, that the word "rent" in the said Act of 1853 means the rent that might reasonably be expected to be obtained for the dwelling-house free from all usual tenants' rates and taxes; thirdly, that the poor rates, district rates, and water rates mentioned in the special case are usual tenants' rates; fourthly, that the word "rent" in the said Act of 1853 cannot mean the rent actually paid, because such rent is the criterion of the actual value of the houses, and because such a construction would produce inequality of rating.

In addition to the sections of the Sheffield Waterworks Act of 1853, which are set out in the case, the following sections of the several after-mentioned Acts of Parliament were referred to in the case, the arguments, and the judgment of the court, as having a material bearing upon the question at issue:—

The Sheffield Water Works Act 1830 (11 Geo. 4, c. lv., local and personal, repealed by the subsequent Act of 1853), enacted:

Sect. 93. That the company should furnish a supply of water to every inhabitant of a dwelling house at the several rates per annum respectively, *according to the rent* of the dwelling house supplied, according to the scale in the said section mentioned; and it further enacted that such rate should be payable *according to the actual amount of the rent*, where the same can be ascertained; and where the same cannot be ascertained, according to such rent as such inhabitant shall be assessed at for the house tax.

The Inhabited House Duty Act (48 Geo. 3, c. 55) charges the tax upon houses, in schedule B, as follows:

For every such inhabited house which, with the household and other offices, &c., therewith occupied and charged, are or shall *be worth* the rent hereinafter mentioned by the year, there shall be charged the yearly sums following, *videlicit*.

The Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) enacts:

Sect. 68 (with respect to the payment and recovery of the water rates) that "the water rates, except as hereinafter and in the special Act mentioned, shall be paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the *annual value* of the tenement supplied with water; and if any dispute arise as to such value, the same shall be determined by two justices."

The Parochial Assessments Act (6 & 7 Will. 4, c. 96) enacts:

Sect. 1. That from and after such period, not being earlier than the 21st March next after the passing of this Act (Aug. 1836), as the Poor Law Commissioners shall by any order under their seal of office direct, no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of force, which shall not be made upon an estimate of the net *annual value* of the several hereditaments rated thereunto; that is to say, of the *rent* at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

The Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) enacts:

Sect. 1. The occupier of any rateable hereditament let to him for a term not exceeding three months shall be entitled to deduct the amount paid by him in respect of any poor rate assessed upon such hereditament from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate so paid.

Sect. 4 enables the vestry of any parish to make the payment of the poor rates obligatory on the *owner*, instead of the occupier, in cases where the rateable value of the hereditament (except in London, Liverpool, Manchester, or Birmingham) does not exceed 8*l.*

The Local Government Act 1858 (21 & 22 Vict. c. 98) enacts:

Sect. 55. That the general district rates shall be made and levied upon the occupiers of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net *annual value* of such property, ascertained by the rate (if any) for the relief of the poor made next before the making of the assessments under this Act, subject to the following exceptions, regulations, and conditions, namely,

The *owner*, instead of the occupier, may, at the option of the landlord, be rated in cases where the rateable value of any premises liable to assessment under the Act does not exceed the sum of 10*l.*; or

Where any premises liable to an assessment are let to weekly or monthly tenants; or,

Where any premises so liable as aforesaid are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly; subject to this proviso, that in cases where the owner is rated instead of the occupier he shall be assessed upon such reduced estimate as the local board deem reasonable of the net *annual value*, not being less than two-thirds, nor more than four-fifths of such *annual value*.

The Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) enacts:

Sect. 72. The *owners* of all dwelling-houses or parts of dwelling-houses occupied as separate tenements, the *annual value* of which houses or tenements *shall not exceed the sum of* 10*l.*, shall be liable to the payment of the rates instead of the occupier; and the powers and provisions herein or in the special Act contained for the recovery of rates from occupiers, shall be construed to apply to the *owners* of such houses and tenements. . . .

Field, Q.C. (with him were *Kemplay*, Q.C. and *Barker*) for the plaintiffs, contended that the plaintiffs were entitled to judgment, and to recover the full amount claimed by them in the action for

water rates supplied to the defendant's dwelling-houses. By sect. 79 of the company's Special Act of 1853, such rates were chargeable in respect of the water supplied by the company to dwelling houses within the limits of their Act, upon the full or actual rent or sum at which such dwelling houses were let, and not a word was there said about any deduction or abatement being made from such rent or sum before charging or assessing the water rate thereon. Their original Act of 1830 empowered them to charge the rates *according to the rent* of the dwelling house, and it was to be payable "accordingly to the *actual amount of the rent paid.*" The Waterworks Clauses Act 1849 (10 & 11 Vict. c. 17), s. 68, provides that the water rates shall be payable "according to the *annual value*" of the hereditament supplied with the water. The terms "*annual value*" and "*rent*" in these Acts respectively mean the same thing, namely, the sum actually paid for rent, the amount for which the landlord could distrain. *That* is to be the guide and the criterion for charging the water rate, and any other mode would be inconvenient, uncertain, complicated, and difficult to be ascertained, and unequal in its imposition. The lettable value of a house is increased by this water supply, and a larger rent is consequently obtainable. It is as though a well had been dug on the premises, the benefit arising from which would have to be calculated in arriving at an estimate of the renting value of the premises. The case of *Rook* v. *The Mayor, &c. of Liverpool* (7 C. B., N. S., 240), is a decisive authority in favour of the plaintiffs and of their construction of the section of the Act in question. He cited also, as authorities in support of the view contended for on the part of the plaintiffs:

Rex v. *The Inhabitants of St. Paul, Deptford*, 13 East, 320;
Rex v. *Inhabitants of Framlingham*, Burr. Sett. Cas. 748;
Rex v. *The Inhabitants of Thurmaston, &c.*, 1 B. & Ad. 731;
Elstone v. *Rose*, 19 L. T. Rep. N. S. 280; L. Rep. 4 Q. B. 4; 38 L. J. 6, Q. B.;
Reg. v. *The Overseers of Bilston*, L. Rep. 1 Q. B. 18; 35 L. J. 73, M. C.;

and referred to the Inhabited House Tax Act (48 Geo. 3, c. 55), sched. B; the Income Tax Act (5 & 6 Vict. c. 35), sched. A, defining the meaning of *annual value*, and the Poor Rate Assessment, &c. Act 1869 (32 & 33 Vict. c. 41), s. 1.

Manisty, Q.C. (with him was *Cave*) for the defendants, *contra*.—The construction for which the plaintiffs contend cannot be correct, and would lead, if it were to be adopted, to obvious absurdity, inconsistency, and injustice in many cases. If the word "rent" in the section in question is to be construed as necessarily meaning the sum actually paid in all cases as rent, and such sum is to be the guide in charging the water rate, how is the test or criterion to be applied in cases where a furnished house is rented, or where a house is let to a son or other relative, or to an employer's servant at a lower or even a nominal rent, or where a house is occupied by the owner, or where land is let on a building lease at a ground rent? These illustrations show that "rent" in sect. 79 cannot mean the rent *actually paid*, for that forms no criterion of the true value of the premises, and would lead to unequal rating; but it means the rent which may reasonably be expected to be obtained for the particular dwelling house, free from all usual tenant's rates and taxes, such as poor-rates, district rates, and water rates. The case of *Rook* v. *The Mayor of Liverpool* does not apply here, for the decision there was founded on a special agreement between the parties. The liability of the landlord to pay rates in certain cases has been imposed by Acts of Parliament passed subsequently to the company's Act of 1853.

Kemplay, Q.C. replied.

Cur. adv. vult.

26*th June*.—The following judgments were now delivered:—

BRAMWELL B.—This was an action by the plaintiffs for the recovery of a water rate or rent from the defendant, who was the owner of many small houses in Sheffield; and the question was, whether the plaintiffs were entitled to charge him according to what is called, and what in one sense is, the rent paid; that is, the sum paid by the tenant to the landlord for the right to occupy the premises, without deduction; or whether the landlord paying the water rate or rent, was entitled to deduct from the so-called rent of the premises, the poor rate, district rate, and the water rate itself. On the part of the plaintiffs, it was said that the defendant had no right to deduct these items, or any of them; and on the part of the defendant it was contended that he had the right to deduct all of them. Now, what the plaintiffs strongly relied upon was, the language of sect. 79 of their private Act; that is to say, that the company are required to furnish a sufficient supply of water to every inhabitant and occupier of a private dwelling-house, or part of a dwelling-house, at the following rate per annum: that is to say, where the rent of such dwelling-house, or part of a dwelling-house, shall not amount to 7*l.* per annum; and then, where such rent shall amount to 7*l.*, and then going on to various amounts. And sect 80 has these words: "in cases where the landlord, or owner of a number of houses let at rents not exceeding 7*l.* a year," and so on. These are the words on which the plaintiffs mainly relied, and they contended that those words showed that what was commonly called the rent, that is to say, that sum which the occupier paid to the landlord for the right to occupy the premises, was the sum upon which the water rate was to be calculated according to this Act of Parliament, and that no mention was made of any abatement from it. The consequence was, that all that had to be done, was to look at what the occupier paid to his landlord for the right to occupy the premises; and it was said that this was a convenient way of ascertaining the amount to be paid, and that if a discussion was once gotten into as to what the true rent was, it would be a thing almost impossible to settle. For instance, a landlord might say, "Why, I do not receive as much rent in reality for the use of these premises as my neighbour does for similar premises, for mine are dilapidated, and a large sum of that which I receive goes to keep them in repair." In answer to that argument, it was said that one cannot always look to the rent, for the reasons which I will presently mention. The plaintiffs said that the rent must be looked at when it can be, and that, when it cannot, another criterion need be taken to see what the rent will be. The plaintiffs further argued that, in truth, it might be said that the value of the premises for occupation was the rent, notwithstanding these deductions; because, if the landlord had to pay them

instead of the tenant, the premises would become of so much greater value to occupy. It was also urged on the part of the plaintiffs, that with respect to this very water rate, for example, it was as though the landlord had dug a well, or laid on a conduit from a river, or what not, which had made the premises all the more valuable to the occupier; at least, that is what I understand to be the nature of the argument, and no doubt it had some weight, and as such was entitled to consideration. On the other hand, the defendant said that it was impossible that the word "rent" could be looked at as having the signification and operation for which the plaintiffs contended. The defendant called attention to this, that the rent was always spoken of as a rent that did not amount to 7*l. per annum;* so that, if one looked at it literally, in cases where there was no letting at a rent *per annum* at all, but where there was only a letting, say from week to week, or month to month, that was not provided for. Then the defendant further contended that there were cases where the rent could not be looked at; for instance, there were cases where a man occupied his own house; and again, there were cases where a man occupied a furnished house, and paid a gross or lump sum for the occupation of the house and use of the furniture; and again, there were cases where a man might occupy a house for which he was only paying what is commonly called a ground rent, that is to say, where he had taken the land and built a house upon it, and was paying rent for that. Therefore the defendant argued, with real force, that it was impossible that the word rent could be looked at as having that effect and force which the plaintiffs desired to attribute to it. Then, as to the argument that it would lead to difficulties if these deductions were once to be admitted, the defendant met that argument with this answer: he said, it is not so at all; because if, instead of the word "rent," the words "annual value" had been used, all these difficulties would have existed, and yet nobody supposes that they would have been insuperable; therefore, what is to be done in all cases, is to ascertain, if the word "rent" is used, what is the annual value, or what is the real rent of the premises, as distinguished from any adventitious advantages which the premises may chance to enjoy. I am not myself going to attempt to give a definition of "rent," either to satisfy a political economist, or to meet all possible cases in which one might require to know what the meaning of the word was. Everybody understands pretty well what it is. It is that sum which the tenant pays to the landlord for the right to occupy the premises in a normal state, with nothing but what may be called their freehold advantages, and not including any such as I have before called adventitious or abnormal advantages, such as that of having the water rates or poor rates or district rates paid for him. Therefore, the defendant said there was no difficulty in construing the Act of Parliament as he desired it to be construed, or in supposing that the Act of Parliament meant what he, the defendant, contended that it did mean. Well, then came this observation on the part of the defendant, that at the time when this water company's Act of Parliament passed, they would have a right to charge upon the then rents of the houses at the outside. There does appear to be a possibility, under Sturges Bourne's Act, that the houses or some of them might have been made liable to a rate under that Act, but it has never been put in force. Saving that exception, at the time when the water company's Act passed, the tenant paid all the tenant's rates. The obvious consequence of putting them on the landlord is to raise the rent—to raise what is called the rent; to raise the sum which the tenant will pay for the occupation. It is perfectly manifest that, if a man gets a house of which he has not to pay the rates which he would have to pay if he accepted the next house of a similar value, he would pay more for the former house than he would for that of which he would have to pay the rates; and, therefore, the argument on the part of the defendant was, that if the plaintiffs are right in their construction, the result of putting on the landlord the district rate, the poor rate, and the water rate is to increase the nominal rent paid to the landlord, and consequently to increase the sum at which the occupier of the premises may be charged for the water rate; and, therefore that, in effect, these Acts of Parliament, passed with a wholly different object, would have the effect of adding perhaps ten per cent. to the water rates or rents of the people of Sheffield. Certainly, that was a very strong observation. And it was also pointed out that certain ridiculous and impossible consequences would follow; for instance, there might be two houses of precisely equal value, of both of which the same man is the owner, and he occupies one of them, which is worth 9*l.*; and he lets the other of them and has to pay the district rate, the water rate, and the poor rate upon it, and therefore he lets it for upwards of 10*l.* a year. The result will be that, in respect of the house which he himself occupies (I am not now dealing with the particular figures, but merely giving an illustration), he would be liable to be charged with one rate for his water, and in respect of the neighbouring house, which his tenant occupied, he would be liable to be charged with another rate for the water supplied to his tenant. Now, that cannot in reason be, unless there is some positive necessity for it, and extremely plain words to that effect in the Act of Parliament. Another thing, as was also shown, would follow; I may take the very figures I have mentioned. As soon as the landlord has to pay the district rate and the poor rate and the water rate upon his house, the rent becomes upwards of 10*l.* a year, and then he is not the man to be charged with the rates, because it is only when the rent is 10*l.* a year that the clause applies. When I say 10*l.*, it may be that the illustration ought to be limited to 7*l.* I am not going into any entanglements of that description; it is not necessary for the purpose which I have in hand. But taking 10*l.* or 7*l.* to be the criterion, he will, when he pays the district rate, the water rate, and the poor rate for his house, raise the rent above the statutory amount, and the consequence will be that he will not be under an obligation to pay; whereas, as soon as his tenant pays it, the rent will go down below the statutory amount, and then the landlord will be under an obligation to pay it. The consequence would be that there would be certain houses which it would be impossible to say were within the Act of Parliament so as that the landlord must pay the rate or that the tenant must pay the rate; and, indeed, that is true, I think, of the other rates, the district and the poor rates. Well, that seems to be an absurdity. Then, as I said before, the defendant says that this really is no part of the rent, if we call it rent; it is no part of the annual value

of the premises. It is of no use to liken it to the case of a well that has been dug, or of a conduit that has been brought from the stream, which would have become part of the freehold, and might be taken into account in estimating the value of the premises. This is not so. It is something which is enjoyed in conjunction with the freehold and its advantages, and it is no more a part of the freehold than gas supplied for the purpose of lighting, or, what it is perfectly possible might be had, warm air; as for instance, suppose a row of houses next to a factory, and the owner of the houses to be the owner of the factory, and that he could conveniently warm all the houses with hot air from the factory, and so save his tenants the expense of coals to a considerable extent, for which he might charge them an additional rent; or it might be, as is not uncommon in manufacturing districts, that steam power might be laid on. Let us take all those cases. It would be unreasonable to say that they contributed to the rent of the houses, although, as between landlord and tenant, they might conveniently use the word "rent," and they might agree that it should be distrained for, and, in point of law, it might all issue out of the realty. But it is impossible to suppose, under these circumstances, for the purposes of this Act of Parliament of enabling the water company to charge, that the sum so payable would be rent. This was the argument on the part of the defendant, and I own that it prevailed with me. I cannot think that there is much difficulty in the case. No doubt the word "rent" is used in the Act of Parliament, but it is spoken of as a yearly rent, which would exclude probably the most numerous class of cases where there is no yearly rent at all. It means value. It must mean value for the other reasons that are urged, namely, that there are some houses without any rent at all. It cannot be said that this is a part of that for which a tenant pays under the name of rent or yearly value as in the Act of Parliament, and the absurd consequences that would result from the plaintiffs' being in the right in this case show that they cannot be so, and consequently that our judgment should be for the defendant. I am not going into the authorities, because I know that my brother Cleasby has done so. The only case on which I will make any observation is that of *Rook* v. *The Mayor, &c., of Liverpool* (*sup.*), which certainly to my mind was decided by the court on the ground that the parties had come to an agreement. There appears to have been, under the Act of Parliament, a sort of right to come to an agreement; but in point of fact they had come to one, and had agreed that the particular sum there mentioned should be the sum upon which the water rate should be fixed. I have thus expressed my views in order that the parties may see that my brother Cleasby and I have not merely adopted the one of us the opinion of the other; but I have my brother Cleasby's written judgment here, which I will read immediately, having only one more observation of my own to make. I have delivered a separate judgment in this case partly because I might say something which perhaps might not be contained in my brother Cleasby's judgment, and partly for the purpose of its being seen that we have attended to the case, although I am quite aware that, from the amount in dispute and the importance of the question, let the judgments be on which side they may, and let the arguments used in them be what they may, the probability is that the present are very much *pro formâ* judgments, and that our delivering them is merely for the assistance of the parties in getting to the next stage in which the case will make its appearance.

The learned Baron then proceeded to read the following written judgment of

CLEASBY, B.—In this case the question for our consideration is, what is the proper meaning to be given to the word "rent" in the 79th section of the Sheffield Water Works Act 1853. According to that section, houses are to pay water rates upon a different scale, according to the rents of the houses; not in exact proportion to the rents, but going by steps. For example, if the rent shall not amount to 7*l.* per annum, then at a rate for the whole year not exceeding 6*l.* per cent. per annum on such rents; but not in any such case to exceed the sum of 7*s.* 2*d.* per annum; if the rent exceeds 7*l.*, but not 8*l.*, then at a rate not exceeding 8*s.* per annum, and so on upon a varying scale; and if the rent amounts to 100*l.* per annum, the rate is not to exceed 3*l.* per cent. upon such rent. By "The Water Works Clauses Act 1847" (10 & 11 Vict. c. 17), s. 68, water rates are to be payable according to the annual *value* of the premises, and this Act is only incorporated with the Sheffield Act where the provisions of the latter do not vary the former; and as the standard of rating is different, the 68th section of the general Act is not so entirely applicable as to justify us in saying that the effect of the two Acts is, that the "annual value" mentioned in the 68th section of the general Act, and the "rent" mentioned in the 74th section of the special Act must mean the same thing. It should be noticed that, in the earlier Sheffield Water Works Act (11 Geo. 4, c. lv.), s. 93 the water rates were payable according to the *rent*, taken by certain steps in a similar manner, though not exactly the same, as in the present Act. But that Act is repealed, and is only adverted to on account of the general provision in sect. 93, "that the rate shall be payable according to the actual amount of the *rent*, where the same can be ascertained; and where the same cannot be ascertained, then, according to such rent as such inhabitant shall be assessed at for the house tax." Now, when we refer to the Act for assessing the house tax (48 Geo. 3, c. 55), and to the schedule (B) thereto, we find that the assessment is at certain rates where the houses shall be *worth* the rents after mentioned, and then follow the scale of rents, and the assessment at so much in the pound. This, though not forming part of the Act in question here, is well worthy of notice, as showing the use of the word "rent," as signifying the rent which a house is *worth*, which is, in other words, the yearly worth or value. For, although the actual rent is to be the guide, when it can be ascertained, this must mean the actual rent when it represents the value, and not where, from other conditions, under which it is paid as rent, it is no criterion of value at all. And the same reasoning, we think, applies to the Act in question. The word "rent" cannot signify, strictly, the rent actually or accidentally paid. In a row of houses, all of equal value, one might be let at a nominal rent from love and affection; another might be let at a greatly reduced rent to a servant in the employ of the landlord; another might yield a small rent because the tenant had repaired the

house himself, or paid a premium; and no one would contend that, in any such cases, the *actual* rent paid would be the criterion. It would not be the criterion in any case in which it does not form a means of comparison with other houses, as regards their *worth*. In general the rent paid is what the house is worth, and is the real criterion of value, as distinguished from estimates. It makes a fact the test, which is certain, and excludes partiality. Having arrived at the conclusion that the *actual* rent is not necessarily the "rent" referred to in the 79th section of the Sheffield Water Works Act of 1853, but the proper rent for the houses which would, in general, correspond with the actual rent of small houses let at weekly rents, it follows, as we think, that the proper rent must be ascertained by some regular and fixed standard, and not by a standard depending upon whether the house is let or occupied by the owner, or let for more or less than three months, or for a greater or less value than a particular sum, or upon the application of certain Acts of Parliament to the property, or upon the particular arrangement made between the landlord and his tenants. Now, upon the proper construction of the 79th section, standing by itself, supposing no subsequent Act of Parliament on the subject of rating to be applied to the premises, the rent paid by an ordinary tenant, who himself paid all the rates and charges properly borne by occupiers, would clearly satisfy the word "rent." It may appear that this would be so only as regards houses above the annual value of 10*l.*, because, as regards houses below that value, by the 72nd section of the general Act the owners of such houses are liable to the water rate instead of the occupier, so as to make the water rate necessarily, as regards such houses, part of the rent, but this is an apparent objection only. It would be an objection if the word "rent" in the clause in question must signify the rent which the tenant pays; whereas the more reasonable meaning is what rent the premises are *worth* as "rent" under ordinary conditions. The word "rent" may, we think, be read to mean what the landlord gets as "rent," under the usual conditions, though technically this is not its meaning; and, if the landlord is obliged to pay the water rate, all that he gets as *rent*, and all that he ought to have taxed as *rent*, is the whole payment after deducting what he is so obliged to pay. The same reason applies with equal force to the payment of poor rates and district rates. We thus hold the word "rent" in the 79th section of the Act in question to mean the proper rent to a tenant paying the rates and charges regularly paid by the tenant, of which the actual rent, where the tenant does pay those rates and charges is, in general, the proper criterion; and this is the same thing as the yearly worth or annual value. And by so holding, we escape from the inconsistency of rating the premises upon a different standard, according as the value of the premises makes the actual payment of the rates fall upon the tenant or the landlord. The words "rent" and "annual value" are often used indiscriminately, and we think that they are done so in the 68th section of the general Act, and the 79th section of the special Act. As another instance, although it is not allowed to refer to the marginal reference in construing the clause in an Act of Parliament, yet we may do so in considering the general sense in which words are used. The 72nd section of The Waterworks Clauses Act 1847, makes the rate payable by the landlord when the *annual value* of the premises does not exceed 10*l.*; and the marginal note is "owners of houses not exceeding 10*l.* *rent* to be liable to the rates." We have referred to the various authorities cited in the course of the argument. We do not think that the settlement cases have any real bearing upon a case like the present, where we are considering a system of rating houses. But it may be noticed that it would appear that the case of *Rex* v. *The Inhabitants of St. Paul's, Deptford*, in 13 East, 320, was decided because the court felt bound by a previous decision in the case of *Reg.* v. *Inhabitants of Framlingham* (Burrow's Settlement Cases, p. 748); and, as regards the case of *Rex.* v. *The Inhabitants of Thurmaston* (1 B. & Ad. 731), the words of the Act of Parliament therein referred to were, as to one of them, that the houses must be *bonâ fide* hired for 10*l.* by the year, and the rent paid for one year, and as to the other of them, that the house must be rented at 10*l.* a year, and the rent actually paid for that term; so that the payment by the tenant of the rent of 10*l.* for one year is the criterion of settlement, a reason which does not apply to the present case at all. The case of *Elstone* v. *Rose* (19 L. T. Rep. N. S. 280; 38 L. J. 6, Q. B.; L. Rep. 4 Q. B. 4) raised a question as to the jurisdiction of the County Court judge, and the grounds of decision there do not at all assist the decision in the present case. In *Reg* v. *The Overseers of Bilston* (L. Rep. 1 Q. B. 18; 35 L. J. 73, M. C.), a poor rate case, it was held that a payment made by the landlord as a water rent ought not, in ascertaining the rateable value of the premises, to be deducted from the amount, 9*l.* 2*s.*, found as a fact by the sessions to be the gross rental, on the ground that it did not come within any of the deductions allowable under the Parochial Assessment Act (6 & 7 Will. 4, c. 96), s. 1. In that case there was nothing in the nature of a water rate, but the water was supplied at the option of the inhabitants, and the agreed rent paid by the landlord or tenant as arranged between them. The court held it to be clear, and could not do otherwise, that the so-called water rent was not a tenant's rate or tax, and that it did not come within the other head of deductions, as an expense necessary to maintain the premises in a state to command the rent, any more than the supplying by agreement of gas instead of candles, or of meat, or any other necessary of life, would have done so. That case, therefore, has no bearing upon the question in the present case, which is, how the compulsory water rate is to be imposed. In the present case, all the deductions claimed are in respect of charges which are the subject of rates, and compulsory so far as the property is concerned. But the case mainly relied on by the plaintiffs was that of *Rook* (app.) v. *The Mayor, &c., of Liverpool* (resp.) (7 C. B., N. S., 240). According to the marginal note that case would be a strong authority in their favour; and, if the question raised in that case and decided had not been complicated by an agreement between the parties, which was relied on in the judgments, and in fact formed the foundation of them, we should have felt bound by the decision upon a question of such a general nature as rating, and have decided accordingly. In that case the water rate was to be upon the annual value of the premises, and there was a power to compound

where the yearly rent or value did not amount to 10*l*. There had been a composition paper by which the appellant *agreed* to compound for the water rates, and in a schedule the *rental* of the two sets of premises was stated to be 4*s*. 6*d*. per week and 3*s*. 6*d*. per week, respectively; and there was a proviso that, in case the rentals were not correctly stated, the corporation might insert the correct rentals and recover the water rates accordingly. It appeared that, in fact, the rentals were sixpence a week more in respect of both sets of premises, the landlord claiming to deduct the sixpence for the rates paid by him. The court held that in that case the appellant must be rated to the full amount; but not, it is submitted, because that would be the correct mode of rating independently of the terms of the composition, but because the appellant had *agreed* to make the *actual rental* the criterion, or rather the corporation had a right to act upon his having so agreed. Erle, C.J., in the course of the argument says (at p. 257 of 7 C. B, N. S.): "You say the written contract between the parties is on the rental and with a view to that alone; and that, for aught that appears, the council would not have entered into it upon any other footing." And the whole of his judgment afterwards given is to the same effect. The conclusion of it is as follows: "My judgment is founded upon the terms of the composition paper which is before us." Mr. Justice Willes says: "It seems to us to have been agreed on both sides that the rent should be taken to represent the value." So that no judgment whatever is given upon the general question of annual value, but only upon the proper construction of the composition paper. There is no such question as that before us now, and therefore that decision does not in any way conflict with the reasons which we have given for the conclusion arrived at in the present case. For the reasons above given we think that in determining the class to which the houses belong, the actual rent paid by the tenant is not to be taken, but the sum which comes into the landlord's pocket as rent, after the deductions for water rates, poor rates, and district rates, whenever he pays them. Our judgment therefore will be for the defendant.

The same question arises in the case of *Bennett* v. *The Sheffield Waterworks Company*, stated by the magistrate. And according to our judgment already given, the decision in that case will be reversed.

Judgment for the defendant.

Attorneys for the plaintiffs, *Pitman* and *Lane*, 27, Nicholas-lane, Lombard-street, E.C., agents for *Blakelock Smith*, Sheffield.

Attorneys for the defendant, *Pattison*, *Wigg*, and *Co.*, 50, Lombard-street, E.C, agents for *Broomhead*, *Wightman* and *Moore*, Sheffield.

COURT OF APPEAL IN CHANCERY.

Reported by R. STEWART ROCHE and H. PRAT, Esqrs., Barristers-at-Law.

Wednesday, June 19, 1872.

(Before the LORDS JUSTICES.)

PRESTON v. THE CORPORATION OF GREAT YARMOUTH.

Corporation—Mortgage of rates—Local Act—Provision for repayment by ballot—Right of mortgagee to repayment of principal—Account—Receiver.

The corporation of a borough were, by Act of Parliament, authorised to raise a certain sum of money for local improvements by mortgage of the general district rates. In the form of mortgage prescribed by the Act, no time was specified for the repayment of the money, and the only mode of repayment mentioned in the Act was that the Corporation should yearly and every year pay off 100l., at the least, of the moneys borrowed under the Act, and it was provided that the mortgagees to be paid off should be ascertained by ballot.

On a bill by one of the mortgagees for payment of the principal moneys owing to him, and for the appointment of a receiver:

Held (*affirming the decision of Bacon, V.C.*), *that the mortgagee was not entitled to be paid the principal moneys owing to him, except by the means and in the manner provided by the Act, nor to have a receiver of the district rates appointed by the court.*

THIS was an appeal from a decision of Bacon, V.C.

The hearing before the Vice-Chancellor is reported in 26 L. T. Rep. N. S. 235, where the facts of the case are fully stated.

The Vice-Chancellor having dismissed the plaintiff's bill with costs, the plaintiff appealed.

Eddis, Q.C. and *W. Pearson*, for the appellant, contended that he was entitled under the Act to have his mortgage paid off after six months' notice, and as the corporation had, after such notice, failed to repay him his principal, he was entitled to have a receiver appointed of the rates: (*Hopkins* v. *The Worcester and Birmingham Canal Proprietors*, L. Rep. 6 Eq. 437.) If the contention of the corporation that they were only bound to pay off 100*l*. in each year were correct, it would take them 200 years to pay off the 20,000*l*. which they had borrowed; and the rights of the mortgagees could not be prejudiced in this way for the benefit of the ratepayers. They also cited

Lord Crewe v. *Edelstone*, 1 De G. & J. 93;
De Winton v. *The Mayor and Corporation of Brecon*, 33 L. T. Rep. 296; 26 Beav. 533;
Postlethwaite v. *The Maryport Harbour Trustees*, 20 L. T. Rep. N. S. 138;
Fripp v. *The Chard Railway Company*, 11 Hare, 241, 259;
Ames v. *The Trustees of the Birkenhead Docks*, 20 Beav. 332;
Public Health Act 1848 (11 & 12 Vict. c. 63), ss. 113, 114;
Local Government Act 1858 (21 & 22 Vict. c. 98), ss. 10, 57.

Without calling upon

Kay, Q.C. and *Lindley*, Q.C., who appeared for the corporation, or

Rodwell, who appeared for a bondholder representing the mortgagees who did not wish to be paid,

Lord Justice JAMES said:—This litigation, in which the plaintiffs, not satisfied with the case being argued and decided in the court below, have occupied the time of this court for some hours, is only explicable by the fact that one of the plaintiffs

appears to be a solicitor. A more idle contention appears to me never to have been raised than whether a person who has lent money to the Corporation of Great Yarmouth, on the security of the rates, is entitled to get his money back by having a receiver appointed of the rates and tolls of the borough of Great Yarmouth, when he might sell his bonds in the market for a price which would no doubt be within a few pounds of their nominal value. The plaintiffs, as representing the other bondholders, raise a great many nice points about this matter, which involves only a few pounds at the utmost, and institute an expensive litigation, the costs of which they may find that they will have to pay personally. In my opinion the litigation is as idle in point of legal contention as it is in substance. I cannot bring myself to doubt at all as to what the meaning of this Act of Parliament is, looking at the whole context of it, and the proper construction to be put upon its provisions with regard to these mortgages. The Commissioners of Great Yarmouth, who are only public functionaries, were authorised to raise money on the rates of the borough for certain public purposes, and were authorised to take the money, not as a loan to themselves, for they were not the debtors, or as money advanced on their own property, for they had no property, but as money lent on the security of tolls to be raised under the Act. The Act having provided that they should take the money in the shape of annuities on lives, or by means of the credit of the Act of Parliament, it contained an express provision how the principal was to be paid off. The provision is this. It was supposed it would take a long time to pay the money off, and the provision was that they were at all events to apply 100*l.* in each year, and if they had more than 100*l.*, they were to apply at least 100*l.* every year in payment of the creditors by ballot. There was a particular machinery provided for the ballot, and notice was to be given to the creditors whose names were drawn, and that was the sole provision made by the Act for the repayment of the principal. This provision is, to my mind, plainly inconsistent with the idea that a creditor whose name was not drawn at the ballot would be entitled immediately to go and demand the whole of his money, which is the contention here. The contention raised by the plaintiffs would amount to this, that although the Corporation were to begin to pay off the money in the way I have mentioned, any of the creditors had power to call on them to repay their principal at once, and in default to come to this court for a receiver. I am of opinion that there has been no default. The interest has been paid regularly. There is no default as to the principal, for the Corporation have continued to pay (at least there is no allegation to the contrary) 100*l.* a year in discharge of the principal. They have done all that the Act of Parliament intended them to do, and there being no default in payment of principal or interest, it appears to me that this court has no jurisdiction or power to interfere with the application of these moneys by the person whom the Act of Parliament has appointed to apply them, namely, the treasurer of the Commissioners of the borough of Great Yarmouth. I am of opinion that the decision of the Vice-Chancellor is perfectly correct, and that it ought to be affirmed with costs.

Lord Justice MELLISH:—I am of the same opinion. *Appeal dismissed with costs.*

Solicitors: *Sharpe, Parkers, Pritchard and Co.*, agents for *J. and C. A. Preston*, Great Yarmouth; *Andrew Storey*, agent for *Charles Driver*, Great Yarmouth; and *F. T. Dubois.*

ROLLS COURT.

Reported by G. WELBY ELSE, Esq., Barrister-at-Law

Monday, June 10, 1872.

CHAMBERLAYNE v. BROCKETT.

Will—Charitable legacy—Legacy to be applied to such charitable purpose as legatee should think fit—Death of legatee in lifetime of testatrix—Lapse—Bequest for building almshouses when site should be given—Perpetuity.

A testatrix bequeathed legacies to several persons, to be applied by each of them to such charitable purposes as each might deem most advisable:

Held, that such legacies lapsed by the death of the legatees in the lifetime of the testatrix.

Testatrix directed that a number of almshouses in different parishes should be erected at the expense of her residuary personal estate, when and as soon as land should at any time after her death be given for that purpose:

Held, void on the ground of remoteness.

SARAH CHAMBERLAYNE, by her will, dated the 13th Jan. 1838, bequeathed to several persons, some of whom died in the lifetime of the testatrix, the sum of 100*l.* each, to be applied by each of them to such charitable purposes as each might deem most advisable, and she directed that out of the residue of her personal estate, when and as soon as land should at any time thereafter be given for the purpose, as thereinafter mentioned, that an almshouse, or almshouses, consisting of ten rooms, with suitable appendages for ten poor persons, should be built in the parish of Southam, in the county of Warwick; also an almshouse, or almshouses, consisting of five rooms, with suitable appendages for five poor persons, in the parish of Long Itchington, in the county of Warwick; also an almshouse, or almshouses, consisting of five rooms, with suitable appendages for five poor persons, in the parish of Okeley, in the county of Essex; and also an almshouse, or almshouses, consisting of six rooms, with suitable appendages for six poor persons, in the hamlet of Bushend, in the parish of Hatfield Broad Oak, in the county of Essex, all to be built in a plain substantial manner, without any expensive ornament whatever.

The questions raised were first whether the legacies of 100*l.* each to such of the legatees as died in the lifetime of the testatrix lapsed; and, secondly, whether the direction for the erection of almshouses failed on the ground of remoteness.

Sir *R. Baggallay*, Q.C. and *Speed* for the plaintiffs.—The legacies to such of the persons as died in the lifetime of the testatrix must be treated as having lapsed. Although the gift for the erection of almshouses is not invalid under the Mortmain Act, yet it is void for remoteness, as no land has been given, and the court will not hold the fund for an indefinite time to see whether land will be given: (*Sinnett* v. *Herbert*, L. Rep. 7 Ch. App. 232; 26 L. T. Rep. N. S. 7.) They also cited:

Philpotts v. *St. George's Hospital*, 6 H. L. Cas. 338;
Henshaw v. *Atkinson*, 3 Mad. 306;
Mather v. *Scott*, 2 Keene, 172;
Re Watmough's Trusts, L. Rep. 6 Eq. 272;
Edwards v. *Hall*, 11 Hare, 1.

Fry, Q.C. and *Cadman Jones* for the defendants in the same interest.

Hemming, for the Attorney-General.—The legacies to such of the persons as have died in the lifetime of the testatrix ought to be applied *cy près* to charitable purposes, on the ground of the general charitable intent; and as regards the bequest for the erection of almshouses, it is not void under the Mortmain Act; and the objection on the ground of remoteness does not apply to a charity. There ought to be an inquiry whether lands will be given for the purpose.

Lord ROMILLY held that the legacies to those persons who had died in the lifetime of the testatrix lapsed, and that the gift for building almshouses was void, not as being within the statute of Mortmain, but because the gift being to a charity to be ascertained, not immediately, nor within any given time, but when and as soon as land should at any time be given for the purpose of almshouses being erected in the parishes mentioned, the testatrix had transgressed the rule against perpetuities, for an indefinite time might elapse before the gift could take effect as a charitable gift.

Solicitors, *Taylor, Hoare*, and *Taylor*; *Raven* and *Bradley*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

May 30 *and June* 6, 1872.

SECOND COURT.

REG. *v.* THE REGISTRAR OF FRIENDLY SOCIETIES.

Trade union—Disruption of society—Mandamus to register—Trade Union Act 1871 (34 *&* 35 *Vict. c.* 31).

The Amalgamated Society of Carpenters and Joiners was a trade union which had deposited its rules under sect. 44 *of* 18 *&* 19 *Vict. c.* 63, *with the Registrar of Friendly Societies, before the passing of the Trades Union Act* 1871. *A disruption of the society took place in May* 1871, *and the society was divided into two sections, one of which consisted of the executive council and some of the members, whilst the other represented the larger number of members and a larger part of the funds; the former continued its place of business in London, the latter set up at Manchester. Applications were made by both sections to be registered in the name of the society under sect.* 6 *of The Trade Union Act* 1871; *but the registrar refused to register either of the sections, on the authority of a regulation made by the Secretary of State under sect.* 13, *forbidding the registration of a trade union under a name identical with that of any other existing trade union, whether registered or not registered. The London section obtained a rule nisi for a mandamus to compel the registrar to register them, contending that this regulation was beyond the powers conferred by the Act, and invalid; and that having complied with the provisions with respect to registry, they were entitled to registration.*

Held, that the dispute between the members of this society was one which ought to be decided by the Court of Chancery, and that this court would not enter into the merits upon a rule for mandamus.

Mac Donald had obtained, on the 29th April, a rule *nisi* calling upon the Registrar of Friendly Societies in England, to show cause why a writ of *mandamus* should not issue, directed to him, commanding him to register the Amalgamated Society of Carpenters and Joiners, meeting at East Temple Chambers, Whitefriars, London, as a trade union, upon the application, dated the 15th April 1872, of T. T. Matthews and others, according to the provisions of the Trade Union Act 1871. Notice of the rule was directed to be given to J. Thompson and others, the representatives of the Manchester portion of what was the same society, a disruption having taken place amongst the members. The registrar had refused applications made by both sections to be registered in the name which had been used by the society when united, for reasons which he stated in writing, as hereinafter appears.

By The Trade Union Act 1871 (34 & 35 Vict. c. 31) s. 6:

Any seven or more members of a trade union may, by subscribing their names to the rules of the union, and otherwise complying with the provisions of this Act with respect to registry, register such trade union under this Act, provided that if any one of the purposes of such trade union be unlawful, such registration shall be void.

By sect. 13:

With respect to the registry, under this Act, of a trade union, and of the rules thereof, the following provisions shall have effect.

1. An application to register the trade union, and printed copies of the rules, together with a list of the titles and names of the officers, shall be sent to the Registrar under this Act.

2. The Registrar, upon being satisfied that the trade union has complied with the regulations respecting registry in force under this Act, shall register such trade union and such rules.

3. No trade union shall be registered under a name identical with that by which any other existing trade union has been registered, or so nearly resembling such name as to be likely to deceive the members or the public.

4. Where a trade union applying to be registered has been in operation more than a year before the date of such application, there shall be delivered to the registrar before the registry thereof a general statement of the receipts, funds, effects, and expenditure of such trade union in the same form, and showing the same particulars as if it were the annual general statement required as hereinafter mentioned to be transmitted annually to the registrar.

5 The registrar upon registering such trade union shall issue a certificate of registry, which certificate, unless proved to have been withdrawn or cancelled, shall be conclusive evidence that the regulations of this Act with respect to registry have been complied with.

6. One of Her Majesty's principal Secretaries of State may from time to time make regulations respecting registry under this Act, and respecting the seal (if any) to be used for the purpose of such registry, and the forms to be used for such registry, and the inspection of documents kept by the registrar under this Act, and respecting the fees, if any, to be paid on registry, not exceeding the fees specified in the second schedule to this Act, and generally for carrying this Act into effect.

By sect. 17,

The registrars of the friendly societies in England, Scotland, and Ireland shall be the registrars under this Act.

Under clause 6 of sect. 13, regulations were made as follows:

Trade Union Act 1871 (34 & 35 Vict. c. 31).

In pursuance of the powers vested in me by the above-mentioned Act, I, the Right Hon. Henry Austin Bruce, one of Her Majesty's principal secretaries of State, make the following regulations:

1. The registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not registered, or so nearly resembling such name as to be likely to deceive the members or the public.

2. Upon an application for the registration of a trade union which is already in operation, the registrar, if he has reason to believe that the applicants have not been duly authorised by such trade union to make the same, may, for the purpose of ascertaining the fact require from the applicants such evidence as may seem to be necessary.

3. Application for registry shall be made in the form subjoined to these regulations.

4. All documents transmitted to the registrar relating to any registered trade union shall be open to inspection of any person on payment of 1*s.*

5. The certificate of registry shall be delivered to the applicant on payment of 1*l.*

(Signed) H. A. BRUCE.

Whitehall, 8th Dec. 1871.

The following was the registrar's refusal to register the applications made in this case:

Trade Union Act 1871.

In the matter of the applications to register the Amalgamated Society of Carpenters and Joiners as a trade union.

An application is before me dated 23rd Dec. 1871, requiring me to register the Amalgamated Society of Carpenters and Joiners as meeting at East Temple Chambers, Whitefriars-street, Fleet-street, London. This application (hereinafter called "the London application") is signed by H. P. Colliver and others, who state they are authorised to make it by a resolution passed by the executive council of the above-named society.

Another application is before me dated 30th Dec. 1871, requiring me to register the Amalgamated Society of Carpenters and Joiners as meeting at 53, Grosvenor-street, Chorlton-on-Medlock, Manchester. This application (hereinafter called "the Manchester application") is signed by John Thompson and six others, who state that they are authorised to make it by a vote of the whole of the members of the society, taken at meetings summoned for the purpose in the month of Sept. 1871, when 3821 votes were recorded in favour of registering the society, 125 members only voting against the proposal to register.

As both applications are to register a trade union under the same name, if one had been complied with the other must have been refused: (34 & 35 Vict. c. 13, s. 13, sub.-sect. 3.)

It appeared from the balance sheets accompanying the respective applications, that both related to one and the same society, whose rules, as the rules of the Amalgamated Society of Carpenters and Joiners, had been deposited with me under sect. 44 of the Friendly Societies Act (18 & 19 Vict. c. 63), previous to the passing of the Trade Union Act 1871.

I therefore served notice on both applicants that on the 15th Jan. 1872, I should be prepared to hear evidence for or against their respective applications.

Though I am authorised, by regulation 2 of the Secretary of State's Regulation of 8th Dec. 1871, to require from the applicants such evidence as may seem to me necessary, no power is given me by the Trade Union Act 1871 to administer an oath, or to compel the production of any evidence; but I was willing and desirous to hear anything that either of the applicants for registration might be disposed voluntarily to lay before me, with the view of ascertaining whether I could satisfy myself as to the right of either party to obtain registration to the exclusion of the other, without requiring that right to be established by litigation; or of ascertaining whether by mutual consent their differences could be arranged, or whether the applicants could be registered under different names.

The London applicants were represented before me by Mr. MacDonald, barrister, instructed by Mr. Howard; the Manchester applicants by Mr. Shaen of the firm of Shaen, Roscoe, and Massey.

Both parties stated that they could not consent to take my decision, if adverse, as binding, and would reserve their rights to compel me, by *mandamus* or otherwise, to register upon their application, if I should refuse to do so.

Mr. Macdonald delivered to me a protest in writing in the following terms:

"Trade Union Act 1871.

"The Amalgamated Society of Carpenters and Joiners. *Take notice*, that on behalf of this trade union, I protest against the proceedings to hear evidence for and against its application to be registered under the Trade Union Act 1871, and that the said hearing is attended by the said union, subject to all the rights reserved by this protest. And further take notice that on behalf of the said union, I hereby intimate that it is advised the regulations of Mr. Secretary Bruce, dated the 8th Dec. 1871, are illegal, and in contravention of the said Act, and that it reserves to itself the right and power, by *mandamus* or otherwise, to compel its registration in terms of the said Act.

"And further take notice that this protest will be used in any legal steps the said union may be advised to take.

"Dated this 15th Jan. 1872.

"(Signed) A. HOWARD,

"37, Queen-street, Cheapside, Solicitor for the Amalgamated Society of Carpenters and Joiners.

"To A. K. Stephenson, Esq.,
Registrar of Friendly Societies."

Subject to this statement and protest, each party tendered evidence which satisfied me that differences had occurred in the society, as it existed under the rules deposited with me, previous to the passing of the Trade Union Act, which differences had led, on the 18th May, 1871, to a division of the society into two sections, which were represented by the applicants before me. It also appeared that the funds of the society in the possession of its various branches, as returned by the applicants in their respective balance sheets, amounted on the 31st Dec. 1870, to £17,568 19*s.* 4*d.* It also appeared that the books of the society, whose rules were, as above stated, deposited with me as registrar of friendly societies, were, and still are, in possession of the London applicants; but it was contended by the Manchester applicants that such possession was illegal.

It appeared, therefore, that the questions at issue were mixed questions of fact and law, depending on the application of the legal construction of the rules as deposited, to disputed facts; and that such questions involve very large interests. I am of opinion, that under the Trades Union Act 1871, the duties of the registrar are ministerial, not judicial; that no power is either expressly or impliedly given to him by the Act to call for evidence either oral or documentary, or to administer an oath; and that the regulations made by the Secretary of State cannot confer on the registrar any power which the Act does not give him.

Though the applicants have voluntarily given me information, they have declined to give me any authority beyond what the Act gives to the registrar.

I express no opinion on the merits of the case of either party; but decline to register the trade union under either application, unless directed by mandamus so to do, or until the decision of a competent court determining the legal status of the applicants to my satisfaction has been obtained by one or other of them.

To facilitate the determination of the question, I hereby refuse to register the Amalgamated Society of Carpenters and Joiners, upon the application of John Thompson and others, dated 30th Dec. 1871.

(Signed) A. K. STEPHENSON,
Registrar.

London, 19th Jan. 1872.

From the time of this refusal, the Manchester section took no further steps for the purpose of obtaining registration; but on the 15th April 1872, a further application for the registration of the society was made on behalf of T. T. Matthews and others, representatives of the London section. This application, concerning which the rule nisi was obtained, produced the following:

Notice of Refusal to Register.

Friendly Societies' Registration Office
28, Abingdon-street, S.W., London,
16th April, 1872.

Trades Union Act, 1871.

The accompanying documents are returned unregistered, for the following reasons:

They are a renewal of the application to register made to me on the 23rd Dec. 1871, which I refused, in writing, on the 19th Jan. 1872, until the decision of a competent court, determining the legal status of the applicants to my satisfaction, had been obtained, either by them or by the other applicants for registering the same trade union.

No such decision having yet been obtained, I hereby again refuse to register the Amalgamated Society of Carpenters and Joiners, on this application;

(Signed) A. K. STEPHENSON,
Registrar.

A. Howard, Esq., Solicitor.

The rule was enlarged last term.

The Registrar of Friendly Societies was not represented by counsel.

H. James, Q.C. and *Besley* now showed cause on behalf of the Manchester applicants.—This is an attempt by the London section to snatch the whole of the funds which belonged to the society when united. The proper court for the decision of this dispute between the two branches is a court of equity. The registrar, at all events, was right in refusing to register either branch whilst the other claimed to be called by the same name, and this court will not in its discretion consider the various claims of a dissolved partnership upon a rule for mandamus under the Trade Union Acts. If it were necessary to enter here into the merits of the dispute, and to consider how far either party was justified by the rules, it would first appear and must be admitted by the other side, that the Manchester section represents the larger part of the branches and the funds, as well as the majority of the members; how far that is to balance the fact that the London section consists of those members who were originally elected by the whole society to be the executive council is a matter solely and entirely for a court of equity. All that the Manchester section now desires is to prevent the registration of the London section in the name claimed by both.

Mac Donald supported the rule.—The only effect of sects. 2 and 3 of the Trade Union Act 1871, are to protect members of a trade union from an indictment for conspiracy, and to prevent the contracts which they enter into from being void. The Act does not bring such a society as this within the cognisance of the Court of Chancery. It does not give a trade union a legal existence, at all events before registration. It has been held that the objects of this very society were partly in restraint of trade, and therefore illegal, viz., in *Farrer* v. *Close* (L. Rep. 4 Q. B. 602, 20 L. T. Rep. N. S. 802), where, although the court was equally divided, the principle of the previous case of *Hornby* v. *Close* (15 L. T. Rep. N. S. 563; L. Rep. 2 Q. B. 153) was affirmed. As no illegal transaction can be brought before a court of equity, the London section cannot establish the rights which the members claim in pursuance of their rules by any other mode than this application. [BLACKBURN, J.—There is nothing to deprive the Court of Chancery of jurisdiction in a dispute of this kind. Even if a judge in equity refused to interfere, upon the authority of those two cases, under the old law, the Act of 1871 is sufficient to bring trades unions within the jurisdiction now.] At all events the London branch has a right, under the rules of the union, and under sect. 6 of the Act, to be registered. The only ground upon which the registrar has refused is that he is prevented by the regulations of the Secretary of State, dated the 8th Dec. 1871. These regulations are far beyond the provisions of the Act, and cannot be binding upon the registrar. [LUSH, J.—The Secretary of State has power to make regulations for the purpose of carrying the Act into effect; and surely these rules are within the meaning of the words of sect. 13, sub-sect. 6.]

BLACKBURN, J.—I have no doubt that this rule should be discharged. It is a great mistake to imagine that societies of this kind are out of the protection and jurisdiction of the courts of equity. If any objection could formerly be raised to an application in Chancery for the settlement of such a dispute as this, the 3rd section of the Trade Union Act 1871, at all events, has now put an end to it. By that section, "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." What the registrar has to do under this Act is to register a trade union, of which seven members have complied with the provisions of the Act with respect to registry. The object of this application to be registered is no doubt to obtain for the applicants the benefits conferred by the 8th section, which vests all the property of such societies in trustees. The effect of registering either of these sections in the name claimed by both, would be to give that section the power to nominate trustees, to whose management the whole of the large sum of money belonging to the society would immediately be subject. The registrar has considered that he had no power to register either of these sections whilst the other claimed the same name, and that so long as both these branches existed, neither of the two sets of applicants could be said to have complied with the provisions of the Acts. At all events neither set has complied with the second of the regulations issued by the Secretary of State. I cannot see why those regulations are not within the authority given to him by the last clause of the 13th section; but even if not, I should say the registrar, immediately that he found out that the parties who were applying to him were really claiming a large sum of money against each other, was bound to say, "I will not alter the position of these disputants." It is quite clear that we have no power to compel the registrar to do otherwise; but I see no reason why the Court of Chancery should not decide what is right to be done. That is the proper court to which application should first be made. All that we decide now is that the registrar was right in refusing to alter the positions of the parties.

MELLOR, J.—It would not be right to compel the registrar to prefer one branch of this society to the other. A court of equity would have power to deal with this dispute, and when the respective rights of the two sections are settled, there will be no objection to registration. The 2nd and 3rd sections of the Trade Union Act 1871 have removed all the difficulties which previously existed in obtaining such a settlement.

LUSH, J.—I am of the same opinion.

Rule discharged.

Attorney for the London applicants, *A. Howard.*

Attorneys for the Manchester applicants, *Shaen, Roscoe, and Massey.*

Saturday, June 1, 1872.

MILDMAY (app.) v. THE PARISH OF WIMBLEDON (respa.).

Poor-rate—National Rifle Association—Rifle butts—Store shed—Wimbledon and Putney Commons Act 1871 (*34 & 35 Vict. c. ccix.*).

The respondents made two poor rates, one on the 11th Aug. 1871, *the other on 27th March* 1872, *in both of which the National Rifle Association, the appel-*

lants, were assessed for their storehouse, butts, &c., on Wimbledon Common, used by them only during their summer shooting.

The lord of the manor had agreed to let, and the appellants to take, a part of the common, to be occupied by the latter from the 10th July to the 12th Aug. 1871, *with liberty to use and erect butts and temporary buildings, to occupy and drain the part let, and to have the free and sole use of the ground, so far as the lord of the manor could confer it, for the purpose of their meeting. The association, after their meeting, were to fill in all holes and remove all erections made by them.*

By 34 *&* 35 *Vict. c. cciv., which was passed on the 16th Aug.* 1871, *the association are authorised exclusively to occupy and use this part of the common as a rifle ground and place for an encampment, for all purposes of the annual meeting of the association during seventy-seven consecutive days between the 1st May and 31st Aug. every year, and for purposes of rifle shooting and a review during fourteen of those days. They may put up a paling or fence during this period round their ground. They are to pay to the conservators of the common 100l. a year. Certain rifle corps are also authorised to shoot upon the ground at certain times. But nothing in the Act shall give to the association or any corps any right in or easement over any part of the common; and every such body shall be deemed to be by virtue of this Act merely in the enjoyment of a statutory privilege, subject, and without prejudice, to all rights or easements enjoyed by other persons.*

During the shooting period the association receive payment for the admission of persons to the ground enclosed by the palings, and from the volunteers and others who encamp there.

The butts remain all the year round, and are fenced in. There is a brick store shed, in which materials are generally stored; but during the shooting period it is used as a workshop for the repair of targets, &c.

Held, that the association were liable upon these two rates to assessment for the store shed only, and not for the butts or ground.

On the the 11th Aug. 1871 a poor rate was made for the parish of Wimbledon, in which the appellant was rated, as follows:-

No. of Assessment.	Names of Occupiers.	Name of Owner.	Description of property rated.	Name or situation of property.	Gross estimated rental. £ s. d.	Rateable value. £ s. d.	Rate at 1s. 6d. in the pound.
279	National Rifle Association.	The same	Storehouse, Butts, &c.	Wimbledon Common.	1000 0 0	900 0 0	67 10 0

Upon the 27th March last a further rate was made precisely in a similar form, except that the number of the assessment was 277.

It is admitted that notice of appeal against each of the said rates has been duly given, and that all conditions to the right of appeal have been fulfilled. The following case, in pursuance of the order of Mellor, J., made on the 10th April 1872, has been stated under the provisions of the statute 12 & 13 Vict. c. 45, s. 11. It was agreed that this case should be deemed, if necessary, to have been separately stated in each of the said appeals.

The questions for the opinion of the court are, first, as to the liability of the appellant (subject to the statement hereinafter contained) to be rated to either of the poor rates hereinbefore-mentioned at all; and next, if so, as to the principle on which he should be rated, and the extent of his liability.

The appellant is the secretary of the National Rifle Association. This association was formed in the year 1860, for the purpose of giving permanence to volunteer corps, and to encourage rifle shooting throughout the Queen's dominions. The association is not incorporated. It does not possess a charter, and is entirely a voluntary association. H.R.H. The Prince of Wales is the patron, and H.R.H. The Duke of Cambridge acts as president. The affairs of the association are managed by a council or committee of noblemen and gentlemen, for whom the appellant acts as permanent secretary. The privileges of members, and the objects and rules of the association, are stated and are contained in a certain book, which may be taken as part of the case. The funds out of which the expenses are defrayed are derived from donations, subscriptions of life members, the entrance fees charged for admission to the part of Wimbledon-common temporarily inclosed by the association for the purpose of their annual meetings, and the entrance fees charged to competitors at such meetings. Up to the year 1871 there had been 439 life members, each of whom had paid 10*l.* 10*s.*, and thirty-two life members, each of whom had paid 5*l.* 5*s.* In the year 1871 there were 855 annual members, each of whom had paid not less than 1*l.* 17*s.*, and 1701 members, being volunteers, each of whom had paid not less than 10*s.* The annual income from members, exclusive of life members, for the twelve years ending 1871, has been on the average 1832*l.*

Wimbledon-common is a large tract of uninclosed land, partly in the parish of Wimbledon, partly in the parish of Wandsworth, and partly in the parish of Putney, and all lying within the manor of Wimbledon. The soil of the said common was, at the time when the said rate was granted, vested in Lord Spencer, as lord of the manor of Wimbledon, subject to the rights of the freehold and copyhold tenants of the said manor over the same.

Prior to the year 1871 the council of the association, by the permission of Lord Spencer, formed out of the soil of the common numerous butts for the purpose of rifle shooting at their annual meeting. The permission was given in writing, but not under seal, and was in the form set out in the case, or in a somewhat similar form. These butts were made of earth and turves dug from the common and heaped together in masses of certain dimensions. The general position of such butts, which are fenced in, was shown on a plan which accompanies this case. When the shooting was about to take place the targets were placed in front of these butts. When not in use the targets were removed, but the butts remained standing on the common, fenced in as aforesaid. In the year 1870, or in the early part of 1871, two of the butts were removed by persons acting under the directions of the council, and in lieu thereof one butt was erected in the rear, which butt was described on the said plan as "Long

Range Butt," at a cost of 770*l.* or thereabouts. A store shed has been formed at the back of this butt, which store shed is formed of brick, with a corrugated iron roof. This store shed is 208 feet in length and twenty-six feet in width, and the cost of erection was about 400*l.* It is used and intended to be used for storage of materials only, except during the annual meeting, when it is intended to be used as a workshop for repairs to targets, &c. The store shed was not used for any purpose until after the close of the last annual meeting, the same not having been completed fit for use.

In the month of May 1871, under the direction of the council, certain persons employed by them began to erect on the common temporary refreshment buildings and sheds, required for the purpose of the meeting to be held in the month of July. About a fortnight previous to the meeting a portion of Wimbledon common, partly situate in the parish of Wimbledon and partly in an adjoining parish, was inclosed, by persons acting under the direction of the council, with a close wooden hoarding. The meeting commenced on the 10th July, and terminated with the review held by H.R.H. the Duke of Cambridge on the 22nd July. During the meeting, except the intervening Sunday, an entrance fee of 1*s.* was charged for admission within the inclosure to all pedestrians not having passes, a fee of 2*s.* 6*d.* was charged for horses, and a fee varying from 5*s.* to 20*s.* for carriages. On the review day an additional fee was charged for entrance to a temporary stand erected within the inclosure. A public footpath and bridle path run across the inclosure. Within the hoarding the rifle shooting took place, and a camp of military tents was formed, in which certain members of the volunteer force, some of the competitors for the prizes, and a company o the Royal engineers and men from other regiments of the Queen's army, who assisted in the proceedings, lived during the meeting. Each volunteer using a tent paid 1*s.* 2*d.* per day for the same, except the officers of volunteer regiments, each o whom paid 25*s.* for the use of a tent during the meeting. The tents were supplied from Government stores, and the payments made for the use of them by volunteers are estimated to cover only the expense incurred by the council in procuring and erecting the tents, and in supplying water and straw for use during the meeting. The hoarding was removed within a few days after the meeting, and all the temporary buildings, including the refreshment buildings, were removed by the 25th Aug., or thereabouts. The materials of the refreshment buildings and other temporary buildings were removed to the said storehouse for the purpose of being used at subsequent meetings. All the acts aforesaid were done by the council under the permission of Lord Spencer, and no payment in the nature of rent was made by them to Lord Spencer for such permission.

On the 16th Aug. 1871 the Royal assent was given to an Act of Parliament entitled "The Wimbledon and Putney Commons Act 1871," whereby the right and interest of Lord Spencer in Wimbledon Common aforesaid were vested in certain persons named in the said Act, and therein called Conservators, but subject to certain rights and privileges reserved to the said National Rifle Association, for the purpose of enabling the said association to hold meetings for rifle shooting on Wimbledon Common. A copy of this Act was to be taken as part of this case.

Up to the time of the making of the rate on the 27th March, the Common has remained in its ordinary condition of an open common, subject to the provisions of the said Act. The conservators have not interfered with the use of the storehouse, but the said materials and things still remained thereon at the time of the making of the last-mentioned rate.

It is agreed that no objection of form is to be taken on either side, and for the purposes of this case it is admitted that the appellant is the proper person to be rated, assuming that either he, as such representative of the council of the said association, or the said council, or the members of the said association, or some or one of them, or the Association as a body, is or are liable to be rated.

The questions for the opinion of the court are as follows:—First, is the appellant liable to be rated at all to the poor rates hereinbefore mentioned, or to either of them? secondly, if liable to be rated at all, in respect of what property, and upon what principle?

If the court should be of opinion that he is not liable to be rated at all, then the rate book is to be amended by striking out the assessment of the appellant.

If the court should be of opinion that the appellant is liable to be rated, it is agreed that the amount of the rateable value shall be settled by an arbitrator.

And it is further agreed that judgments in conformity with the decision of the court, and for such costs as the court may adjudge, may be entered in both of the said appeals on motion by either party at the sessions next after such decision.

The following is the agreement alluded to in the case, and stated to be set out in the schedule;

Memorandum of an agreement made this 22nd May 1871, between the Right Honourable John Poynts Earl Spencer, K.G., of the one part, and the Right Honourable Francis Douglas Charteris, commonly called Lord Elcho, and John Sidney North, M.P., of 16, Arlington street, in the county of Middlesex, esquire, two of the members of the council of the National Rifle Association, of the other part. The said Earl Spencer, as lord of the manor of Wimbledon, in the county of Surrey, and so far as he in respect of such seigniory or lordship can or lawfully may, hereby agrees to let, and the said Lord Elcho and John Sidney North, for and on behalf of the National Rifle Association, hereby agree to take all such portion of Wimbledon Common within the said manor as was taken and occupied for the purposes of the said association last year, on the terms and conditions, and for the purpose hereinafter mentioned, and for no other purpose.

1. The part of the common agreed to be let is to be occupied by the National Rifle Association from the 10th July to the 12th August next, and no longer, and is to be used as the shooting ground of the said association during its forthcoming meeting, in the month of July next, and at no other time.

2. The association are to be at liberty to enter on the ground on the 22nd May 1871, for the purpose of preparing it for the use of the members during the meeting in July next. The association are also to be at liberty to use the butts now standing on the ground, and to erect new butts and such temporary buildings as the purposes of their said meeting may require; and they are to remove all such erections at the expiration of the tenancy, if thereunto required, as stipulated in the 9th condition.

3. The association are also to be at liberty, during the period they are hereby empowered to occupy the portion of the common agreed to be let, to do all things needful for draining the same in a proper manner, and also to

use a wooden shed at the back of the Mill stables as or for a storehouse during the meeting, and for no other purpose, and are to remove such wooden shed after the expiration of their meeting if required, according to the terms of the 9th condition; and the drainage works and sheds so authorized to be done and used respectively shall be subject in all respects to the supervision of the lord of the manor, his agents and servants, who shall be at liberty to give any directions respecting the same that to him or them may seem expedient; and the association shall be bound to carry out such directions, and shall not depart therefrom.

4. The association during their occupation under this agreement are, so far as the lord of the manor can confer the power, to have the free and sole use of the ground for the purpose of their meeting, with full power to keep off and remove any intruders, and to allow the erection of tents or booths for the sale of refreshments or otherwise, for the use of the members of the association, their friends, and servants.

5. All claims (if any) for compensation on account of the temporary interruption caused to any right of pasturing on the commons are to be settled and paid by the association to the claimants; and the lord of the manor is to be in no way responsible for the settlement or payment of such claims, or liable on account of the temporary interruption of the right (if any).

6. As regards any paths or ways which may exist across the portion of the common comprised in this agreement, the association undertake to accommodate the public satisfactorily for any interruption of their use of such paths or ways during the existence of this agreement; and as between himself and the association, the lord of the manor is not to be held responsible for the interruption in the use of such paths or ways.

7. The association undertake to indemnify the lord of the manor against all claims, damages, costs, and expenses which he may incur or be put unto in consequence of their occupation of the portion of the common comprised in this agreement.

8. The association undertake that all proper precautions shall be taken by means of signals and otherwise to prevent any accidents arising from the firing or otherwise, and that the proceedings shall be conducted peaceably, and with as little annoyance as possible to the residents in the neighbourhood and the public generally.

9. At the expiration of this agreement the association undertakes peaceably to yield up the portion of the common hereby agreed to be let, and within three weeks from the termination of their meeting to fill in all holes and trenches, so as to render the ground safe for pedestrians and equestrians; and also, if thereunto required by the lord of the manor, to remove all erections, and restore as nearly as may be the face of the common to its original state and condition.

10. In case of breach or default in performance of any one or more of the foregoing conditions on the part of the association, the lord of the manor is to be at full liberty, by notice in writing addressed to the secretary of the association at the offices of the association, to determine this agreement, and thereupon the same shall be at an end, and the association shall immediately yield up possession in the same manner as is provided in the ninth of these conditions, and comply with the other requirements of that condition.

The said Lord Elcho and John Sidney North hereby for themselves, their heirs, executors, and administrators, undertake and agree with the said Earl Spencer that they will be jointly and separately personally responsible for the performance of this agreement, as witness the hands of the parties.

Sects. 40, 41, 44, 45, 46, 47, 51, 56, and 67 of the Wimbledon and Putney Commons Act 1871 (34 & 35 Vict. c. cciv.), bear on the case.

Denman, Q.C. (with him *F. M. White*) for the appellant.—These are separate questions as to the rateability under the agreement and under the Act of Parliament, although the same authorities should be discussed in determining them. In *Reg.* v. *Morrish* (32 L. J. 245, M. C.), the appellant was rated for his occupation of a certain space in the Exhibition building of 1862, under an agreement with the royal commissioners, for the sale of refreshments. He was to fit up this space with counters, and lay on gas and water; he was to be subject to the bye-laws and regulations made by the commissioners for the orderly conduct of the Exhibition and the persons employed therein; all fittings and erections were to become the property of the commissioners upon their erection. The appellant carried out this agreement, and continued to sell refreshments through the whole time the Exhibition was open. The keys of the doors opening from the refreshment rooms into the Exhibition buildings were always kept by the police employed by the commissioners, and the police usually locked the appellant and his servants out every evening, and admitted them again in the morning, but during part of the time the appellant had an entrance from the outside. It was held that he was not liable to be rated to the relief of the poor, inasmuch as he had no exclusive occupation of the space so allotted to him. In *Watkins* v. *The Overseers of Milton-next-Gravesend* (L. Rep. 3 Q. B. 350), it was held that the document under which the appellant was licensed to keep his coal bulk moored in the Thames did not constitute a demise to him, and therefore did not render him liable to be rated for his occupation of the soil of the river. The conservators thereby only granted to the appellant a licence to use the moorings, and the court therefore held that he was not the occupier. *Grant* v. *The Local Board of Oxford* (L. Rep. 4 Q. B. 9), was a similar assessment of the University Boat Club with respect to certain posts in the river and a barge which was moored to them; the court considered there was no proof of occupation as of right, and therefore the club was not liable to be rated. The case of *Reg.* v. *St. Mary Abbot's, Kensington* (12 A. & E. 824) bears some analogy to this, in that a cemetery company was held liable to be rated for the whole of their cemetery, although they had in fact sold in perpetuity the exclusive right of burial in the vaults, catacombs, &c., made by them; had ceased to exercise any act of ownership over them after the sale; and had delivered the keys to the purchasers. Here the lord of the manor, under the agreement, and the conservators under the statute, have given to the association far less rights of occupation than those which the purchasers of the vaults enjoyed. In *Reg.* v. *St. Martin-in-the-Fields* (3 Q. B., 204), Miss Burdett Coutt's box at Drury Lane Theatre was held to be rateable; but that decision depended entirely upon the special words of a local Act, and has no application to this case.

Thesiger for respondents.—The principles to be derived from the authorities, applicable to this particular assessment are,—first, the overseers must rate the persons in occupation of the land, and it matters not how short may be the actual use those persons make of it; secondly, the overseers must rate the occupiers upon the whole annual value, subject to the deductions mentioned in the first section of the Parochial Assessment Act 1836, (6 & 7 Will 4, c. 96); thirdly, the overseers must consider in the value the absence of the occupiers. As to the first rate, the association must be liable under the agreement, which is an absolute demise by Earl Spencer for a certain period of occupation, extending over the 11th Aug. 1871, the date of this rate. The term of the agreement was from the 10th July to the 12th Aug., and it makes no difference that the hoardings were down, and the

place given up before the date of the rate. [LUSH, J.—If this were a demise, it was for the express purpose of the shooting, which terminated, as is found, on the 22nd July. The demise therefore terminated when its object was completed.] The agreement demises the exclusive occupation to the 12th Aug. With regard to the second rate, I cannot contend that the association made any use of the butts at the exact time when the rate was made, but the words of the Act are such as to make the Association's interest in the land a rateable occupation, and that occupation as a matter of fact is secured throughout the year by the fences mentioned in the case. [HANNEN, J.—Mere fences do not reserve occupation exclusively.] The words of the Act are very strong, and the store shed is clearly rateable. [COCKBURN, C.J.—Does not the 67th section shut out your contention? We think the effect of that section is to preclude the occupation of the soil by the association. The store shed is another matter.]

Denman in reply.—The store shed at all events was not used for any purpose until after the close of the last annual meeting, and could not, therefore, be subject to the first rate. [*Theeiger.*—Not so; your contention is that the meeting closed on the 22nd July; it might, therefore, well have been used before 11th August.] The store shed is a mere appendage to the butts.

COCKBURN, C.J.—This occupation of the area is not sufficient, for by sect. 67 the association is not to have any right in, or easement over any part of the common, but is to be deemed simply to be in the enjoyment of a statutory privilege of the nature described in the Act. Inasmuch, however, as the store shed is a building erected and left upon the ground, and occupied by the association, the appellant must be considered as liable to be rated in respect of so much.

LUSH and HANNEN, JJ. concurred.

No order as to costs.

Attorneys for appellant, *Markby, Wylde* and *Burra.*

Attorneys for respondents, *G. C. Sherrard,* for *Bartrop* and *Son,* Kingston.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING, B. A. KINGLAKE, and H. F. POOLEY, Esqrs., Barristers-at-Law.

Saturday, June 8, 1872.

BARRETT (app.) *v.* MARKHAM (resp.).

Friendly society — Treasurer making default — Absence of fraud—Summary remedy—18 *&* 19 *Vict. c.* 63, *s.* 24.

Summary proceedings under sect. 24 of the Friendly Societies Act 1854, *can be taken against an officer of a friendly society for withholding the funds thereof only in cases when such officer has been guilty of fraud in so doing.*

ON appeal from the decision of a metropolitan police magistrate dismissing a summons preferred under sect. 24 of 18 & 19 Vict. c. 63, against the treasurer of a friendly society for withholding its funds, the following case was stated:

The appellant was one of the trustees of a friendly society called "The Prince of Wales Lodge, Order of Ancient Shepherds, Ashton Unity, South London District," and the respondent was, until the 28th Oct. last, the treasurer of that society.

The parties appeared before one of the magistrates of the police courts of the metropolis sitting at the Lambeth Police Court, upon a complaint preferred by the appellant, as such trustee under the Act to Consolidate and Amend the Law Relating to Friendly Societies 1855 (18 & 19 Vict. c. 63) s. 24, in which the respondent was charged, "For that he being an officer of a friendly society, did, having in his possession certain moneys belonging to the said society to the amount of 31*l.* 2*s.* 11½*d.*, unlawfully withhold and misapply the same."

The following facts were proved: That the respondent was duly appointed treasurer of the said society, but had not been required to give the security directed by sect. 21 of the Act. That the moneys which he was charged with withholding and misapplying had been received by him in his character of treasurer for the use of the society; that it was his duty to render quarterly an account of all moneys received and paid by him on account of the society, and to pay over to the trustees on demand the balance due from him on such accounts: that the last account rendered by him was dated the 5th Aug. last, and it appeared therefrom that he was indebted to the society in the sum of 26*l.* 10*s.* 2½*d.* to that date, and from subsequent entries in the treasurer's book further sums making a total sum due by him to the society of 31*l.* 2*s.* 11½*d.*, the amount charged in the complaint.

This sum he was unable to pay, and as he could not give such security for the payment as was satisfactory to the trustees, these proceedings were taken.

There was no charge of fraud or misrepresentation against the respondent in respect of these moneys.

The magistrate held that the inability and consequent refusal of the respondent to pay the balance was not a withholding or misapplying under sect. 24, and for the following reasons.

That although the words in sect. 24 are sufficiently general to include the treasurer, yet having regard to the provisions of sects. 21, 22, and 23, it was not the intention of the statute that a treasurer should be dealt with under sect. 24, unless some fraudulent circumstances accompanied the act with which he is charged, and fraud is not imputed to the respondent.

The sects. 21, 22, and 23, appeared to him to contain all that was thought necessary for the regulation of office of treasurer, his duties and liabilities, and sect. 22 directs the manner in which any balance found due from him to the society shall be recovered, as also the proceeding to be taken in the case of a treasurer who detains property belonging to the society, which in the case of any other person, is provided by sect. 24.

That a treasurer is not bound to account for any specific sum received by him; he may place it in his banker's hands or elsewhere, and may use such particular money as his own without incurring any liability beyond indebtedness, but he is required to render an account of all moneys received and payments made by him, and the balance, if any, due by him on such account becomes a debt due by him to the society.

That this relation of debtor and creditor is shown by sects. 21, 22, and 23, and that upon the

facts proved, a treasurer cannot be said to have withheld or misapplied moneys within the meaning of sect. 24; that the words "withhold" and "misapply" in sect. 24, must apply to some specific moneys which the party holding has no right to use except for some particular purpose, and who misapplies by employing it, though without fraud, in his own business, and withholds it when he refuses to pay, though from inability, to those authorised to receive it.

That where a debt has been created, the refusal —not a refusal to account, for the account has been justly rendered—but to pay, and this from inability, is not a "withholding" within this section, nor the act whereby the inability arises a "misapplying."

That a contrary construction would encourage friendly societies to neglect those precautions which the Act has provided and required to protect their members against defalcations of their treasurers, while at the same time it would render a treasurer liable to be imprisoned for refusing to pay money which he honestly believed not to be due by him to the society.

The question for the opinion of the court is whether the decision of the magistrate was right or wrong.

Oppenheim for the appellant.—The magistrate ought to have convicted. The proceedings were taken under sect. 24 of the Friendly Societies Act 1855 (18 & 19 Vict. c. 63). The appellant was an officer of the society. The question raised is whether an officer of a friendly society who, without fraud, "withholds or misapplies" the funds of the society entrusted to him, can be proceeded against under the 24th section. In *Sinden* v. *Bankes* (30 L. J. 102, Q. B.), Hill, J., an analogous question having arisen, said: "I think, also, that it was intended to give cumulative remedies against treasurers, and not to prevent the society from availing itself of the common law remedy." The fact, then, that the society might have proceeded under the 22nd section, does not preclude them from proceeding under the 24th. The word "withhold" does not necessarily imply fraud. A man withholds money when he is simply unable to pay it, because he has not got it. *Ex parte O'Donnell* (L. Rep. 1 Q. B. 274), does not apply to this case. There, it was the assignee of the officer of the society who had the money, and it was not shown that he had the specific moneys of the society in his hands, and it was for that reason that the Court of Queen's Bench decided that he could not be proceeded against under the 24th section.

J. Thompson for the respondent, was not called upon.

WILLES, J.—The statement in the case that the respondent was not guilty of any fraud in my judgment puts an end to the whole matter. The 23rd section of The Friendly Societies Act gives a civil remedy, and the 24th section, which is a penal one, was intended to meet the case of a default of a criminal character, where the defaulter had been guilty of fraud or imposition. It does not refer to defalcations of so criminal a character that an indictment would lie in respect of them, but to such as are of a criminal nature. That is plain from beginning to end of the section. The words are "withhold or misapply" the funds or "wilfully apply them" to purposes other than those expressed in the rules of the society. These words imply imposition. Penal consequences do not apply in this country in cases where there is no criminal intent. The concluding part of the section shows that it was intended to create an offence, and that, though it is not meant to apply to a case where the society might proceed by indictment, the acts it refers to must be of the same character as a criminal offence.

KEATING, J., concurred.

Judgment for respondent.

Attorney for appellant, *Fullagar*.

Attorney for respondent, *Ody*.

Wednesday, June 19, 1872.

PEGGE v. GUARDIANS OF THE LAMPETER UNION.

Criminal lunatic — Maintenance by guardians — Order of justices—3 & 4 Vict. c. 54, ss. 1 and 2.

The 3 & 4 Vict. c. 54, ss. 1 and 2, enacts that if any person imprisoned in any prison shall appear to be insane, it shall be lawful for one of Her Majesty's principal Secretaries of State to direct such person to be removed to a county lunatic asylum or other proper receptacle for insane persons until such person has become of sound mind, and has been certified to be so by two physicians or surgeons.

Sect. 2 enacts that it shall be lawful for two justices of the peace to inquire into the place of last legal settlement of such insane person, and if it does not appear that he or she is possessed of any property which can be applied to his or her maintenance, they may direct the board of guardians to pay all reasonable charges for the weekly maintenance of such lunatic.

The defendants had paid from the year 1855, *a weekly sum of* 16*s. to the plaintiff for the maintenance of a criminal lunatic.*

On 19*th Oct.* 1869, *the defendants wrote to the plaintiff to say that they in future should pay no more than* 11*s.* 1*d. a week for the care of the lunatic. The plaintiff continued to keep the lunatic, and on the defendants still refusing to pay more than* 11*s.* 1*d. per week, brought his action to recover the difference. There was no evidence to prove that the plaintiff had ever procured a justices' order to be made on the guardians under the 2nd section of 3 & 4 Vict. cap. 54.*

Held that it was competent for the guardians to agree to pay for the maintenance of the lunatic without an order of justices; that as the plaintiff could not get rid of the lunatic without an order of the Secretary of State, the defendants could not determine the contract by a notice refusing to pay; also that the court would infer from the fact of the guardians having paid 16*s. a week for fifteen years, that they had agreed to pay* 16*s. a week as long as the lunatic remained in the asylum.*

THE declaration stated that the plaintiff sued the defendants for money payable by the defendants to the plaintiff for care, board, lodging, attendance, and maintenance bestowed and supplied by the plaintiff to Mary Hughes, a criminal lunatic, at the request of the defendants, concluding with the ordinary money counts

The defendants pleaded: First, never indebted; thirdly, payment into court of 21*l.* 12*s.*

Issue joined.

The action was brought by the keeper of the

Briton Ferry private lunatic asyium for the maintenance of one Mary Hughes, a criminal lunatic, from the 24th Dec. 1870 to the 24th Dec. 1871.

In the year 1848 the lunatic was indicted at the Carmarthen Assizes for the murder of her three children, and being found insane, she was ordered to be kept in safe custody during her Majesty's pleasure. She was accordingly removed to the Devizes Lunatic Asylum, where she remained for several years.

In or about the year 1855 she was removed, by order of the Secretary of State, to the private lunatic asylum at Briton Ferry, where the guardians of the Lampeter Union duly paid for her maintenance.

In the year 1865 an asylum for the counties of Cardigan, Camarthen, and Pembroke was opened at Carmarthen, and all lunatics belonging to the Lampeter Union confined in various private asylums were removed to the county asylum, but Mary Hughes, being a criminal lunatic, was unable to be removed without a warrant from the Secretary of State, which, however, not being obtained, she remained as before an inmate of the Briton Ferry Lunatic Asylum. The plaintiff had always charged 16*s.* a week for the keep of Mary Hughes, which sum the guardians had paid, but in Oct. 1869 they wrote the following letter to the plaintiff:

Lampeter Union, Lampeter.
19th Oct. 1869.

Re Mary Hughes, a lunatic.

Dear Sir,—I am directed by the guardians of the poor of this union to inform you that after this date they will not pay you for the care and maintenance of this lunatic a higher amount than they pay for the care and maintenance of lunatics at the joint counties asylum at Carmarthen, which is at present 11*s.* 1*d.* per week.—Yours truly,
D. LLOYD.

Charles Pegge, Esq.,
Vernon House, Briton Ferry.

To this letter Mr. Pegge wrote to say that he could not keep her for so small a sum, but took no further steps in the matter, and in January sent in a claim for 16*s.* a week, but the guardians only sent him a cheque for 11*s.* 1*d.* per week, and on the 18th Feb. 1870 wrote the following letter:—

Lampeter Union, Lampeter,
18th Feb. 1870.

Dear Sir,—I am directed by the guardians of this union to inform you that they have been advised to resist the payment to you of any cheques for the care and maintenance of Mary Hughes, a lunatic, beyond the amount remitted by me to you, the same being in the opinion of the guardians a fair and reasonable allowance. The guardians are prepared to defend any action or other proceedings you may bring against them for the recovery of the balance claimed by you.—Yours truly,
D. LLOYD.

Chas. Pegge, Esq.,
Vernon House, Briton Ferry, Neath.

The plaintiff therefore brought his action for the keep of the lunatic from 24th Dec. 1870 to 24th Dec. 1871, when the defendants paid into court 21*l.* 12*s.*, being at the rate of 11*s.* 1*d.* per week from 24th March 1871 to 24th Dec. 1871. At the trial before Bramwell, B., and a common jury at the last Bristol spring assizes it was contended for the defendants that the plaintiff ought to have obtained an order of justices under 2 & 3 Vict. c. 54, ss. 1 and 2.(*a*)

It was proved that at the time that Mary Hughes was sent to the Briton Ferry Lunatic Asylum the guardians wrote to the owner of the

(*a*) Sect. 1. If any person while imprisoned in any prison or other place of confinement, under any sentence of death, transportation, or imprisonment, or under a charge of any offence, or for not finding bail for good behaviour, or to keep the peace, or to answer a criminal charge, or in consequence of any summary conviction or order by any justice or justices of the peace, or under any other than civil process, shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire, with the aid of two physicians or surgeons, as to the insanity of such persons, and if it shall be duly certified by such justices and such physician or surgeons that such person is insane, it shall be lawful for one of Her Majesty's principal Secretaries of State, upon receipt of such certificate, to direct by warrant under his hand that such person shall be removed to such county lunatic asylum or other proper receptacle for insane persons, as the said Secretary of State may judge proper and appoint; and every person so removed under this, or already removed, or in custody under any former order relating to insane prisoners shall remain under confinement in such county asylum, or other proper receptacle as aforesaid, or in any other county lunatic asylum, or other proper receptacle to which such person may be removed, or may have been already removed, or in which he may be in custody by virtue of any like order, until it shall be duly certified to one of her Majesty's principal Secretaries of State, by two physicians or surgeons, that such person has become of sound mind, whereupon the said Secretary of State is hereby authorised, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper, or other persons having the care of any such asylum or receptacle as aforesaid, directing that such person shall be moved back from thence to the prison, or other place of confinement, from whence he or she shall be taken, or if the period of imprisonment or custody of such person shall have expired, that he or she shall be discharged.

Sect. 2. That in all such cases as aforesaid, unless one of her Majesty's principal Secretaries of State shall otherwise direct, it shall be lawful for such two justices, or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire into, and ascertain by the best evidence or information that can be obtained under the circumstances, of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person, and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish where they adjudge him or her to be lawfully settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians, established by the Poor Law Commissioners, then the guardians of such union, or of such parish (as the case may be), to pay on behalf of such parish, in the case of any person removing under this Act, all reasonable charges for inquiring into such person's insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to pay such weekly sum as they or any two justices shall, by writing under their hands, from time to time direct for his or her maintenance in the asylum or receptacle in which he or she shall be confined; and in the case of any person removed under any further Act relating to insane prisoners, to pay such weekly sums as they or any two such justices as aforesaid, shall, by writing under their hands, from time to time direct for his or her maintenance in the asylum or receptacle in which he or she is confined, and when the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, city, borough, or place where such person shall have been imprisoned; but if it shall appear upon inquiry to the said, or any other two justices of the county, city, borough or place where such person is imprisoned that any such person is possessed of property, such property shall be applied for or towards the expenses incurred, or to be hereafter incurred on on his or her behalf, and they shall from time to time, by order under their hands, direct the overseers of any parish wheresoever

asylum, stating that they would pay 16*s.* a week so long as Mary Hughes remained in his custody.

A verdict was found for the defendants, leave being reserved to the plaintiff to move to set it aside and enter a verdict for the sum of 9*l.* 4*s.* 1*d.* beyond the amount paid into court, on the ground that the facts disclosed ample evidence of a contract by the defendants to pay a reasonable sum to the plaintiff for the maintenance of the lunatic, until she was legally discharged from his custody, and in the meantime the judgment should be stayed. The court were to be allowed to draw inferences of fact. A rule having been obtained.

Kingdon, Q.C. and *Kinglake* showed cause.—The sum of 16*s.* a week was paid until it was discovered that the cost of lunatics in the joint counties asylum was only 11*s.* 1*d.* per week, and after the guardians found out that fact, it became their duty to pay no more for this lunatic. Whatever contract there was between the parties was determined by the guardians' letter of the 19th Oct. giving the plaintiff notice that they would not pay more than 11*s.* 1*d.* The plaintiff ought to have obtained an order of justices to inquire and determine what sum shall be paid by the guardians under the provisions of the 3 & 4 Vict. c. 54, s. 2, and if he has not done that he must accept the offer of the board of guardians. [WILLES, J.—The guardians are liable for the maintenance of the lunatic; it is only a question of how much they are to pay. The plaintiff cannot get rid of his charge, being a criminal lunatic.] The plaintiff never dared to say that an order of justices had ever been made. [KEATING, J.—Suppose the guardians agree with the plaintiff to waive the order of justices?] The guardians may waive the order, and the case is reduced to a question of contract determinable by either party. Otherwise we shall have a contract existing between the parties, to bind them through all time. There clearly not having been an order made, we ought not to act as if there had been one: (*The Bradford Union* v. *The Clerk of the Peace for the County of Wiltshire*, L. Rep. 3 Q. B. 604.) Although in all cases within the scope of this authority, a contract of the guardians binds them without being under seal, yet this was not a contract which they had power to make:

Chitty on Contracts, last edit., p. 265, and cases there cited;

Nicholson v. *The Guardians of the Bradfield Union*, L. Rep. 1 Q. B. 620.

We do not contend that 16*s.* is an unreasonable sum to pay, but that the plaintiff is entitled to no more than 11*s.* 1*d.* per week.

H. James, Q.C. (*Pinder* with him), were not called upon.

WILLES, J.—This case turns on the construction of 3 & 4 Will. 4, c. 34, and the course taken by the guardians under that Act. The case turns on the statute, because by it any person in the position of the lunatic may be dealt with and sent to a lunatic asylum under the order of the Home Secretary. It occasionally happens that a person in a good condition of life commits an offence, and being adjudged by the verdict of a jury to be a lunatic, is sent to a public lunatic asylum, thereby throwing the cost of maintenance upon the union, when the friends of the lunatic would rather pay a small sum and have the advantage of the treatment of a private lunatic asylum. In any case of the kind two questions arise, whether the lunatic should be sent to a private or public asylum. It becomes necessary, when persons are sent to a private asylum, to provide for the mode of their maintenance, and that is provided by the second and following sections, and the justices are given power, where the lunatic is possessed of property and is a person of means, to issue their warrant to the overseers to seize the money or sell the goods and receive the rents of the lunatic for the purpose of paying the expenses of the lunatic's keep; but, in the case of a pauper lunatic, the justices are to make an order upon the guardians of the union to pay such weekly sum for the maintenance of such person as they shall by writing under their hands direct. I need hardly say that if the owner of a private asylum accepts the care of a criminal lunatic under the order of the Secretary of State, he is bound to keep him; but there seems nothing in the statute obligatory to keep him in the first instance. That, however, it is not necessary for us to decide here; it is only necessary to state that once having accepted such care, nothing would entitle the keeper to transfer the lunatic except the warrant of the Secretary of State to remove the lunatic from his custody. The plaintiff here was, therefore, obliged to continue to keep Hughes until he received an order for her removal. We are, by the leave reserved at the trial, allowed to draw inferences of fact, and I draw the inference that the plaintiff was maintaining the lunatic on behalf and at the request of the guardians of the Lampeter union. The 2nd section says that it shall be lawful for two justices of the peace to inquire into and ascertain the personal legal disability of any insane person, the place of last legal settlement, and his or her pecuniary circumstances; and, if it does not appear that he or she is possessed of any property which can be applied to his or her maintenance, they may direct the overseers or the board of guardians, as the case may be, to pay all reasonable charges for inquiring into such persons' sanity and for their weekly maintenance at an asylum or receptacle for insane people; and if they have any property they, the justices, are authorised to direct such property to be applied on behalf of their maintenance so long as they remain in confinement. The result of the section is that any lunatic who turns out a pauper shall be maintained by the guardians of the union to which he or she formerly belonged. The justices are to inquire and to act, but the guardians are liable to pay. If the individuals who are to pay choose to waive the expenses of an inquiry before the justices and the provisions of the statute, and pay without such inquiry they are at liberty to do so. As to the expenses of the lunatic they would only pay a reasonable sum for her maintenance, for what was a reasonable sum they could ascertain as well as the justices, and it necessarily results from the fact that the guardians paid 16*s.* per week for sixteen years, without

any money, goods, chattels, land, or tenements, of such person shall be, to seize so much of the said money, or to seize and sell so much of the said goods and chattels, or receive so much of the annual rent of the lands or tenements of such person as may be necessary to pay the charges, if any, of inquiring into such person's insanity and of removal, and also the charges of maintenance, clothing, medicine, and care of any such insane person, accounting for the same at the next special petty sessions of the division, city, or borough, in which such order shall have been made, such charges having been first proved to the satisfaction of such justices, and the amount thereof *being set forth* in such order.

objection, that the plaintiff considered that if he took the lunatic to his asylum he would have 16*s.* per week as long as he kept her, and this is the inference we draw. The guardians, however, instead of keeping to their contract, attempted by their notice of 19th Oct. to strike off 4*s.* 11*d.* a week, although the order of justices, and we may assume there was one, was still unaltered. There was clearly an agreement to pay 16*s.* or a reasonable sum to sustain the plaintiff's right, which could not be altered by the guardians. As to the question whether a right of action given by statute would lie on the statute, I am of opinion that it would, as it is clearly stated by Comyns, C.B. in his Digest, title Action upon the Statute (F), where he refers to 2nd Inst. 486: "If a statute provide a remedy for a party grieved, though it do not give any express penalty or forfeiture he may have an action on the statute."

BYLES, J.—I am of the same opinion. There was clearly at one time an actual contract for 16*s.* a week until the lunatic should be removed. The defendants refused to continue to pay 16*s.*, and proposed to substitute 11*s.* 1*d.*, the same as they paid for lunatics at the joint counties asylum. The plaintiff accepts the lunatic on the understanding that he is to receive 16*s.* a week, and when he has once got her he cannot turn her out, and she must remain on his hands until an order of removal is obtained from the Home Secretary.

KEATING, J.—I am of the same opinion. Previously to 1871 there must have been some arrangements made between the guardians and the keeper of the lunatic asylum, and I think we are at liberty to assume an order was made. Otherwise the guardians being satisfied that the maintenance of Mary Hughes must fall on them, entered into an agreement to pay 16*s.* a week. If that is so, the only question that remains is whether they could make such a contract, and for the reasons given by my brother Willes it appears that they were able to contract and be bound by such contract. The rule must, therefore, be made absolute. *Rule absolute.*

Attorney for plaintiffs, *Wrentmore*, for *Jones* and *Curtis*, Neath.

Attorneys for defendant, *Humphreys* and *Morgan*, for *David Lloyd*, Lampeter.

June 4 and 5, and July 5, 1872.

BRECON MARKETS COMPANY (LIMITED) *v.* NEATH AND BRECON RAILWAY COMPANY.

Toll—Railway—Highway.

Plaintiffs were possessed of an ancient toll on every carriage and on every one of certain specified articles brought into or driven through the town of B. Defendants' line of railway ran through the town of B., and they ran on it into and through the town railway carriages of the ordinary description, and trucks containing the specified articles above referred to.

Held that defendants were not liable to pay plaintiffs' toll on the carriages or on the trucks or the articles carried in them, for that, if the toll claimed was a toll thorough, plaintiffs did nothing on defendants' line to earn the toll, and if it was a toll traverse, plaintiffs must be taken to have parted with the soil over which defendants' railway ran, without any reservation of the toll, and without having stamped upon it the character of a highway.

SPECIAL CASE.

1. The plaintiffs are incorporated by the Brecon Markets Act 1862 (25 & 26 Vict. c. 86), hereinafter called the Market Act.

2. The defendants are incorporated and regulated by the Dulas Valley Mineral Railway Act 1862, and by the Neath and Brecon Railway Act 1863, hereinafter called the Railway Acts. The defendants' principal office is in London.

3. The most material parts of both Acts are in the appendix, Nos. 1 and 2, but either party may refer to any of the said Acts, and the Acts incorporated with such Acts respectively.

4. The plaintiffs claim in this action payments described as drift tolls and dues in the Market Act. The pleadings and particulars (which may respectively be amended on either side, as the court may think fit) are in the appendix Nos. 3 and 4.

5. The following items of the 4th schedule to the Markets Act describe the tolls claimed in this action. The 4th schedule: "Drift tolls and dues, and fair tolls payable within the borough. For every score of horned cattle driven through the borough, 10*d.*; for every score of swine, ditto, ditto, 5*d.*; and so on in proportion for any number of horned cattle, sheep, or swine, less than a score. For every waggon or carriage with four wheels, belonging to any person not residing in the county of Brecon, passing to, through or from the borough, 1*s.* For every waggon belonging to any person residing in the county of Brecon, passing through the borough to any place in any other county, 1*s.* For every waggon belonging to any person not resident in the county coming to the borough with hops, leather, or other articles to be sold, 1*s.* For every waggon bringing stone coal, 6*d.*" The tolls mentioned in the said 4th schedule to the Market Act are tolls formerly due and payable to the mayor, aldermen, and burgesses of the borough of Brecon as mentioned in the Market Act, and transferred to the plaintiffs by the Markets Act.

6. The defendants under the powers of the railway Acts constructed the railway mentioned therein, and the greater part of such railway has been applied for passenger traffic since 3rd of June 1867. It joins the Brecon and Merthyr Tydfil Railway (hereinafter called the Merthyr Railway), belonging to the Brecon and Merthyr Tydfil Junction Railway Company (hereinafter called the Merthyr Railway Company) by a junction with it within the borough of Brecon aforesaid, referred to in the Market Act, and therein and hereinafter called "The Borough." The defendants have a station within the borough, called the Brecon Station. The Vale of Neath Railway belonging to the Great Western Railway Company forms a junction with the defendants' railway, and with it the Vale of Neath Railway, by means of the said junction at Neath forms, by means of the said junction in the borough, a continuous railway system with the Merthyr Railway, which continues on from such junction within the borough to various stations on that railway outside the borough. The Hereford, Hay, and Brecon Railway Company, and the Mid Wales Railway Company exercise running powers, and run trains into the borough over the Merthyr Railway. The said junction has not yet been opened for public passenger traffic, as that has been restrained by in-

junction at the instance of the plaintiffs, but it has been and is used for the transmission of the goods and cattle traffic.

7. The mode of conducting the traffic on the several railways at present and during the period referred to in the particulars of demand is as follows:

8. The defendants at their various stations on their railway outside the borough, some of which are within the county of Brecon, and others beyond that county, book passengers to the borough, and convey them in their carriages in trains in the ordinary manner to their station in the Borough, but not beyond it.

9. The Great Western Railway Company book passengers from Swansea to the borough, and from other stations belonging to them to Neath, where passengers rebook to the Borough. These passengers are conveyed by the Great Western Railway Company in their carriages to the said junction at Neath, and such passengers then leave those carriages, and are conveyed by the defendants in their carriages, as their other passengers are, to their said station in the borough, but not beyond. The fares from Swansea to the borough, and from other stations to Neath, as the case may be, are received by the Great Western Railway Company at the time of the booking of the passengers.

10. The defendants also at their said station within the borough book passengers to Swansea outside the borough; these passengers are conveyed by the defendants in their carriages in trains in the ordinary manner to the stations on their railway, or if for any station on the Vale of Neath Railway, such passengers change from the defendants' carriages at Neath Junction aforesaid, and are then conveyed by the Great Western Railway Company in their carriages to the destinations of the passengers. The fares from Brecon to Swansea, and to the other stations on the defendants' railway are received by the defendants at the time of the booking of the passengers.

11. The passenger carriages so used by the defendants are the ordinary four-wheeled railway carriages drawn in a train by a six-wheeled engine with a tender or by a six or eight-wheeled tank engine. The same carriages frequently pass from and to the station in the borough in the above manner several times a day.

12. The defendants also, at various stations on their railway outside the borough, some of which are within the county of Brecon, and others beyond that county, receive horned cattle, sheep, and swine consigned to different persons at various stations both within and beyond the county of Brecon on the Merthyr Railway and other railways communicating with it. Such horned cattle, sheep, and swine are carried by the defendants in their trucks beyond the said junction in the borough to the station of the Merthyr Railway Company, also in the borough, and are there delivered to the Merthyr Railway Company and other companies in the waggons or trucks in which they have been brought there, and the Merthyr Railway Company, or the other companies, convey them from such station in the same trucks, to their respective destinations, and there deliver them to the consignees. The defendants use the ordinary four-wheeled cattle waggons or trucks which are drawn in trains by the usual engine and tender. The tolls in these cases for the whole journey are received by the defendants from the consignors; but cases do occur where the carriage is not prepaid. This mode of conveyance has affected the passage of such animals by other means through the borough which before the construction of the defendants' railway passed in large droves and greater numbers.

14. The defendants also, at the various stations on their railway outside the borough, some of which are within and others beyond the county of Brecon, receive stone coal (which expression is used in this case in the same sense as in the Market Act), lime, and other articles consigned to different merchants and persons at the Brecon station and the various stations both within and beyond the county of Brecon on the Merthyr Railway and other railways in connection therewith. Such of the stone coal, lime, and other articles as are consigned to different persons and merchants in the borough, are delivered there by the defendants to the consignees within the borough, and such as are consigned to different persons at stations beyond Brecon are carried by the defendants beyond the said junction to the goods station of the Merthyr Railway Company in the borough, and there delivered to the Merthyr Railway Company and other companies, in the waggons or trucks in which they have been brought there, and such last-mentioned railway company carry them therefrom in the same waggons or trucks to their respective destinations, and there deliver them to the consignees. The tolls in these cases for the whole journey are received by the defendants from the consignors when it is prepaid. The defendants also bring into the borough for their own use, and keep at the Brecon station, quantities of stone coal.

15. The Great Western Railway Company also at the various stations on their railway receive stone and other coal, lime, and other articles consigned to different merchants and persons at the defendants' station in the borough, and at various stations both within and beyond the county of Brecon, on the Merthyr Railway Company's and other railways in connection with it, and such stone, coal, lime, and other articles, are conveyed by the defendants to the said junction at Neath, and are there delivered to the defendants in the waggons or trucks in which they have been brought there, and the defendants convey them in such trains and waggons or trucks in the manner mentioned in the next preceding paragraph according to their destination. The tolls in these cases for the whole journey are received by the Great Western Railway Company from the consignors when prepaid.

16. With reference to the two last preceding paragraphs, the defendants and the Great Western Railway Company use the ordinary four-wheeled railway waggons or trucks, and they are drawn in trains by the usual engine and tender or tank engine.

17. The fares or tolls so received as aforesaid for a through journey, on more than one railway, are apportioned at the Railway Clearing House, according to the system there established by law.

18. In some instances the passenger carriages, cattle or goods waggons or trucks, used for the purposes above-mentioned, belong to the defendants, in others they belong to the Great Western Railway Company, in others to other persons or companies residing within the county

of Brecon, in other cases to persons or companies residing beyond the limits of the said county. The coal waggons frequently belong to the coal masters who raise the coals.

19. In many instances such passenger carriages, cattle and goods waggons, or trucks, belonging to the defendants or used by them, pass into, through, or from the borough, empty, once or several times a day.

20. The court may make such inferences of fact as it may think proper.

21. The question for the court is, Whether the plaintiffs are entitled to recover any and what tolls or payments under the various circumstances above described? The amounts recoverable, if any, to be ascertained on the principle settled by the court as arranged between the parties, and judgment is to be entered up according to the opinion of the court, either for the plaintiffs for such amount with costs (including the costs of ascertaining such amount), or for the defendants with costs.

The following were the plaintiffs' points: First, the expression "waggon" and "waggon, or carriage with four wheels," comprise railway passenger trucks and railway goods' trucks; secondly, cattle, sheep, and swine conveyed through the said borough are driven through it within the meaning of the schedule; thirdly, a railway truck bringing stone coal into the borough is a waggon bringing stone coal, within the meaning of the schedule; fourthly, the defendants are not only liable in respect of their own trucks, but also in respect of trucks belonging to others drawn by the defendants; fifthly, the defendants are liable in respect of horses, cattle, sheep, and swine conveyed by them into and partly through the borough, and by other companies through the remainder and out of the borough; sixthly, the defendants are liable to tolls whether they act in fulfilment of their own contracts or as agents or carriers for other companies or persons, and whether they convey their own goods and animals or those of others; seventhly, the ancient tolls mentioned in the Act of Parliament, and which received their full confirmation by the 79th and 81st sections of the Act, are payable irrespective of any particular mode of conveyance through, to, or from the borough.

The following were the defendants' points: First, that the plaintiffs are not entitled to recover any tolls or payments under any of the circumstances stated in the case; secondly, that the tolls imposed by the Brecon Markets Act 1862, were never intended to, and do not, in fact, apply to cattle, goods, and waggons conveyed by and upon a railway; thirdly, that such tolls are applicable only to cattle, goods, and waggons passing to, through, or from the borough upon the highways in the customary and ordinary manner; fourthly, that the plaintiffs are not legally entitled to recover any of the items of their claims in this action.

Dowdeswell, Q.C., for the plaintiffs, was stopped by the court.

Sir *G. Honyman*, Q.C. (*J. O. Griffits* with him), for the defendants, referred to the Market Act giving the toll, and also to the defendants' Acts. He cited

Brett v. *Beales*, 10 B. & C. 508;
Edinburgh, &c. Railway Company v. *Linlithgow, &c. Railway Company*, 1 Macq. 1; 3 Macq. 691;
Rowe v. *Shilson*, 4 B. & Ad. 726;
Newmarket Railway Company v. *Foster*, 2 C. L. Rep. 1617.

[WILLES, J.—The question seems to be whether, when toll traverse has been granted in respect of land, although, if any one passes over the land, the grantee of the toll may waive the trespass and demand the toll, yet, if he parts with the land without having stamped the character of a highway upon it, he is still entitled to toll on that land in the hands of his grantee. What seems uncertain is this: He being entitled to the tolls, so long as any one passes over the land, whether he has made it a highway or not, if he grants the land away to another without having made a highway upon it, is he entitled to the toll, while the land belongs to his grantee.]

Dowdeswell, Q.C., in reply, cited
Pelham (Lord) v. *Pickersgill*, 1 L. Rep. 660;
Ellis's Introduction to Domesday, vol. 1, p. 256;
Prideaux v. *Warren*, 2 Levinz, 96;
Crispe v. *Belwood*, 3 Lev. 424;
Foreman v. *The Free Fishers and Dredgers of Whitstable*, 21 L. T. Rep. N. S. 804; L. Rep. 4 Eng. & Ir. App. 266; 38 L. J. 845, C. P.;
Rickards v. *Bennett*, 1 B. & C. 223;
Mayor, &c. of London v. *Hunt*, 3 Lev. 37;
Jenkins v. *Harvey*, 1 C. M. & R. 877;
Lord Falmouth v. *George*, 5 Bing. 286;
Great Western Railway Company v. *Rous*, L. Rep. 4 H. of L. 650;
Mayor, &c. of Carlisle v. *Wilson*, 5 East, 2.

Cur. adv. vult.

July 5.—WILLES, J., delivered the judgment of the Court (Willes and Keating, JJ.)—This case raises a question which, chiefly upon the ground of its general importance, we took time to consider, viz., whether the carriage of goods by a railway company upon their railway, or to their railway station, entirely upon land belonging to the railway company, and not upon any highway or in the enjoyment of any easement or other right reserved by the former owners of the land, or those under whom he claims, can be subject to a toll thorough or toll traverse arising by prescription or grant; for, the tolls claimed are admitted to be of that description, and not tolls created by the statute under which the company was incorporated, and by which it appears they are invested with the rights previously existing in the corporation of Brecon for the purposes mentioned in that Act. We are of opinion that no such toll can be imposed. The enjoyment of the railway company is a proprietary one of their own land, purchased without any reservation as to the use thereof by the seller or by the person or persons from whom he bought. It is not the use of the land or easement of another, nor the enjoyment of any benefit directly or indirectly conferred upon them by another. There are cases, doubtless, in which tolls are sustained in respect of some advantage of which each member of the public may avail himself if he thinks proper, and which must be paid in respect of the opportunity and capacity of enjoyment in the individual and general public benefit, whether there be any actual enjoyment by the particular individual or not, as, for instance the payment or render of the best fish by each boat frequenting a particular cove to the owner of the land, who provided there a rope and windlass to assist fishing boats in landing in rough weather (*Earl of Falmouth* v. *George*, 5 Bing. 286), or anchorage in respect of the provisions of buoys, a landing place, or other conveniences for the public (*Foreman* v. *Free Fishers of Whitstable*, 38 L. J.

345, C. P.), or metage in respect of providing for the measurement or weighing of goods brought into a port which there was an obligation to maintain, or other port dues of a like kind (*Jenkins* v. *Harvey*, 2 C. M. & R. 393). The rule applicable in such cases in respect of the obligation to maintain ports or other conveniences for public use, that an individual frequenting the place and having the power of taking advantage of the benefit provided shall pay the due whether he takes advantage of the benefit or not, has no application to the case of toll for passing upon land. Tolls for passing upon land are granted by the Crown in respect of a consideration to be enjoyed by the persons who are to pay them, and they cannot be effectually granted without such a consideration or so as to extend or to be taken beyond the place in which such consideration arises. They consist of two sorts, toll thorough and toll traverse. Toll thorough may be taken upon land not belonging to the grantee, and, consequently, no consideration can be implied for such grant. It is taken upon a highway and granted to some one who undertakes some public work for the benefit of those who use the highway, as, for instance, in making the road or keeping it in order and repair for the use of the passers by, and it can only be taken in the way or ways to which such obligation applies. Therefore, if a person were entitled to toll thorough in a town, in consideration of keeping certain streets in order, the toll would apply only to such streets, and persons using other streets could not be made subject to the toll: (*Trueman* v. *Walgham*, 2 Wils. 299; *Brett* v. *Beales*, 10 B. & C. 508.) Accordingly it was not argued that the claim in question could be maintained as a toll thorough, because nothing is done by the corporation or by the plaintiff towards the repair of the railway or otherwise to aid or assist the traffic of the railway company. It was, however, insisted that the claim might be maintained as for a toll traverse, which consists of a toll granted and claimed for going over the land of the grantee. A toll traverse is said to differ from a toll thorough in this, that no consideration for it need be averred. This does not, however, mean that there need be no consideration for it; it merely expresses that, as there can be no toll traverse except in respect of going over the land of the grantee, the consideration of using the land is implied from the character of the toll, and need not be further averred than by stating that it is a toll traverse. The consideration is the giving up the land of the grantee. This does not make it necessary that the grantee should actually retain the soil in the land. It is enough that he should have the land at the time of the grant, and allow the use of it to the persons who are to pay the toll; and it is not necessary that he should be the lord of a manor, though such grants have usually been made to lords of manors. Whilst the grantee has the land, he is entitled to the toll in respect of the use of it. If he part with the land, he may still retain the right to the toll, as in the case of *Lord Pelham* v. *Pickersgill* (1 T. R. 667), where a toll traverse over a public road was sustained upon the footing that the public road had been originally laid out on the grantee's land in consideration of payment of the toll, and that the grant of the land was subject to the public right of way to which the toll attached, and which secured to the person charged with the toll that user which was the consideration for it. The same law was acted upon in *Crisp* v. *Belwood* (3 Lev. 424), *Cotton* v. *Smith* (2 Comp. 47), and in the case so much relied upon for the plaintiffs of *Richards* v. *Bennett* (1 B. & C. 223), more fully reported in 2 D. & R. 389. In all these cases the grantee either reserved the land or, by dedicating it to the public as a highway secured to persons who used it, the consideration for which the toll was granted. Some of the expressions attributed to the court in the report of *Richards* v. *Bennett* were relied upon as meaning that it was sufficient that the grantee should be possessed of the land at the time of the grant, without regard to his having subsequently parted with it by a general conveyance without granting a public right which remained impressed upon the land, and secured the use of it to the public, and without any exception or reservation in the grant (if such could legally exist apart from a public right), enabling the grantee to allow of such use, and so to earn the toll. It will be found, however, upon examining the case of *Richards* v. *Bennett*, and the authorities upon which it was founded, that no such opinion was there held. The question arose upon the validity of a plea stating that the goods came upon the manor, which was considered to mean that they came upon land which continued to be the plaintiffs, or upon which he had reserved a right to have them landed so as to earn the toll. We are not dealing with a case of prescriptive taking of tolls in the places in question, to sustain which any such reservation could be implied. This land is still the plaintiffs'. If they were not the original owners of the land, they can have no right there. If they were the original owners, they have parted with it without devoting it as a highway or otherwise to the use of the public or other persons using it. It is at best the simple case, then, of a landowner entitled to toll traverse parting with his land out and out, without having any right therein. According to the argument for the plaintiffs, after such a grant without reservation the grantor could sue the grantee for doing upon his own land any of the things for which a toll could be claimed if it remained the property of the grantor. This would be in derogation of the right of possession granted, and could only be secured by reservation; and there is no reservation. So much for use by the grantee; but suppose a third person were to enter without leave from the grantee, he would, according to the argument, have to pay damages for the trespass to the grantee, and toll also to the grantor; and if the toll were (as a toll may be) not fixed, but of a reasonable amount (*Corporation of Stamford* v. *Lambert*, 1 C & J. 57, 400), he must pay twice over for the supposed valuable consideration. No authority was cited to sustain this strange conclusion; but reference was made to the numerous cases in which a right in gross (separate from the proprietary right) has been held not to pass with the land over which it was to be exercised; and it was said that as such a right does not pass to the grantee, therefore it must remain in the grantor, and may be exercised by him in spite of his grant of the land. One of these cases will suffice for an illustration, viz., that of a free warren which may exist either in a man's own land or in the land of another, and which, if in gross, does not pass by the grant of the land. But, suppose a man having free warren in gross in his own land, grants the land without re-

servation to another, what is the result? May he enter and disturb his grantee? The case of *Morris* v. *Dimes* (1 Ad. & E.), furnishes no authority upon the question, for it only shows that the grantee takes nothing in the warren, and so cannot enforce it against a third person. The answer is to be found in Brooke's Abridgment, Grauntes, 144, where the better opinion is said to be that, if a person having a right of warren in gross in his own land demises for years without mentioning the warren, the lessor cannot have the warren, because it is not reserved, and the lessee shall not have it, because it is not granted, and such warren in gross is suspended during the term. And so in the present case, the corporation, if they were originally owners of the land, have in like manner parted with it. There is no evidence of any reservation, express or implied, and the railway company, the present owners of it, may use it for all lawful purposes, including those for which toll is claimed. We are well impressed with the importance of maintaining rights founded upon ancient usage, and of maintaining any right that has been long enjoyed in fact, to the extent to which such usage points out a possible legal origin. Such a consideration is, however, inadmissible in the present case because, allowing the usage to be just, and assuming toll traverse established through the borough, such toll traverse has for the reasons mentioned been parted with, or at least suspended until the land finds its way back to the corporation, or their statutory grantees. Whether upon goods finding their way from the land of the railway company into the streets of Brecon a toll will become payable, has not been argued, and the decision of that question is beside the present litigation. Our judgment affects tolls upon goods which have not left the land of the railway company.

Judgment for the defendants.

Attorney for the plaintiffs, *J. R. Cobb*, Brecon.
Attorneys for the defendants, *Dean* and *Taylor*.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs., Barristers-at-Law.

Saturday, Jan. 20, 1872.

(Before MARTIN, CHANNELL, and PIGOTT, BB.)

DYTE *v.* THE ST. PANCRAS BOARD OF GUARDIANS.

Board of guardians—Appointment by of medical officer to infirmary—Appointment not under seal—Necessity of seal to validity of contract—Corporation — Distinction between an ordinary and trading one—Executed and executory consideration—Difference between—Estoppel.

The appointment by a corporation, such as a board of poor law guardians, of a person to be "medical officer" to the corporation for any fixed or definite period of time, ought to be under seal.

D., being a candidate for the post of medical officer to the H. infirmary, the appointment to which was in the hands of the defendants, as poor law guardians of St. P., a resolution, passed at a meeting of the infirmary committee, was approved of and adopted at a board meeting of the guardians on the 6th Dec., "That D. be appointed medical officer for three months, at and for a sum of 100l. and board and rations;" and on the 9th Dec. D. received a letter from the clerk to the guardians, announcing to him his appointment, and inclosing a copy of the above resolution.

On the 7th Jan. D. entered upon his duties as medical officer, and fulfilled them up to the 25th March, when the three months expired, and he received 100l. salary for that period of service. He continued on in the office, nothing being said or done on either side until the 6th April, when a resolution was passed by the infirmary committee, "That the medical officer and other officers" (naming them) "whose engagements expired at Lady-day should be employed monthly, at the several salaries assigned to them by the guardians." This monthly appointment was approved of by the Poor Law Board "until the infirmary should be transferred to the management of the C. L. District Board," which transfer it was expected would take place about Midsummer, but which did not, in fact, happen until Michaelmas.

On the 24th May, at a meeting of the infirmary committee, a written notice from the board of guardians, signed by their clerk, was handed by the chairman of the committee to D., that his appointment of medical officer would terminate on the 24th June; the chairman at the same time verbally telling him that the notice was formal only, and that, if the infirmary were not transferred by the 24th June, the notice would go for nothing.

On the 23rd June D. was informed by an official letter from the clerk to the guardians that his successor had been elected by the guardians, and would commence his duties about noon on the 24th Thereupon D. retired from the office under protest against his illegal dismissal, and brought an action against the guardians to recover 100l. for salary, and an equivalent for board and rations, for three months, in lieu of three months' notice.

At the trial there was a conflict of evidence as to whether D. had been informed of the resolution of the 6th April, the clerk of the guardians stating that he had notified it to D., and D. averring that he was never informed of it.

Held by Martin, Channell, and Pigott, BB. (discharging the plaintiff's rule to set aside the nonsuit entered at the trial), that the plaintiff had failed, for want of a contract under seal, *to show a contract binding upon the corporation to employ him beyond the time for which he had been actually employed and paid by them; and that, not being a case of an* executed *consideration or of a contract with a* trading *corporation, it did not come within either of those exceptions to the general rule which requires contracts with corporations to be under seal.*

Held also, that the verbal statement of the chairman of the infirmary committee at the time when the notice terminating the appointment was given to the plaintiff, did not amount to an estoppel as against the defendants, the poor law guardians.

THIS was an action brought by the plaintiff, a medical practitioner, to recover from the defendants, the guardians of the poor of the parish of St. Pancras, the sum of 127*l.* 6*s.* the amount of one quarter's salary, at the rate of 400*l.* a year, and also the equivalent for apartments and rations for three months, alleged and claimed by him to be due to him, in lieu of notice, by reason of his alleged illegal dismissal by the defendants from the post

or office of medical officer of the Highgate Infirmary under the circumstances hereinafter stated.

The plaintiff, by his declaration in the first count, charged that in consideration that the plaintiff would enter into the service of the defendants and serve them from the 25th March 1870, till such time as the management of the Highgate Infirmary Board should be transferred from the defendants to the central board, in the capacity of resident surgeon to the said infirmary at the salary of 400*l.* per annum, with board and residence, the defendants promised the plaintiff to retain him in the said service during the said period in the capacity and on the terms aforesaid. Averment, that the plaintiff entered into the said service in the capacity and on the terms aforesaid, and continued therein for a part of the said period and until the breach of the said promise hereinafter alleged, and was always ready and willing to continue in the said service during the year of the said period, whereof the defendants always had notice, yet the defendants, before the said transfer, dismissed the plaintiff from the said service, and refused to retain the plaintiff therein for the remainder of the said period, whereby the plaintiff was deprived of the salary and profits which he would have derived from being retained in the said service, and remained for a long time unemployed. There were then the ordinary money counts.

The defendants pleaded—first, to the first count, denying the promise as therein alleged; secondly, to the money counts, except as to 26*l.* 5*s.* parcel, &c., never indebted; thirdly, further, to the said money counts, except as to the said parcel, &c., satisfaction and discharge by payment before action; fourthly, further, to the said money counts, as to the 26*l.* 5*s.* parcel, &c., payment into court.

Replication 1: Issue joined on the first and second pleas; 2, issue taken on the third plea; and as to the fourth plea the plaintiff takes the 26*l.* 5*s.* out of court in satisfaction, &c.

Rejoinder: Issue joined by the defendant on plaintiff's second replication to third plea.

The facts, as they appeared at the trial of the action, before Pigott, B., at the London Sittings at Guildhall, after Trinity Term 1871, were, briefly stated, as follows:—In Dec. 1869, the plaintiff was a candidate for the then vacant post of resident medical officer to the Highgate Infirmary, the appointment to the post being in the gift of the defendants, the guardians of the St. Pancras Poor Law Union. On the 5th Dec. 1869, the Infirmary Committee passed the following resolution:—"Resolved, that it be recommended to the guardians at their meeting this afternoon, to appoint Dr. Dyte medical officer *for three months*, and that he devote his whole time during such period, at and for a sum of 100*l.*, board, and rations." This resolution, and the appointment therein recommended, was approved by the board. On the 7th Dec. 1869, the plaintiff wrote as follows to the clerk of the board, Mr. Fildew:—"Dear Sir,—I have been expecting to receive an official intimation of my having been *temporarily* appointed to the office to which I was recommended yesterday by a resolution of the special Infirmary Committee. Overwhelmed with work as you no doubt are just now it has probably escaped you," &c. And in reply thereto he received on the 9th Dec. an official letter from Mr. Fildew announcing to him his appointment, and enclosing a copy of the above resolution, in which letter Mr. Fildew added the following notification:—"Perhaps I should say that the appointment will take effect only from the date of the day on which you enter on your duties at the infirmary; at present I am unable to give you that information, but will do so when fixed." Subsequently to these letters the plaintiff was informed that he was expected to enter on his duties on the 7th Jan. 1870, on and from which day he entered upon and fulfilled his duties as resident medical officer up to the 25th March, when the three months expired, and when he received 100*l.* salary for that period of service. It having been originally considered that the infirmary would be transferred to the Central London Sick Asylum District Board at Lady-day 1871, all the appointments to posts in the infirmary, including that of the plaintiff as medical officer, were made for that period only, and his appointment was sanctioned (as was necessary) by the Poor Law Board, on the express condition that it was to cease upon the infirmary being handed over to the Central Sick District Board as above mentioned. The transfer, however, not having come to pass at Lady-day, the plaintiff continued to perform the duties of his post after Lady-day, nothing being said or done on either side in the matter until the 6th April, when, at an infirmary committee meeting, a resolution was passed, "That the medical officer" (and other officers and servants mentioned in the resolution) "whose engagements expired at Lady-day should be employed monthly at the several salaries assigned to them by the guardians." Of this resolution Mr. Fildew, the clerk, stated in evidence that he gave verbal notice to the plaintiff, but the plaintiff, on the contrary, swore he was never told anything of the kind. On the 24th May a meeting of the infirmary committee was held, and at this meeting the medical officer (the plaintiff) was called into the room, together with the matron and the steward, when notices were handed to them by the chairman of the meeting, informing them that their appointments would terminate on the 24th June.

The following is a copy of the notice handed to the plaintiff:

24th May 1870.

Sir,—The guardians of the poor of the parish of St. Pancras hereby give you notice to terminate your appointment as medical officer at the Highgate Infirmary on the 24th June next ensuing. I am, &c.,

DANIEL FILDEW, Clerk.

D. H. Dyte, Esq.

At the same time that the chairman handed these notices to the plaintiff and the other officials, he, according to the evidence of the plaintiff, expressly informed them that "the notices were merely formal in order to protect the guardians from liability for the officers' salaries beyond the 24th June, as it was thought the infirmary would be transferred at that time; but, if it should not be then transferred, the notices would go for nothing, and matters would continue as at present." On the 23rd June the plaintiff received an official letter from the Clerk to the Board of Guardians, informing him that his successor, a Dr. Shaw, had been that day elected by the guardians (the defendants) as medical officer of the infirmary, "upon the termination of your engagement to-morrow, the 24th June, instant," and that Dr. Shaw would commence his duties about noon on the 24th. The plaintiff thereupon wrote to the Poor Law

Board communicating the above facts, and on the 27th June he received a reply from the board to the effect that as under the notice of the 24th May his appointment apparently terminated on the 24th June, they were unable to interfere in the matter, but would forward a copy of his letter to the St. Pancras Board. On the same day (the 27th June) the defendant retired from the post and quitted the infirmary, under a strong written protest, sent by him to the defendants, against the illegality of their proceedings, and claiming 100*l.* for salary, and "an equivalent in lieu of rations and apartments for three months," in lieu of three months' notice. The infirmary was not transferred to the Central District Board until Michaelmas 1870, until which time the other officers of the infirmary, who had on the 24th May received notices similar to that which the plaintiff received, were retained at the infirmary in their several posts.

The following document, being a printed return dated 16th April 1870, furnished to the infirmary committee at the instance of one of its members, was relied on by the plaintiff as showing that his appointment was ratified by the Poor Law Board until the transfer of the infirmary took place.

Return, called for on the motion of Mr. Joseph Salter, showing a detailed statement of the "total costs of the infirmary at Highgate, including" . . . "a list of the officers appointed, dates of appointment, and for what period, and the salaries allowed to each."

. . . . . .

TABLE 4.—List of officers appointed at Highgate Infirmary, dates of appointment, for what period, and amounts of salary.

1.—OFFICERS DULY APPOINTED.

Name	Office.	Date of Appointment.	For what period.	Salary per annum.
David H. Dyte.	Medical officer.	6th Dec. 1869.	Originally appointed by the guardians for 3 months. They have, however, since been continued by the guardians for another month. The Poor Law Board have approved of the appointments until the infirmary has been handed over officially to the managers of the Central London Sick Asylum District Board.	At the rate of £400—board, lodging, & washing.

The defendants' counsel contended that there was no case for the jury. The board of guardians being a corporation, were not liable under a contract except under seal, and if there was any contract it expired at Lady-day 1870, and no new contract had been shown to have been made; and, moreover, whatever the contract was, it had been terminated on the 24th June by the notice given on the 24th May. The plaintiff's counsel, on the other hand, insisted that the engagement of the plaintiff was not a contract which required to be under seal, and though it was for three months only at first, yet it was afterwards made conditional on the transfer of the infirmary to the Central District Board, and sanctioned in that respect by the Poor Law Board. The learned judge was of opinion that the only question for the jury was whether the plaintiff had received any intimation that the engagement was to be monthly after the 25th March, whereupon the counsel for the defendants withdrew that part of the case altogether, and rested the case upon the point of law only. The plaintiff was thereupon nonsuited by direction of the learned judge, leave being reserved to him to move to set that nonsuit aside, and enter a verdict for him for the amount claimed in the declaration, subject to the following points reserved, namely, first, whether there was a contract; secondly, whether it was binding, not being under seal; thirdly, whether there was notice; fourthly, whether the notice was valid; fifthly, whether there was any waiver of the notice; and the plaintiff was nonsuited accordingly.

A rule was subsequently obtained by *M. Chambers*, Q.C. on behalf of the plaintiff in Michaelmas Term 1871, to set the nonsuit aside, and to enter the verdict for the plaintiff for 127*l.* 6*s.*, on the ground that the contract engaging or continuing the plaintiff as medical officer of the Highgate Infirmary, was valid, though not under the seal of the defendants; that the contract with the plaintiff was to serve as medical officer of the Highgate Infirmary until the establishment was handed over to the Central London Sick Asylum District Board, or until the plaintiff had had three months', or reasonable notice to give up his said appointment; that the plaintiff had no legal notice to give up or leave his appointment, and did not waive such or any notice, or in any other way abandon his right to continue in office; the plaintiff to be at liberty to amend the declaration upon the usual terms; and against that rule,

H. James, Q.C. and *Beasley*, for the defendants, now showed cause, and submitted that the nonsuit was right on many grounds. There was no evidence for the jury in support of the contract on the following grounds: First, there was no contract under seal, which was needful in the case of a corporation; secondly, there was no evidence of the *fact* of the contract alleged in the declaration—it was not only requisite that it should be under seal, but there was no contract *in fact*; thirdly, whatever contract there was was properly determined. To subdivide the second and third grounds, there being an engagement for three months, the plaintiff, by continuing on the service, after its expiration, became only a servant at will, to be determined at any time on the payment of a *quantum meruit*. Then the service was determined by a proper written notice, which notice by a corporation cannot be set aside by a verbal statement of a single member. The plaintiff was endeavouring to enforce the *executory* part of this alleged contract against a *non-trading* corporation, which cannot be sued upon such a contract if not under seal, whatever may be the law as to other corporations. Numerous cases support that proposition. [MARTIN, B. refers to *The Mayor, &c. of Ludlow* v. *Charlton* (6 M. & W. 815; 10 L. J., N. S., 75, Ex.), where it was held that a municipal corporation cannot enter into a contract to pay corporate funds for borough improvements except under the common seal.] No doubt the old and general rule of law is that a seal is required in every case of a contract made by or with a corporation: (See the judgment of Rolfe, B., in *The Mayor &c., of Ludlow* v. *Charlton ubi sup.*) To the same effect were the decisions of the Court of Common Pleas in *Arnold* v. *The Mayor, &c. of Poole* (4 M. & G. 860; 12 L. J., N. S., 97, C.P.) and the judgments of the Court of Queen's Bench, in *The London Dock Company* v. *Sinnott* (8 E. & B. 347; 27 L. J. 129, Q. B.), and *Reg.* v. *The Mayor, &c. of Stamford* (6 Q. B. 443; 13 L. J., N. S., 177, Q. B.)

In later times, however, a distinction has been drawn between ordinary municipal corporations and (so called) *trading* corporations, and also between cases of *executed* and *executory* consideration, and an exception to the old general rule has been and is now recognised:

The Mayor, &c., of Stafford v. *Till*, 4 Bing. 75;
Beverley v. *The Lincoln Gaslight and Coke Company*, 6 A. & E. 827; 7 L. J. N. S., 113, Q. B.;
Church v. *The Imperial Gaslight and Coke Company*, 6 A. & E. 346; 7 L. J., N. S., 118, Q. B.;
Sanders v. *The Guardians of St. Neots Union*, 8 Q. B. 810; 15 L. J., N. S., 104, M.C.

Then in *Clarke and another* v. *The Guardians of the Cuckfield Union*, in the Bail Court (21 L. J. 349, Q.B.), it was held by Wightman, J. following those decisions, that if the guardians at a properly constituted board meeting give orders for putting up water closets at the union workhouse, and they are put up and afterwards accepted and approved of by them, it is no defence, in an action against them for the price of the work, that there was no contract under seal, the purposes for which they were made a corporation requiring that such articles should be provided. The principle of the distinction and exception before referred to is well and clearly stated by Wightman, J. in his judgment in that case, where, after commenting on the various cases, he regrets the present state of the law, and thinks it would have been better, and have avoided the existing uncertainty, if the old rule had never been relaxed; but, as it is, he was inclined to think the case came within the recognised exception to the general rule, and that where it was necessary that work should be done or goods supplied to effect the express purposes of the corporation, and such work or goods was done or supplied and accepted, and approved of by the corporation, and *the whole consideration for payment executed*, the corporation could not keep the goods or the benefit, and refuse to pay on the ground of the want of a seal to the contract; and the learned judge thought (though not without much doubt, by reason of the authorities in some respects contrary), that such a conclusion was warranted by the three cases before mentioned and others to which he adverted in his judgment. But it is submitted that there is an evident distinction between a *trading* corporation and an ordinary municipal corporation, or one such as a board of guardians, and between buying goods or ordering works to be done and appointing a medical officer, which is more like appointing an attorney; and it is observable that, in *Henderson* v. *The Australian Royal Mail Steam Navigation Company* (24 L. J. 322, Q. B; 5 E. & B. 409), which was the case of an executed consideration and a *trading* corporation, Crompton, J., though joining in the judgment of the rest of the court, expressed some doubt on the point of the necessity of a seal, and in *Haigh* v. *The Guardians of the North Brierly Union* (1 E. B. & E. 873; 28 L. J. 62, Q. B.), the same learned judge expressed the same doubt on the same point, and found it difficult to distinguish the case from *The London Dock Company* v. *Sinnott* (*ubi sup.*). The defendants here, it is submitted, are in the same position as in *Sinnott's* case. If the defendants are right on this point, all the other questions fall; but it is submitted that an appointment made by a resolution can be put an end to in the like manner. After the 25th March the plaintiff was there only as a servant at will. It is on him to prove a special contract to continue till the transfer of the infirmary to another board, and there is not a shred of evidence to support such a contract, save the verbal statement of the chairman of the infirmary committee, who was not an *agent* of the corporation. [MARTIN, B. — Without any reference to the case of a corporation at all, where, as between man and man, is there any evidence here of a second contract?] It is submitted that there is not a tittle. They noticed also *Lamprell* v. *The Guardians of the Billericay Union* (18 L. J., N. S., 282, Ex.; 3 Ex. 283), and *Nicholson* v. *The Guardians of the Bradfield Union* (14 L. T. Rep. N. S. 830; L. Rep. 1 Q. B. 620; 35 L. J. 176, Q. B.)

M. Chambers, Q.C. and *Nasmyth*, for the plaintiff *contra*, supported their rule. It is contended on the plaintiff's part, first, that if a seal were necessary, the order of the Poor-Law Board, under sect. 46 of the 4 & 5 Will. 4, c. 76, directing the guardians to appoint medical officers, which order was under the seal of the Poor-Law Board, was a perfect sealing of the contract to support it on that ground, and that the seal of the guardians to the actual appointment was not necessary; secondly, the original contract was until the transfer of the infirmary should take place, and that did not happen until Michaelmas 1870. But if the court should think the original contract was only for three months, then it is contended that there was a second contract to continue until the transfer, by reason of the resolution to employ him monthly, and that appointment as appears by the evidence in the case, being expressly approved by the Poor-Law Board "until the infirmary be handed over to the Central Sick District Board." This operated as an estoppel *in pais*, and it did not lie in the mouths of the defendants after that to take the objection of the want of a seal. But even as to the law of the matter, it is submitted that the plaintiff's contention is right. With regard to ancient corporations the law, as laid down from time to time, with regard to the use of the seal on important occasions was not doubted or disputed. But the doctrine to be eliminated from all the numerous cases in all the courts was this, that, if it was essentially necessary to the discharge of their duties by the corporation that a certain act should be done, and their duties would be unfulfilled unless the act were done, then it was an act under the charter, or under the Act of incorporation, and no seal was necessary. An appointment of a medical officer was a most important and urgently necessary duty—a duty absolutely essential to be performed without, it might be, even an hour's delay, and on what principle of justice or propriety could it be said that though that were so, yet it was to be postponed until all the members could be called together, and forms gone through, and the corporate seal be attached to the appointment; and if it were not so attached, were all the medical officers liable to be dismissed at a day's warning? It was submitted that it could not be so. In cases like this, where sickness or death was the matter under consideration, there was ample power in the guardians to make the appointment without seal. The case of *Church* v. *The Imperial Gas Company* (*ubi sup.*), shows that a corporation may maintain *assumpsit* for the breach of an executory contract connected with the purposes for which that corporation was constituted; and Lord Denman, C.J., there repudiated the distinction between executed and executory contracts.

Surely the relation must be reciprocal, and if a corporation may sue, it may be sued on such a contract. And in *Nicholson* v. *The Guardians of the Bradfield Union* (*ubi sup.*), Blackburn, J., in deciding as he did in that case, would not say what his opinion would be if it had been an unexecuted contract; and none of the judges have departed from this, that there need be no seal to a contract, even of the highest importance, if the appointment be one of urgent and essential necessity. Again, as to the chairman's statement, he was the delegated agent of the committee to deliver the notice, and must be assumed to have acted properly as such, and so the defendants were bound by what he said. The state of matters afterwards shows this to be so. The guardians met weekly, and all the other officers having been continued in their posts till Michaelmas was a ratification of the chairman's statement. And the memorandum, appended to the return or statement called for on the motion of one of the guardians, stating the period of the original appointments, and the approval of the Poor Law Board of the subsequent monthly employment, was another act of ratification. [CHANNELL, B.—Suppose there had been no verbal statement by the chairman, what do you say would be the effect of the notice?] It is submitted first that the engagement, as explained by the clerk, was to be until the transfer of the infirmary, and the word "temporary," on which the defendants relied must be construed as meaning that; and the notice, therefore, would be of no effect. But secondly, the notice was waived by the second appointment for a monthly employment, which was sanctioned by the Poor Law Board as an appointment until the transfer. The court would not hold that so essential and important an officer as the medical officer could be taken to be a mere servant at will, liable to dismissal at a moment's notice. But if there were any doubt as to the matter of the seal, there was none as to the estoppel, and the cases of *Piggott* v. *Stratton* (29 L. J. 1, Ch.), and *Wing* v. *Harvey*, (23 L. J. 311, Ch.) were direct authorities to that effect.

MARTIN, B.—I believe that we are all of opinion that this rule should be discharged, and that the nonsuit which my brother Pigott directed to be entered at the trial was quite right. The plaintiff undertakes in this action to prove that there was a contract entered into with him by the defendants, the St. Pancras Board of Guardians (who are a corporation *simpliciter* and not a *trading* corporation), that they would employ him from the 25th March 1870, until such time as the management of the Highgate infirmary should be transferred from the defendants to the Central London Sick Asylum District Board. Now, as far as I can perceive, there is not a particle of evidence of such a contract which is at all binding on this corporation, and therefore such a contract is not made out. But, I understand that the spirit of the reservation of leave was, that if there was any contract proved which would entitle the plaintiff to any further payment, or to any damages, it was to be considered as raised, or that it might be raised by any amendment necessary for that purpose. Now the plaintiff has been paid for all the work which he actually did at the rate of 400*l.* a-year, which was the sum mentioned when he entered into the employment of this body; and what he has to make out is that there was a contract binding upon the corporation for his employment for any period of time beyond that for which he has actually been employed. Now, in my opinion, he fails as to this for want of a contract under seal. The several cases of *The Mayor, &c., of Ludlow* v. *Charlton*, *The London Dock Company* v. *Sinnott*, *Arnold* v. *The Mayor, &c., of Poole*, and *Reg.* v. *The Mayor, &c., of Stamford* (*ubi sup.* respectively), which have been cited in the argument at the bar, establish, beyond all doubt, that that is so. There are, without doubt, several cases in which *trading* corporations have been held to be liable upon *executed* considerations, and all the courts have been inclined to provide for such cases; for it would be a great injustice to allow a man to do work and labour for, or to supply goods to, a corporation, and then say that he shall not be able to recover the value or price of his labour or his goods, simply because his contract with the corporation did not happen to be under seal. The courts, therefore, would be anxious to assist him in obtaining payment. But, with respect to *executory* contracts, the matter is, in my judgment, very different. It has been argued by the learned counsel for the plaintiff that this was a matter of necessity. It was no matter of necessity at all in that sense. Had it been the case of a medical man suddenly called in by the board of guardians to attend a pauper then and there suffering under acute disease, or a sudden and dangerous fracture of a limb, that might be such a case of necessity; but this is a contract for the employment of a gentleman for a certain period of time in the future, and there is no immediate necessity in it at all; and there is no occasion whatever for the contract being entered into and completed otherwise than under seal. It does not therefore fall within the class of cases where corporations have been held to be liable on contracts not under seal for matters that are of necessity. The point therefore that has been argued upon that head altogether fails. Then what are the circumstances of the case here? They are as follows: In the month of Dec. 1869 the plaintiff entered into a contract for three months that expired on 25th March 1870. He then continued on without any contract at all, performing the work, and, upon the principle which I have already mentioned with regard to *executed* considerations, he would be entitled to recover for work and labour done. But there is nothing whatever to show that any new contract for an extended period of time was entered into. The next thing which occurred, instead of being evidence of any such new contract, shows exactly the contrary, for it is a notice informing him that his services would not be required after, and would be at an end on, the 24th June; which, so far from showing a fresh contract for his continued services, is evidence to show that he would cease to be in the defendants' employment on the day mentioned in the notice, the 24th June. But then it is said that there was an estoppel. Now so far from there being any estoppel, what occurred has not the semblance even of one. An estoppel takes place when parties are induced to go on making arrangements with each other by reason of representations which both parties are unable to dispute. But the facts upon which this so-called estoppel are supposed to be based, are nothing more than these—that a gentleman called Salter, a member of the board of guardians, at a board meeting, moved for a return, and thereupon, by the order of the board, the return which has been referred to was made,

with regard to a great variety of matters: *e.g.*, the cost of the infirmary, the cost of the furniture and fittings, the amount of debt, and the amount of inteaest on the debt; the list of the officers appointed, the dates of their several appointments, and for what period of time, and their salaries. And it is headed, so far as relates to the present question, "List of officers appointed at the Highgate infirmary, dates of appointment, for what period, and amount of salaries." This document shows that the plaintiff, Dr. Dyte, was the medical officer, that the date of his appointment was the 6th Dec. 1869, and that the salary to be paid to him for his services was at the rate of 400*l.* a year. The return then goes on further, and states that these several officers were "originally appointed by the guardians for three months; they have, however, since been continued by the guardians for another month. The Poor Law Board have approved of the appointments until the infirmary has been handed over officially to the managers of the Central London Sick Asylum District." Now, so far from this statement being an estoppel, which is a matter of conclusive evidence, I should say myself that it was very weak evidence indeed of one, and such as the jury would have been well justified in utterly disregarding. This document is a return not made as between the defendants and the plaintiff, but a return made to the general body of guardians, upon the motion of one of their own board, and is utterly unlike anything which can be called an estoppel. It shows the approval of the Poor Law Board of the several appointments therein specified, until the period had arrived for the infirmary being handed over to the Central Sick Board, which is something very different altogether from the original appointment for three months which was afterwards continued by the guardians for a month. It seems to me that all which this paper states is that these various persons had been appointed, and that their appointments had been approved of by the Poor Law Board; but that if it should turn out that the establishment should be handed over to the management of the Central London Sick Asylum District Board within the month, then their appointments would cease. They gave their approval to the further appointment of the various officers for one month, for which these several persons were respectively employed, subject to that contingency. Whether that be or not the meaning of it, I am, at all events, perfectly clear that the plaintiff has failed to prove it to be an estoppel. It was then said that this appointment need not be under seal, and that there is nothing in the statute requiring that the appointment of the medical officer by the board of guardians should be so. The Act of Parliament (4 & 5 W. 4 c. 76) s. 46 enacts that the Poor Law Commissioners, who, I apprehend, are not a corporation at all, must issue their directions under seal to the boards of guardians to appoint the several paid officers of the union, in order to be binding upon the guardians; but the latter can do it in the manner required by the common law authority. If the appointment in this case is to be treated as a contract between a medical man and a corporation like the St. Pancras Board of Guardians, for the former's appointment to the post of medical officer to the corporation, and his continuance in that office for a year, or any other fixed and definite period of time, then it seems to me that, to be valid, it ought to be, by the common law itself, under seal. And further, even supposing that there were no objection of that kind, I think that there is no evidence here whatever of a binding contract between the plaintiff and the defendants, or of any contract which he could state in his declaration by any amendment, so as to entitle him to recover in this case. Therefore I think that this rule should be discharged.

CHANNELL, B.—I am also very clearly of opinion that this rule should be discharged; and I propose to state the grounds of that opinion very shortly. I think that, if there were a valid contract, the authority of the cases referred to by my brother Martin is conclusive to show that it could be valid only if it were under seal. I am aware that, in certain cases of *trading* corporations, they have been held bound to a contract not under seal; but the body here is not a corporation of that character. One of the cases referred to confirms that view. Then I see nothing here showing that these defendants could be bound by any contract which is not under seal. I think also that the point of estoppel, for the reasons already so fully explained by my brother Martin, does not arise; but supposing that there had been more doubt about that in my mind, than there really exists (for in truth I entertain no doubt about it at all), is there any evidence of the contract which the plaintiff has declared upon? That is quite apart from the question whether it must be verified by a seal or not. I am of opinion that there is here no such evidence. The contract alleged in the declaration, taking all the evidence before us and dismissing all necessity for having it under seal, is not a contract which supports the declaration. The plaintiff had the opportunity at the trial of amending the declaration, but he declined then to do so. It is true that this kind of reservation took place, that if the court saw, in any view of the matter, that a contract could be established, which, though not being under seal, would entitle the plaintiff to recover, but a contract discharged in point of form from the statements in the delcaration, then the court was not to be precluded, after this period of time, from its right to amend the declaration. But no amendment has been asked for to-day, nor has any argument been offered to us to show to my mind that the court could, in any other form, say that the plaintiff is entitled to recover. In my opinion, therefore, the contract was one requiring to be verified by the seal of the defendants; but supposing that that point was not with the defendants, as I think it is, and supposing that we were to look at what was agreed to in fact, independently of the consideration of the seal, the contract laid in the declaration is not made out.

PIGOTT, B.—I am entirely of the same opinion. I take now the same view which I took at the trial, that this was a contract which required a seal. The reason for that is given in those cases to which my brother Martin has already referred. It is the old rule of law, and that is to prevail now unless this case comes within any of the exceptions which have been engrafted upon that rule. Now I think myself that it comes within none of those excepted cases which have been decided. Some of them are cases of *executed* contracts; one, however, is a case of an *executory* contract. I refer to the case of *Church* v. *The Imperial Gas Company* (*ubi sup.*) That was the case of a *trading* corpo-

ration, and the action was brought in respect of matters as to which there had been a contract broken, for not fulfilling the contract. It had been brought by the company for not accepting gas. But that would not make any difference; it would be equally necessary that there should be a seal if there was to be mutuality in the contract. Although there was no sealed contract in that case, yet no doubt the court did hold that the action might lie; but it was expressly upon the ground that it was a *trading* corporation, therefore that is not an exception at all serviceable to the argument on the part of the plaintiff in the present case. In the present case the fact is that there was no seal from the beginning; there was a resolution and an intimation by letter that the hiring was for three months, and what happened afterwards was merely a continuing on in the employment. It has been argued that there was an estoppel arising upon what the chairman of the infirmary committee said when the notice determining the service was given to the plaintiff. It seems to me, however, that that cannot be made the ground of an estoppel against the defendants, because the person who made that statement had no authority from them to make any such statement, and there is no evidence of any such authority. He was merely a member of the infirmary committee, and he was not then acting as a member of the corporation, even if it could be an estoppel if he had been. I think it could not be one even then, because he would only be one of the corporate body, and without express authority what he said on the occasion would not bind the whole corporation. Then, as to the other estoppel arising upon the "return" furnished to the board of guardians, my brother Martin has already disposed of that. I think that there is nothing in the nature of an estoppel arising out of that document, and I concur with my learned brothers in thinking that the plaintiff's rule should be discharged. *Rule discharged.*

Attorney for the plaintiff, *W. Venn*, 3, New-inn, Strand, W.C.

Attorneys for the defendants, *Cunliffe* and *Beaumont*, Chancery-lane, W.C.; agents for *W. D. Cooper*, Guilford-street, Russell-square, W.

JUDGES' CHAMBERS.

(Before Mr. Justice QUAIN.)

Sept. 13 *and* 17, 1872.

REG. *v.* LANYON.

Adjudication in bastardy—Order first served incorrectly drawn up—Power of same justices to draw up a correct order subsequently and proceed thereon.

Where two justices had adjudicated A. to be the father of a bastard child, but by mistake the order first drawn up and signed did not correctly embody the terms of such adjudication, and no step had been taken to enforce such order beyond serving the same on A., who treated it as a nullity;

Held, that the same justices were entitled to cause a second order to be drawn up, and enforced, embodying correctly the terms of their adjudication, notwithstanding that the first order had not been quashed, and notwithstanding that there had been no fresh summons or hearing, or tender of costs.

IT appeared from the affidavits that a summons in bastardy came on to be heard before two justices of Cornwall, at Falmouth, on the 30th Jan. 1872, when such justices adjudicated Lanyon to be the father of a bastard child, and ordered him to pay 2*s.* a week from the date of its birth towards its maintenance. An order in writing was thereupon drawn up by the clerk, signed by the justices who adjudicated on the summons, and served on Lanyon, but it was subsequently ascertained that in this document the sum of 2*s.* 6*d.* had been inserted, where the sum of 2*s.* only ought to have appeared, and that the date of the birth of the child had been altogether omitted. No proceeding was therefore taken to enforce it, and Lanyon refused to make, and did not make, any payment to the complainant. In this state of things the complainant, in May 1872, applied to the same justices for a proper order, and an order, dated 30th Jan. 1872, embodying correctly the verbal adjudication of that date, was thereupon made out and signed by the same justices, and served on Lanyon, who refused to obey it, and the payments under it being in arrear he was committed to the Cornwall county prison at Bodmin, pursuant to the provisions of the 7 & 8 Vict. c. 101, s. 3.

On these facts the learned judge, on a former day (Sept. 10th), on the application of *Folkard*, granted a summons, calling upon the keeper of the prison to show cause why a writ of *habeas corpus* should not issue to bring up the body of Lanyon, or why Lanyon should not be discharged from custody without any writ of *habeas corpus*, the contention on behalf of the prisoner being that, inasmuch as the first order had never been quashed, the second order was invalid, or that at all events there ought to have been a fresh summons and a fresh hearing after tender of costs, before the justices could make a second order.

Murch now showed cause. — The prisoner is not entitled to the writ or to his discharge. In the case of *Ex parte Johnson* (3 B. & S. 947; 32 L. J. 193, M. C.) it was held, overruling *Reg.* v. *The Justices of Flintshire* (15 L. J. 50, M. C.) that the time for appealing against an order in bastardy was from the date of the oral judgment, and not from the time when the order in writing was signed. Such an order must therefore, be taken to be made when pronounced orally, and may be drawn up at any time. Here, the only order made was the oral order of 30th Jan. 1872, and such order was never drawn up till May, when all proceedings taken upon it were perfectly regular. The first order drawn up was not the order of the justices, but a nullity, and the prisoner admits in his affidavit that he so treated it. But it will be said on behalf of the prisoner that the service of the first order upon him is such an enforcing of that order as to bar any further proceeding by the complainant without a fresh summons. In *Reg.* v. *Brisby* (18 L. J. 157, M. C.), which will be relied on by the other side, it clearly appears that mere service of an order is not such an enforcing of it, and that case is also an authority for contending that, where the first order is a nullity, it is not necessary that it should be quashed before a second application can be made. And although in that case there was a fresh summons, and a fresh hearing, the justices there were not the same justices who had made the original adjudication. That case is, therefore, no authority for the contention that the same justices cannot

cause their order to be correctly drawn up without a fresh summons. Here, all the complainant did, was to request the same justices to hand her a record of their adjudication of 30th Jan. Then, as to the point with reference to tender of costs, such a proceeding is only required where no result has followed from a first hearing, and a second hearing becomes necessary, which is not the case here.

Folkard in support of the summons.—The order first drawn up and signed is the only order of which notice can be taken, and until it is quashed, no other order can be made in the same subject matter: (*Reg.* v. *The Justices of Cheshire*, 5 B & Ad. 439.) But assuming that it was not necessary that the first order should have been quashed, here the justices have entertained a second application without any fresh summons or fresh hearing, which is clearly not in accordance with the course pursued in *Reg.* v. *Brisby* (*sup*). And, lastly, the justices had no jurisdiction to make a second order until a tender of the costs already incurred by the prisoner had been made to him by the complainant. According to the case of *Reg.* v. *Hinchcliff* (1 Q. B. 356) he was entitled to be replaced in the position in which he stood before the hearing of 30th Jan. The second order is, therefore, invalid, and the prisoner is entitled to his discharge.

The learned judge said that he would take time to consider the matter, and on the 17th Sept. delivered the following judgment:—

QUAIN, J.—This is an application for a *habeas corpus* in order to obtain the discharge from custody of the prisoner Lanyon, who has been committed for disobeying an order in bastardy whereby he was adjudged the father of a bastard child, and ordered to pay 2*s.* a week towards its maintenance. It was objected on behalf of the prisoner that the order in bastardy was invalid, and that the commitment founded on it was consequently illegal. The facts were these: On the 30th Jan. 1872, an application was made to two justices for an order of affiliation in the usual way, who, after hearing the evidence adduced before them, made an order adjudging the prisoner to be the father of the child, and ordered him to pay 2*s.* a week to the mother. By mistake of the clerk to the justices a written order was drawn up ordering the prisoner to pay 2*s.* 6*d.* a week instead of 2*s.*, and omitting to state the date of the birth of the child from which time the payments were to be made. The justices by mistake signed the order so drawn up, and this order was served on the prisoner. It was stated in the affidavit of the prisoner that he refused to obey this order, as he was advised that it was a nullity; and the applicant also swore that she made no attempt to enforce it on the same ground, and no step was taken to enforce this order except serving it on the prisoner. Two months later the applicant went before the same two justices and asked that the order made by them on the 30th Jan. should be correctly drawn out and signed, in order that she might enforce it, and accordingly an order was then drawn up and signed and dated as of the 30th Jan. (the day when the original order was made) correctly embodying the terms of the original order, and a correct order was then delivered to the applicant. This last order was served on the prisoner, and on his failure to obey it he was committed to prison, and this was the imprisonment of which he now complained. It was objected that the justices had no power to make the second order till the first had been quashed on appeal or *certiorari*, or that, if the applicant was entitled to treat the first order as a nullity, no second order could be made except after a fresh summons and a fresh hearing, and after tender of the costs of the first summons. I am of opinion that this objection is not well founded, and that the commitment of the prisoner is right. It has been decided in *Ex parte Johnson* (3 B. & S. 947) that an order in bastardy is made when the judgment of the justices is pronounced orally in court, and that the formal written order is merely the record of the adjudication, and may be drawn up afterwards and signed at any time, and that consequently the time for appeal against such an order was from the oral adjudication in petty sessions and not from the time when the written order is signed or served. The applicant in this case had a right to have the order made in her favour correctly drawn up. The order first drawn up did not embody correctly the terms of the order made, and in fact no such order as that first drawn up was ever really made by the justices, their signatures having been appended by mistake to a wrong order. It is an error, therefore, to allege that a second order was made. The only order made was the oral order of the 30th Jan. and an incorrect record of that order having been delivered to the applicant I think that she was entitled to apply to the same justices and to request that a correct record of their order should be delivered to her. This is all she did, and as there was in fact no second order made it follows that no fresh summons and fresh hearing were necessary. The case of *Reg.* v. *Brisby* (18 L. J., 157, M. C.) was cited as an authority that a new summons was required before a second order could be drawn up. In that case the point now raised was not involved, nor was there any opinion expressed on the subject. The second application in that case appears to have been made to other justices than those who heard the first, and, of course, if other justices are called upon to make an order, there must be a fresh hearing before them. But here the same justices who heard the first application are called upon merely to draw up a correct record of their own order. That case, however, is a distinct authority for the proposition that where the order first drawn up is bad on the face of it, as in this case, and, therefore, a nullity, there is no necessity to have it quashed on appeal or *certiorari* before a second application to the other justices is made; nor was there any necessity in this case to tender the costs of the first summons; that course is required to be adopted only where the first hearing is admitted to have been altogether abortive, and that, therefore, the proceedings have to be commenced over again. Under such circumstances the case of *Reg.* v. *Hinchcliff* (10 Q. [B. 356), decides that the justices are not bound to entertain a second application until the costs of the first have been paid or tendered, and the defendant has been thereby replaced in his original position. But in this present case, so far from the first adjudication being admitted to have been abortive, that is the only adjudication which the applicant now seeks to enforce. What she asks is, that a correct record of that adjudication should be drawn up, and she seeks for no fresh hearing nor judgment in the case, nor is the prisoner subjected to any fresh costs by reason of the mistake made in drawing up the first record of the order. It is

clear, therefore, that no tender of costs is required in this case where the first and only adjudication was right, and the applicant seeks to enforce that adjudication. The case of *Wilkins* v. *Hemsworth* (7 A. & E. 807), may also be referred to. In that case the justices signed two orders intended to be duplicates, but, by mistake, the order served on the father ordered the mother instead of the father to pay 1*s.* 6*d.* a week. Afterwards a correct copy of the order was drawn up and served on the father, and it was held that as there was but one order made the service of an incorrect copy of it could not vitiate the order, but that a correct copy might afterwards be drawn up, served, and enforced. For these reasons I am of opinion that the commitment of the prisoner was right, and this summons must therefore be dismissed.

Summons dismissed.

Attorneys for the complainant and justices, *Price, Bolton*, and *Fielder*, agents for *W. J. Genn*, Falmouth.

Attorneys for the prisoner, *Gregory, Rowcliffes*, and *Co.*, agents for *W. Jenkins*, Falmouth.

V.C. WICKENS' COURT.

Reported by EDWARD WINSLOW and HENRY GODEFROI, Esqrs., Barristers-at-Law.

Nov. 11, 12, *and* 13, 1872.

ATTORNEY-GENERAL *v.* THE TOTTENHAM LOCAL BOARD OF HEALTH.

Misapplication of funds—Audit—Costs.

Where a local board of health misapplied the rates toward defraying the expenses of a Bill in Parliament, the Court granted an injunction to restrain the further prosecution of the Bill, which, however, had been abandoned before the hearing. The auditor had surcharged some of the defendants, members of the board, with the amount paid for such expenses, and no order was therefore made on that part of the prayer of the information which sought to make them personally liable; but costs were decreed against them.

A member of the board, who proved that he had opposed the scheme embodied in the Bill, was held not to be personally liable, and the information was dismissed as against him, with costs against the relator.

Semble, that where the clerk or secretary to a corporation aggregate puts in an answer in his own name, he might not be able to get his costs; but, secus, where he acts only for the board, and no further answer is asked from the latter.

THIS was an information at the relation of Henry Childs to restrain the defendants, the local board of health, and their clerk, Edmund Crowne, James Brickwell, Nathaniel Tregelles, Robert Luke Howard, Edward Clarke, and John Follard Lovering, from applying any moneys produced by the rates and funds under their control towards payment of the expenses incurred or to be incurred by them in the preparation, introduction, or promotion of a Bill in Parliament for the utilisation of the sewage of the Tottenham district upon certain portions of the Lammas and other lands in Tottenham and Walthamstow parishes by irrigation. It was also prayed that the defendants other than the board and their clerk might be ordered to repay to the board a sum of 400*l.* paid to Messrs. Wyatt and Hoskins as expenses with regard to the Bill, and also to pay the costs of this suit, but not out of any rates or funds under the board's control. An injunction in the terms of the prayer had been granted on motion, and the bill had been abandoned. The case now came on on motion for decree as to that part of the prayer which asked for an order charging the defendants with the 400*l.* so paid and the costs of the suit. It appeared that the sewage scheme had been opposed by the ratepayers, but that the board nevertheless persevered in it, acting under the advice of Mr. Rawlinson, an eminent engineer.

Answers had been put in by Crowne, the clerk to the board, by the other defendants except Lovering jointly, and by Lovering alone. The case made by them was that the board acted *bonâ fide* for the benefit of the ratepayers. Lovering stated that he was opposed to the irrigation scheme, and that though he was present at some of the meetings at which it was discussed, and also at that at which the cheque was signed for the 400*l.*, he was not personally chargeable, as he in fact voted against the payment, though such vote was not recorded.

During the hearing of the case an affidavit was put in stating that the auditor for the union had disallowed the 400*l.*, and surcharged the defendants, Clarke, Howard, and Brickwell as to that payment.

Schomberg Q.C. (*Jason Smith* with him) for the informant, contended that the proceedings of the board were clearly illegal:

Attorney-General v. *West Hartlepool Improvement Commissioners*, L. Rep. 10 Eq. 123; 22 L. T. Rep. N. S. 510;
Attorney-General v. *Eastlake*, 11 Hare, 205;
Attorney-General v. *Corporation of Norwich*, 16 Sim. 225;
Simpson v. *Denison*, 10 Hare, 51;
Reg. v. *Mayor and Corporation of Sheffield*, L. Rep. 6 Q. B. 652;
Joint Stock Discount Company v. *Brown*, L. Rep. 8 Eq. 381; 20 L. T. Rep. N. S. 692.

Waller for Crowne stated that he appeared for them simply as clerk to the board, and asked for his costs against the relator, under rule 16 of the 40th Consolidated Order. [THE VICE-CHANCELLOR: He cannot have them in the first instance, where the bill prays for relief as well as discovery.] *Waller* cited Morgan and Davey on Costs, p. 151, and referred to *Attorney-General* v. *Burch* (4 Madd. 178).

Greene Q.C. (*H. B. Howard* with him) for Brickwell, Tregelles, Howard, and Clarke, claimed the protection of sect. 140 of the Board of Health Act of 1848 (11 & 12 Vict. c. 63), which grants exemption for things done *bonâ fide* for the purposes of the Act, and cited sect. 75 of the Local Government Act 1858 (21 & 22 Vict. c. 98.) They also observed that the amount surcharged by the auditor could be recovered under 11 & 12 Vict. c. 91, sect. 4.

Mackeson, Q.C. (*T. Stevens* with him) for Lovering, contended that he was in no way liable, and cited

Land Credit Company of Ireland v. *Lord Fermoy*, L. Rep. 8 Eq. 7; 20 L. T. Rep. N. S. 293;
Rex v. *Justices of Essex*, 3 B. & Ad. 941;
Wright v. *Wales*, 5 Bing. 336;
Cann v. *Clipperton*, 10 Ad. & Ell. 589;
Smith v. *Hobhouse*, 9 Q. B. 1005.

The VICE-CHANCELLOR intimated that as to the 400*l.*, he did not intend to decide anything which would clash with the decision of the auditor.

Schomberg, in reply, cited.
Attorney-General v. *Andrews*, 2 M. N. & G. 225;
Clinch v. *Financial Corporation*, L. Rep. 5 Eq. 484; 19 L. T. Rep. N. S. 334;
Tinkler v. *Wandsworth Board of Health*, 2 De G. & J. 261.

The VICE-CHANCELLOR.—Practically all I have to decide is as to the question of costs; but as Mr. Schomberg asks to have a perpetual injunction, I will grant it against the board, so as to prevent them from applying any rates towards paying any costs of, or relating to this bill. As regards the payment of the 400*l*., any order I might make would be unnecessary, since the auditor's decision may be taken to be *primâ facie* right, and any future question on the subject can be raised under the liberty to apply. I therefore make no order as to that payment. I have now to deal with the liability of the parties as to costs. The case is one in which, assuming the solvency of the persons chargeable, ample justice can be had through the action of the auditor; but where the sum is large I think the ratepayers have a right, notwithstanding such solvency, to come here to check its growth. The 400*l*. might easily have become 4000*l*., and the suit against the local board is certainly a proper one. As to Lovering, I think he has shown himself, on the facts, not to be liable; but as to the other defendants who say that the payment was legal, and I was surprised to hear it argued that it was so, I do not think they are protected by the 140th section of the Act of 1848. The auditor was right to decide as he did, and I hold that it is clear that when persons who know or ought to know that they are acting irregularly, take out of the corporate chest money devoted to other purposes, they are acting illegally, and must be made to refund. It is hardly necessary to say that although the auditor has made the charge against only three, the others are not thereby absolved; at all events they would be secondarily if not primarily liable. As to the costs of Crowne, owing to some irregularity he has appeared and answered by himself; but as the informant has accepted his answer and not required a further answer from the corporation, it may be treated as if the corporation had joined in it. The decree will therefore be as follows: Continue the injunction against the defendant, the board of health, applying any moneys arising out of the rates in payment of any costs or expenses of the Bill in Parliament mentioned in the information. And it appearing that since the information was filed, that is, in the month of June 1872, the auditor has disallowed the sum of 400*l*. stated in the information to have been paid to Messrs. Wyatt and Hoskins out of the rates, and has surcharged the defendants Howard, Brickwell, and Clark with the said sum, this court doth not think fit to make any order in respect thereof; dismiss the information as against the defendant Lovering, with costs; order the defendant, the board of health, to pay the relator's costs of the motion for the injunction; order the informant to pay one set of costs as the costs of the defendant, the board of health, and the costs of the defendant Crowne, other than the costs of the motion for the injunction; the defendants Brickwell, Tregelles, Howard, and Clark to pay to the informant the costs paid by him to the defendants, the board of health and Crowne, and the costs of the suit other than the costs of the motion for the injunction. Liberty to apply.

Solicitors for the relator, *W. F. Watson*; for Crowne and the board of health, *Heath* and *Parker*; for Lovering, *Venning*, *Roberts* and *Venning*; for the other defendants, *Howard* and *Gillespie*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs. Barristers-at-Law.

Wednesday, Nov. 13, 1872.

DENNIS (app.) *v.* TOVELL (resp.).

Harbours, &c., Clauses Act (10 & 11 *Vict. c.* 27), *s.* 74—*Damage to pier—Inevitable accident—Liability of owner of vessel.*

Sect. 74 *of the Harbours, &c., Clauses Act* (10 & 11 *Vict. c.* 27) *enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the buoys or works connected therewith, &c."*

The above enactment applies to the case of damage done to a pier by a vessel through inevitable accident caused by stress of weather.

CASE.

THIS is a case stated by us, the undersigned, five of Her Majesty's justices of the peace in and for the division of Woodbridge, in the county of Suffolk, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before us as hereinafter stated:

At a petty sessions holden at the Shire Hall, Woodbridge, in and for the division of Woodbridge, in the county of Suffolk, on the 13th March 1872, a complaint preferred by Charles Samuel Tovell (hereinafter called the respondent), against John Dennis (hereinafter called the appellant), under sects. 74 and 75 of the Act 10 & 11 Vict. c. 27, charging, for "that, on the 27th Sept. 1871, the said John Dennis was the owner of a certain vessel called the *Ava*, which said vessel, on the day and year aforesaid, at or near Landguard, in the county of Suffolk, did damage to the pier and works of the Harwich Harbour Conservancy Board, there situate, to the amount of 50*l*., by striking violently against the said pier and works, and breaking and destroying divers parts of the same, the said vessel at the time such damage was done not then being in charge of any duly licensed pilot, contrary to the statute in that case made and provided, by reason whereof the said John Dennis, as such owner, of the said vessel, became liable to pay to the said Harwich Harbour Conservancy Board, the sum of 50*l*.," was heard and determined by us, the said John Dennis, the appellant, appearing by Edward Chapman, his attorney, and the said Charles Samuel Tovell being then present; and upon such hearing the appellant was by us ordered to pay to the said Harwich Harbour Conservancy Board, the sum of 50*l*., and in default of payment thereof, the same to be recovered according to law, and an order was afterwards drawn up and signed. Herewith is a copy of such order, which is to be taken as part of this case.

The appellant being dissatisfied with our determination upon the hearing of the said complaint, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing, to state and sign a

case setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into recognizances as required by the statute in that behalf.

Now therefore we, the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case.

Upon the hearing of the complaint it was proved on the part of the respondent and found as a fact, that the said vessel, the *Ava*, did the damage as alleged in the complaint, and it was proved on the part of the appellant that the said damage was the result of an inevitable accident caused by stress of weather, and did not arise from any wilful act or negligence of the master or other persons in the said vessel, and it was contended therefore, on the part of the appellant, that he was not liable to pay to the said Harwich Harbour Conservancy Board the amount claimed for damage so done as aforesaid.

We, however, being of opinion that the said appellant became liable under sect. 74 of the Act 10 & 11 Vict. c. 27 (*a*), to pay the said Harwich Harbour Conservancy Board the said sum of 50*l.* for the damage so done as aforesaid, whether the damage was the result of inevitable or unavoidable accident or otherwise, gave our determination against the appellant in the manner before stated.

The question of law arising in the above statement for the opinion of this court therefore is,

Whether the said damage to the said pier and works, being the result of an inevitable accident, caused by stress of weather, and not arising from any wilful act or negligence of the master or other persons in the said vessel, the said appellant became liable to pay to the said Harwich Harbour Conservancy Board the amount claimed in respect of the damage so done as aforesaid.

If the court should be of opinion that the said order was legally and properly made and the appellant is liable as aforesaid, then the said order is to stand; but if the court should be of opinion otherwise, then the said complaint is to be dismissed.

And the court is humbly solicited according to the power vested in the court by the said statute 20 & 21 Vict. c. 43, to remit the case to us the said justices with the opinion of the court thereon, or to make such other order as to the court may seem fit.

Given, &c.,

W. PAGE T. PHILLIPS.
ROLLA ROUSE.
WM. BEESTON LONG.
J. F. G. PURCELL FITZ GERALD.
RENDLESHAM.

Grantham, for the appellant, contended that it could not have been the intention of the Legislature to make the owners of vessels liable for an inevitable accident of this kind. [COCKBURN, C.J. —It may seem strange, but the Legislature has said that the owner of the ship shall be liable for the accident, however occurring. It may have been supposed that such a case would seldom occur.]

Philbrick (with him *Tindal Atkinson*), for the respondent, was not called upon.

BLACKBURN, J.—The Lord Chief Justice has left the court, but he has already intimated his opinion. I am of opinion that the Legislature, whether intentionally or not, has said that "the owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, &c." The Legislature has put the owner in the same position as a man who keeps a dangerous animal, who must do so at his peril, and be answerable for any injury such animal may do. It enacts simply that the owner shall be liable for whatever damage the vessel may occasion. It appears to me that the Legislature has clearly said so, whether it intended it or not.

QUAIN, J.—I am of the same opinion.

Attorneys for appellant, *Batty* and *Whitehouse*, for *Chapman*, Ipswich.

Attorneys for respondent, *J. L. Morris*, for *Philbrick* and *Son*, Colchester.

HIGGINS (app.) *v.* HARDING (resp.)

Rating—Paving of new streets—Land bounding or abutting on street—Metropolis Local Management Act (25 *&* 26 *Vict. c.* 102), *s.* 77.

Sect. 77 *of the Metropolis Local Management Act* (25 *&* 26 *Vict. c.* 102) *enacts that "where any vestry or district board shall, under the powers given by the* 105*th section of* 18 *&* 19 *Vict. c.* 120, *have paved, or be about to pave any new street, the owners of the land bounding or abutting on such street, shall be liable to contribute to the expenses or estimated expenses of paving the same," &c.*

Vacant land possessed by a railway company close to one of the piers of a railway bridge, and used for the purposes of repairing the bridge, and land which is partly vacant and partly a buttress or support to the embankment of the railway, are "land" within the meaning of the above enactment.

THIS was a case stated for the opinion of her Majesty's Court of Queen's Bench, by James Taylor Ingham, Esq., sitting magistrate of the Hammersmith Police Court, under and by virtue of the statute made and passed in the 21st year of the reign of Her Majesty Queen Victoria (20 & 21 Vict. c. 43) intituled "an Act to improve the administration of the law so far as respects summary proceedings before justices of the peace."

The appellant is the secretary of the Hammersmith and City Railway Company, and the respondent is the clerk of the vestry of the parish of Saint Mary Abbots, Kensington, in the county of Middlesex.

The appellant was summoned for having neglected to pay to the vestry or the respondent the sum of 54*l.* 10*s.* 11*d.*, charged upon the appellant as the owner of certain land abutting upon a street known as St. Marks-road, in the parish of Ken-

(*a*) Sect. 74 of the 10 & 11 Vict. c. 27, provides that the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the buoys or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done, shall also be liable to make good the same, &c., provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

sington, in respect of paving works to be carried out in the said St. Marks-road, under the provisions of the Metropolis Local Management Act 1855, and the other Acts of Parliament amending the same.

The following is a copy of the summons:

HAMMERSMITH POLICE COURT.

Metropolitan Police District to wit. } To John Drew Higgins, Secretary, Hammersmith and City Railway Company, Paddington Station. Whereas George Capper Harding, the clerk of the vestry of the parish of St. Mary Abbots, Kensington, in the county of Middlesex, has this day made complaint before me, one of the magistrates of the police courts of the Metropolis sitting at the Hammersmith Police Court in the said county and within the Metropolitan Police District, that you have refused or neglected to pay to the said vestry or to their said clerk the sum of 54*l.* 10*s.* 11*d.* (although the same has been duly demanded of you), such sum being charged upon you as owner of certain land situate and being east and west side of St. Mark's-road, in the said parish of Kensington, and abutting on a certain street or way, known as St. Mark's-road, in respect of paving works to be carried out in St. Mark's-road aforesaid, under and by virtue of the provisions of the Metropolis Local Management Act, and the other Acts of Parliament amending the same. These are therefore to command you in Her Majesty's name to be and appear on Thursday next, at two o'clock in the afternoon at the Police Court aforesaid, before me or such other magistrates of the said Police Court as may then be there, to answer to the said complaint, and to be further dealt with according to law.

Given under my hand and seal this 1st March 1872, at the Police Court aforesaid.

(Signed) J. T. INGHAM.

The summons was heard before me on the 7th and 14th March 1872, and at the hearing the following facts were proved or admitted:

The said Saint Mark's-road was formerly an occupation road for horses and carts leading to Notting Barn Farm, and also a public footpath, but of late years buildings have been erected and a street formed. On the 2nd Aug. 1870, the said vestry duly passed a resolution that the said Saint Mark's-road was not paved to the satisfaction of the said vestry, and that it was necessary and expedient that the carriage ways and footpaths thereof should be paved throughout the whole breadth thereof, in pursuance of sect. 105 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), and sect. 77 of the Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102).

The appellant, as the secretary of the Hammersmith and City Railway Company is the owner of the land consisting of two portions abutting on the said Saint Mark's-road, one portion being on the west side of the said road, and having a frontage of ten feet, the other portion being on the east side of the said road, and having a frontage of seventy-three feet.

The surveyor for the time being of the said vestry had in pursuance of the aforesaid sections estimated the amount of the expenses for providing and laying such pavement, and apportioned the amount chargeable against the owners of the said two pieces of land at the sum of 7*l.* 1*s.* 11*d.* for and in respect of the piece situate on the west side of the said road, and at the sum of 47*l.* 9*s.* for and in respect of the piece situate on the east side. Notice of the said resolution and apportionment, and demanding payment of the said sums respectively dated the 3rd Oct. 1871, were duly posted and served by the respondent upon the appellant. Copies of such notices are annexed hereto, and are to be taken to form part of this case:

The Hammersmith and City Railway crosses St. Mark's-road on an arch at a height of 16ft., and is carried in the direction of Hammersmith on brick arches. From the east side of the said road the railway is carried on an embankment, the foot of such embankment projecting from 40ft. to 50ft. the line of the arches.

It was also proved that the portion of land on the west side of the said road forms part of a strip of an uniform width of 10ft., which is kept and solely used for the purpose of repairing the arches of the viaduct. It was also proved that the embankment on the east side of the said road formed part of the railway, and acts only as a buttress or support thereto, and could not be used for any other purpose. The space situate between the foot of the embankment and the wall is land purchased by the company to allow for the slippings of the embankment, which have actually taken place, and are likely to recur owing to the peculiar nature of the soil.

It was further admitted by the surveyor for the said vestry that the amounts estimated as chargeable against the owners of the two pieces of land was so estimated in respect of the whole frontage of the two frontages of 10ft. and 73ft. respectively.

Under the above circumstances, it was contended on behalf of the appellant that he was not liable to contribute to the said expenses in respect of his ownership of either of the said portions of land, on the ground that they were mere strips of land forming part of and appertaining to the railway, and necessary for its maintenance; that there was no separate ownership apart from the railway; and that the appellant was not chargeable under the before-mentioned Acts as owner of the railway.

It was further contended that even assuming the appellant to be chargeable in respect of his ownership of so much of the land on the east side of the said road as is situated between the part C. on the said plan and the foot of the said embankment he was not chargeable in respect of the embankment itself or any portion of it, and that therefore the amount claimed in the summons could not be recovered, and the summons must be dismissed.

I found as a fact that the portion of land on the western side of the said road is used with the said railway, and necessary for the repairs thereof, and further, that about one half of the portion of land on the eastern side of the said road is simply a buttress or support to the embankment, but I was of opinion that neither portion thereby lost its character of land, and I therefore made an order that the appellants should pay the said sum of 54*l.* 10*s.* 11*d.* in the summons mentioned and 2*s.* costs.

The appellants being dissatisfied with my determination as being erroneous in point of law, duly applied to me in writing within three days to state and sign a case for the opinion of one of the Superior Courts of law, in pursuance whereof I have stated and signed the above case.

The question for the opinion of the court is whether the appellant is liable to pay the said sum of 54*l.* 10*s.* 11*d.* If the court shall answer this question in the affirmative the said order shall be affirmed and the appellant shall pay the respondent the costs of this appeal. If the court should answer the above question in the negative, the said order to be quashed and the summons dis-

missed, and the respondent shall pay the appellant the costs thereof and of this appeal.

Lopes, Q.C. (with him *E. E. Webster*), for the appellant, contended that these portions of land were not "land" within the meaning of the Acts 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102. Sect. 105 of the former Act provides that "in case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, &c." Sect. 162 provides that "all such hospitals, public schools, and other public buildings, dead walls, and void spaces of ground as are now by law rateable to any rate for the costs and charges of paving or repairing the pavements within any parochial or other district, either separately or jointly with any other object or objects (except only places of religious worship and burial grounds, or places which have been used for burial grounds and are not used for any other purpose) shall be rateable under this Act to the like extent and for the like objects or purposes as they may now be rated, &c." It cannot be said that the present case comes within these enactments; but it will probably be contended that the case does come within sect. 77 of 25 & 26 Vict. c. 102. That section enacts that "where any vestry or district board shall, under the powers given by the 105th section of 18 & 19 Vict. c. 120, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do, &c." It is submitted that the portions of land mentioned in the present case are not "land" within the meaning of this section. It was evidently the intention of the Act to make liable to rating only such lands as would derive advantage from the paving, which none of the lands here would do. That the word "land" in the Metropolis Management Acts is not always to be taken in its widest sense, is shown by the case of *Angell* v. *The Vestry of Paddington* (L. Rep. 3 Q. B. 714), where a church, built on land conveyed to the Commissioners for building Additional Churches, was held not liable to be assessed to the expenses of forming a new street, either as "house" or "land" under those Acts. [*Prentice*, Q. C. referred the court to the case of *Lord Northbrook* (app.) v. *The Plumstead Board of Works* (resps.) (L. Rep. 7 Q. B. 183) where it was held that the words "bounding or abutting on such street," include the soil of private roads leading out of a new street.] *Bowditch* (app.); *The Wakefield Local Board of Health* (resps.) (L. Rep. 6 Q. B. 567; 25 L. T. Rep. N. S. 88) was also referred to.

Prentice, Q. C. (with him *Beresford*) for the respondents, was not called upon.

COCKBURN, C.J.—I did not hear the whole of the argument, but so far as I gather from it, I cannot see that there is any doubt whatever upon the point. Our judgment must therefore be for the respondents.

BLACKBURN, J.—I am of the same opinion. I have no doubt that land occupied as a railway continues to be land. The only reason assigned why it should not be is that those who have the freehold of a church are not rateable in respect of it; but the two cases are not at all similar.

QUAIN, J.—I am of the same opinion. It seems to me that the 77th section of 25 & 26 Vict. c. 102, exactly meets this case. That section provides that "where any vestry or district board shall, under the powers given by the 105th section of the firstly recited Act (18 & 19 Vict. c. 120) have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same," &c. This section seems to me to meet the very case of land not built upon abutting on any street, such as exists in the present case.

Judgment for respondents.

Attorneys for appellants, *Young, Maples*, and *Co.*

Attorneys for respondents, *J.* and *M. Pontifex.*

Nov. 13 *and* 16, 1872.

WARWICK AND BIRMINGHAM CANAL COMPANY (apps.) v. GUARDIANS OF BIRMINGHAM (resps.)

Poor-rate—Wharf, canal, towing path—Same proportion as other land and grounds.

By a local Act of 1793, *the appellants are to be rated in respect of their lands and grounds, and all warehouses and other buildings, in the same proportions as other lands, grounds, and buildings lying near the same are rated. Near the offices, machine-houses, wharf, canal, towing path, and premises, for which the appellants are rated in the respondent's parish, are pieces of vacant land, a piece of garden ground, and sets of premises consisting of warehouses or gasometers, and also of yards and wharves used therewith.*

Held, that the appellants' wharf, canal, and towing path, ought not to be rated in the same proportion as the neighbouring piece of garden ground; nor as if it were land occupied by the appellants, supposing no canal to exist; but that the land upon which the neighbouring sets of premises stand ought to be calculated in the proportion.

ON an appeal to the general quarter sessions holden in and for the borough of Birmingham against a poor's rate made the 15th April 1871 for the parish of Birmingham, in which the above-named appellants were rated as occupiers in respect of their offices, machine houses, wharf, canal, towing path, and premises at a gross rental (estimated) of 462*l.*, and a rateable value of 416*l.*, the recorder amended the rate by reducing the gross estimated rental to 186*l.*, and the rateable value to 163*l.*, subject to the opinion of the court of Queen's Bench upon the following case:

The appellants are a canal company incorporated by an Act of 33 Geo. 3, entitled "An Act for making and maintaining a navigable canal from, or nearly from, a place called the Saltisford, in the parish of St. Mary, in the borough of Warwick, into or near the parish of Birmingham, in the county of Warwick, and to terminate at or near to a certain navigable canal in or near to the town of Birmingham, called the Digbeth Branch of the Birmingham and Fazeley Canal Navigations."

The following sections of this Act are material to the present case:

Sect. 29:

And be it further enacted and declared that the said company of proprietors shall from time to time, be rated to all parliamentary and parochial rates, taxes, and assessments, for and in respect of the lands and grounds to be purchased or taken, and all warehouses and other buildings to be erected by the said company of proprietors, in pursuance of this Act, in the same proportions as other lands, grounds, and buildings lying near the same, are, or shall be rated.

Sect. 53:

And be it further enacted and declared, that the said rates, tolls, and duties shall at all times hereafter be exempted from the payment of all and every parliamentary and other taxes, rates, assessments, or impositions whatsoever.

By the said Act all necessary powers were given to the company to take hold and use lands and erect buildings for the purposes of the company, and to make and maintain the canal and wharves, and to take tolls in respect thereof, all of which have been duly exercised by the company.

The canal has long since been made, and a portion thereof, including the towing path, and some wharves and buildings, are situate within the parish and borough of Birmingham. One of the said wharves, and a portion of the water way or basin made by the company is let off to, and occupied by the Grand Junction Canal Company; the remainder of the canal and premises attached thereto being occupied by the appellants' company.

On the 15th April 1871, a poor's rate for the parish of Birmingham was duly made, and the appellants were assessed thereto as follows:

	Gross Value	Rateable Value
Offices, Machine Houses, Wharf, Canal, Towing-path, and Premises.	£462	£416

but during the hearing of the appeal, these figures were altered to 328*l.* 16*s.* 3*d.* gross, and 300*l.* 3*s.* 9*d.* rateable value, it having been agreed between the surveyors on both sides, that a portion of the canal, situate in the parish of Aston had by mistake been included in the rate.

Against this rate the appellants duly appealed to the quarter sessions for the borough of Birmingham, and in their grounds of appeal, they complained that they were overrated, and were not rated in accordance with the aforesaid provisions of their Act of Parliament. The appeal was heard at the Epiphany sessions, 1872.

A plan was made part of the case, but the following explanation of the locality is sufficient for the material points of the decision: The canal runs nearly in a straight line across part of the respondents' parish, and a section of this piece of the canal, about the middle, is in the parish of Aston. On one side of this piece of canal are pieces of vacant land not rated, and at the part which is in the Aston parish there is a piece of garden ground called Earl Howe's ground which is entirely in the parish of Aston. On the other side of the canal, there are first a wharf and basin in the sole occupation of the Grand Junction Canal Company, next a basin, a wharf, and some buildings in the occupation of the appellants; then come three sets of premises in the separate occupation respectively of W. A. Lyndon, the Birmingham Gas Company, and S. Walker. Each set of premises consists of buildings, either warehouses or gasometers, and also of yards and wharves used therewith. Of these five sets of premises, each has an access to the street; each is surrounded by walls except on the sides abutting on the canal; and each is a separate tenement.

There were about five acres of garden ground similar to Earl Howe's ground, belonging to the London and North-Western Railway Company, situate in the parish of Aston, about a quarter of a mile distant from the canal, and divided from the canal by the line of the London and North-Western Railway Company, but accessible by communication under the line of railway.

At the hearing of the appeal no question arose with regard to the value of the appellants' buildings, which were taken at 29*l.* 13*s.* gross estimated rental, and 22*l.* 4*s.* 9*d.* rateable valuable.

With regard to the remainder of their premises, the appellants contended that the above-mentioned garden grounds were the only lands and grounds which in the present instance could be the measure of their rateable value within the true meaning of the aforesaid sections of their Act of Parliament, and if this contention be correct, their canal, towing-path, wharf, and basin, would be rateable at 22*l.* gross estimated rental, and 20*l.* rateable value.

The respondents, on the other hand, contended that the wharves, yards, and open spaces uncovered with buildings were as much lands and grounds within the meaning of the above Act of Parliament as the garden grounds aforesaid, and that, therefore, the said garden grounds (which were wholly situate in another parish) were not the only lands and grounds to be taken into consideration in assessing the rateable value of the canal and its adjuncts; but that they, the respondents, were also entitled to take into consideration the rateable value of the wharves, yards, and open spaces above mentioned, occupied by Lyndon, the Birmingham Company, the Grand Junction Canal Company, and S. Walker, severing wholly therefrom the sites from any actual buildings or parts thereof, though considering such wharves, yards, and open spaces enhanced in value by reason of such buildings and of others in the neighbourhood. By thus striking an average of all, which they consider as lands and grounds within the meaning of the above statute, lying near the canal, the respondents arrive at a measure of value for the canal; and thus the gross estimated rental of the canal premises would be 299*l.* 3*s.* 3*d.*, and the rateable value 277*l.* 19*s.*

The Recorder did not adopt either of the above contentions, but asked the witnesses on either side to put a value on the whole land occupied by the appellants in the parish, supposing it to exist in its present position, but with no canal, and to be let to a tenant from year to year, and acting on

this opinion, and finding as a fact that the wharf of the canal was as much open land as any in the neighbourhood, reduced the rate to 186*l.* gross, and 163*l.* net; such sums nevertheless, including the value of the said buildings of the appellants before mentioned; and on the application of both parties a case was granted for the opinion of the Court of Queen's Bench. The question for the court is whether the view taken by the Recorder, or that taken by the respondents, or that taken by the appellants, be the correct one; and the rate is to stand or to be amended on the facts herein stated in accordance with the judgment of the court.

Wills, Q.C. (with him *Chandos Leigh* and *Dugdale*), argued for the appellants.—This is a question *primæ impressionis*; for the case of *The Grand Junction Canal Company* v. *The Overseers of Hemel Hempstead* (L. Rep. 6 Q. B. 173), upon which the respondents rely, differs wholly from the present in its facts. The question here is, whether land with buildings upon it is to be taken as a test for the rating of open land. In *Reg.* v. *Glamorganshire Canal* (3 E. & E. 186), the words of the Act creating the rateability were in respect of the lands and grounds to be purchased or taken by the company, and concluded "in the same proportion as other lands lying near the same are or shall be rated." The court held upon those words the true principle of rateability was that the adjoining land covered with buildings should be brought into hotchpot, with the adjoining lands of other descriptions, and that appellants should be rated for the land occupied by the canal, according to the aggregate value at the time of making the rate of all the land brought into hotchpot. We say that all the land occupied by the Birmingham Gas Company is so essentially part of their premises and buildings as to be no test for the land of the canal. [BLACKBURN, J.—If the canal has a piece of land near, although it be building land, it does not seem right to reject it from consideration, and go some distance off in order to find a bit of garden land with which to compare it.] The canal can never be built upon, and therefore can never be made so valuable as this land immediately adjoining. We exclude from our calculation all land which has any building on it. [QUAIN, J.—If you sever buildings from land to make the rate, why not to obtain the test for the rate?] The other cases which bear upon this matter are:

Reg. v. *Grand Junction Canal*, 7 W. R. 597;
Rex v. *Grand Junction Canal*, 1 B. & Ald. 289;
Rex v. *Monmouthshire Canal*, 3 A. & E. 619;
Rex v. *Regent's Canal*, 6 B. & C. 720;
Rex v. *Chelmer and Blackwater Navigation*, 2 B. & Ad. 14.

Brown, Q.C. (with him *Ewins Bennett* and *Buszard*), for the respondents.—The land has been estimated in proportion to neighbouring land not covered with buildings, on the authority of the *Hemel Hempstead* case; but the other cases all seem to show that the value of the appellants' premises should have been estimated even at a higher rate than that taken by the respondents.

COCKBURN, C.J.—The question put to us is which of three different views of the appellants' rateability we think is the correct one. We are left to gather from a very slight statement of the facts in the special case what those views are, and we find it extremely difficult to tell what they are, especially that of the recorder. The authorities do not agree, and we ought to have a more exact statement of the facts in order to find which of them most nearly applies to this case. We are, however, clearly of opinion that the view taken by the appellants is wrong. Also, as far as we understand it, the recorder's is wrong. There remains then to be considered whether the respondents' view is right, or whether the land upon which the buildings stand ought not to be thrown into the hotchpot, from the aggregate of which the rateability should be computed as in the *Glamorgan* case. One thing, to my mind, is clear, viz., that the respondents have adopted a principle the least favourable to themselves of those which can be maintained, and, therefore, I think we ought to adopt their view in this appeal, and leave the future question as to the correct calculation to be raised upon another appeal. Our judgment is, therefore, for the respondents.

BLACKBURN, J.—I am of the same opinion. The appellants contend that ground in their neighbourhood, which has not been taken for buildings or the yards connected with them, should be solely considered in rating their canal. This is clearly wrong, for it is directly opposed to the decision of the *Glamorgan* case. It is difficult to understand the recorder's view of the matter; we doubt whether, under any circumstances, access to the canal should be excluded from the estimate. It may be a question whether the respondents are right; they have omitted the sites of buildings in the proportion they have adopted, and that seems to me to be in opposition to the *Glamorgan* case. It is sufficient, however, that on this rate the respondents cannot claim more than the amount they have fixed; so we give them judgment. Another case may determine the correct principle to be adopted in future.

QUAIN, J.—I am of the same opinion. It is clear that the appellants cannot take a small piece of garden ground as the sole test of their liability. The recorder has left out of his calculation the enhanced value of the land by reason of its neighbourhood to the canal; and that also seems to me to be clearly wrong. If the respondents are not right, the question of their larger claim may be raised upon another occasion.

Judgment for respondents.

Attorneys for appellants, *Taylor, Hoare* and *Taylor.*

Attorneys for respondents, *Newman, Dale* and *Stretton.*

Saturday, Nov. 16, 1872.

GREAT EASTERN RAILWAY COMPANY (apps.) *v.* COMMISSIONERS OF HARWICH (resp).

Local rate—Permanent way of a railway—Attached to a station.

A local Act of 1819 *authorised the respondents to rate all persons who should inhabit, hold, or occupy any house, shop, and other buildings within the limits of the Act, and the lands, yards, and gardens attached to and with any of the before-mentioned buildings respectively occupied.*

The appellants had within the rateable district about a mile and a half of their railway and a station, with a station-master's house, a tank and pumping machine, and a yard for coals and trucks. They were rated by the respondents upon the value not

only of the station and premises, but also of the permanent way.

Held, upon appeal against this rate, that the permanent way could not be said to be attached to or occupied with the station.

On the 17th Aug. 1870 the Commissioners of the town of Harwich made a certain rate under and by virtue of an Act made and passed in the 59 Geo. 3 entitled "An Act for paving, cleansing, lighting, watching, and otherwise improving the town of Harwich in the county of Essex, and supplying the same with water."

The appellants are the owners and occupiers of a railway running from the sea at Harwich through Dovercourt and Manningtree to London and other places, having a station, buildings, sheds, and premises at Dovercourt, together with the permanent way; and the amount payable by the appellants (if liable) in respect of the said rates for paving, lighting, and cleansing the said town of Harwich would be 9*l.* 9*s.* 6*d.*

The appellants refused to pay the said 9*l.* 9*s.* 6*d.*, and gave notice of appeal to the court of quarter sessions of Essex, holden at Harwich, in and for the said county against the said rates. Afterwards by consent, and by order dated the 30th May 1872, the following special case was stated by the appellants and the respondents under the provisions of the statute 12 & 13 Vict. c. 45, s. 11, for the opinion of this honourable court, the parties thereto hereby agreeing that a judgment in conformity with the decision of this court, and for such costs as this court shall adjudge, may be entered at the County Quarter Sessions according to the provisions of the said Act.

The appellants are the Great Eastern Railway Company.

The respondents are the commissioners for carrying into execution an Act of Parliament passed in the 59 Geo. 3, and entitled "An Act for paving, cleansing, lighting, and watching the town of Harwich in the county of Essex, and supplying thesame with water."

The respondents on the 17th Aug. 1870, made, laid, and assessed a rate for the purposes of the said Act on the appellants, as a person duly rated and assessed under and by virtue of the said Act, amounting to 9*l.* 9*s.* 6*d.*, in respect of premises occupied by the appellants within the parish of Dovercourt in the said borough of Harwich.

The rate was duly allowed by two justices, and due notice of appeal to the quarter session was given under the said Act, and no objection is to be made to the form of the present appeal.

The 16th section of the before-mentioned Act enacts

And for defraying the charges and expenses for paving, cleansing, lighting, and watching the said streets, lanes, and other public passages and places, and for removing encroachments, obstructions, nuisances, and annoyances therein, and for supplying the said town with water, be it enacted, that from and after the 24th June 1819, one or more rate or rates, assessment or assessments, shall twice in every year (or oftener, if it shall be thought needful by the commissioners) be made, laid, and assessed by the said commissioners upon all and every person and persons who do, or shall inhabit, hold, or occupy any house, shop, warehouse, wharf, cellar, vault, stable coach house, brew house, brewing offices, granaries, malt houses, store houses, and other buildings within the limits of this Act, and the lands, yards, and gardens attached to and with any of the before-mentioned buildings respectively occupied (save and except any houses, buildings, or other hereditaments used and occupied for the purpose of any public charity, also all churches and chapels, which are not intended to be made liable to the rates hereby imposed), and in such competent sum and sums of money as the said commissioners shall yearly and every year order and direct, so as such rates or assessments do not exceed in the whole the sum of 1*s.* 6*d.* in the pound in any one year, of the yearly value of such houses, shops, warehouses, wharfs, cellars, vaults, stables, coach houses, brew houses, brewing offices, granaries, malt houses, storehouses, and other buildings, yards, and gardens as aforesaid, such yearly value to be ascertained by such ways and means as the said commissioners shall think proper.

The appellants are the owners of a railway running from the sea at Harwich through Dovercourt and Manningtree to London, and having a station at Dovercourt hereinafter called the Dovercourt station. The portion of the permanent way of the railway passing through the parishes of St. Nicholas, Harwich, and of Dovercourt, is 1 mile 29 chains and 70 links, in length. Both these parishes are for the purposes of this case taken to be within the jurisdiction of the commissioners.

The Dovercourt station abuts on the said railway and stands on land belonging to the appellants. It comprises a house inhabited by the station-master in the employ of the appellants, which contains the ticket office and luggage room, and two waiting-rooms; the station has the usual platform, and there are also upon it an engine-shed, a large iron water tank erected on a brick pumping house, and a water column connected with the water tank, where the appellants' locomotive steam engines, both from such station and the railway station at Harwich, are supplied with all the water used in working the railway from the Harwich end of it. The station comprises also a yard open to the railway, and used for depositing coals from railway trucks for sale, and for unloading coals, bricks, limestone, and other materials brought there for removal by carts to the adjoining neighbourhood, but now only used for the last mentioned purpose. All the before-mentioned buildings and premises belong to the appellants, and are so used by them in carrying on their traffic.

The Public Health Act 1858 has not been adopted by the commissioners, so that the railway company do not come under the special provision of the 55th section of that Act.

The appellants are willing to pay so much of the said rate as applies to the buildings, land, and premises above described, but contended that they are not liable for so much as applies to the permanent way.

The question for the opinion of the court is whether the permanent way is rateable by the commissioners under the 16th section of the said act.

Giffard, Q.C. (with him *Marriott*), appeared for the appellants, but was stopped by the court.

Manisty, Q.C. (with him *Grantham*) argued for the respondents.—The station and this piece of the railway are ancillary to each other. [BLACKBURN, J.—The question is whether the permanent way of the railway can be said to be land attached to and with the station-master's house. I should think that the house is rather the adjunct of the railway.] In the case of *Peto* v. *Overseers of West Ham* (2 E. & E. 144), a dock was considered ancillary to an adjoining warehouse, and upon that ground the decision was approved of in a subsequent case, *Reg.* v. *Neath Canal Navigation* (40 L. J. 193, M. C.); there the dock was taken to be

land, although covered with water, and here the permanent way cannot be the less land because it has iron rails upon it.

Giffard was not heard in reply.

COCKBURN, C. J.—To my mind this case is wonderfully clear. These rates are imposed upon persons amongst others occupying lands, yards, and gardens attached to, and with any of the buildings thereinbefore mentioned. The subject of the rate in question is the appellants' station, and the respondents contend that they may include the permanent way as land attached to that building. This piece of the permanent way is no part of the station but is the railway itself, and my only possible answer to the question submitted to us is that it is not subject to this rate. It cannot be said that a railway is attached to a station, and the appellants, therefore, are not properly rated.

BLACKBURN, J.—I am of the same opinion. The question turns upon the terms of the local Act, and Mr. Manisty contends that this piece of permanent way is attached to the station in the same way as lands, yards, and gardens are generally attached to buildings. I think it is clearly not so, and our judg-ment must be for the appellants.

QUAIN, J.—Although a permanent way may be said to be land, it seems to me impossible to include it under the word "lands," when the context is "yards and gardens," as in this section.

Judgment for appellants.

Attorney for appellants, *W. H. Shaw.*

Attorneys for respondents, *Batty* and *Whitehouse.*

Saturday, Nov. 16, 1872.

REG *v.* TOMLINSON.

Certiorari—Bastardy order—Payment from previous summons—Amendment—12 & 13 *Vict. c.* 45, *s.* 7.

The mother of a bastard child obtained a summons against the defendant in Aug. 1870, *but withdrew it when the hearing came on; she obtained a second summons, in which the complaint was stated to have been that day made, in March* 1871, *and upon the hearing the justices ordered the defendant, as putative father, to pay for the support of the child from the date of the first summons in Aug.* 1870. *This order having been brought up by certiorari, application was made by the complainant to amend this date in the order by inserting instead the date of the second summons:*

Held, that 12 & 13 *Vict. c.* 45, *s.* 7, *gave the court no power to make such an amendment, and that the order must be quashed.*

THIS was a rule obtained on behalf of the defendant Thomas Tomlinson, calling upon the complainant, Jane Flower, to show cause why the following order should not be quashed:

At a petty sessions of Her Majesty's justices of the peace for the county of Stafford, holden in and for the division of Stone, in the said county, at the police court, Stone, on the 25th April 1871, before us, John Bourne, Charles Meigh, and Edward Capper Copeland, Esquires, three of Her Majesty's justices of the peace for the said county—County of Stafford to wit—whereas, one Jane Flower, single woman, residing at Stone, within this division, did, on the 11th Aug. 1870, having been delivered of a male bastard child within twelve calendar months prior thereto, make application to Wm. Masefield, Esq., of Her Majesty's justices of the peace acting for this division, for a summons to be served upon one Thomas Tomlinson, of Stone, whom she alleged to be the father of the said child, and a summons has been issued to the said Thomas Tomlinson to appear at a petty session to be holden on this day for this division, in which the said justices usually act, to answer her complaint touching the premises. And whereas the said Thomas Tomlinson having been duly served with the said summons within forty days from this day, and now appearing in pursuance thereof, and the said Jane Flower having now applied to us, the justices in petty sessions assembled, for an order upon the said Thomas Tomlinson, according to the form of the statute in such case made and provided. And it being now proved to us in the presence and hearing of the said Thomas Tomlinson that the said child was, since the passing of an Act passed in 8 Vic. intituled "An Act for the further Amendment of the Laws relating to the Poor in England," that is to say, on the 27th May 1870, born a bastard of the body of the said Jane Flower. And we having in the presence and hearing of the said Thomas Tomlinson heard the evidence of such woman, and such other evidence as she hath produced, and having also heard all the evidence tendered on behalf of the said Thomas Tomlinson; and the evidence of the said Jane Flower, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said Thomas Tomlinson to be the putative father of the said bastard child; and having regard to all the circumstances of this case, we do now hereby order that the said Thomas Tomlinson do pay unto the said Jane Flower, the mother of the said bastard child, so long as she shall live, and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of 2*s.* 6*d.* per week from the said 11th Aug. now last, being the day upon which such application was made to the said justice as aforesaid, until the said child shall attain the age of thirteen years, or shall die, or the said Jane Flower shall marry. And we do hereby further order the said Thomas Tomlinson to pay to the said Jane Flower the sum of 3*l.* 5*s.*, being the costs incurred in obtaining this order, and the sum of 10*s.* for the midwife.

Given under our hands and seals at the sessions aforesaid,

JOHN BOURNE (L. S.)
C. MEIGH (L. S.)
ED. C. COPELAND (L. S.)

It appeared from the affidavit of the clerk to the justices who made the order that, on or about the 11th Aug. 1870, the said Jane Flower applied for and obtained a summons against the defendant; the information and complaint were taken before, and the summons was granted by, Wm. Masefield, Esq., one of the justices for that division. It was believed that the defendant had then removed from the neighbourhood of Stone to avoid service of the summons, and several successive summonses were issued on the said information and complaint, but the defendant could not be served until the month of March 1871, when he was duly summoned to appear on the 11th April. On that day the com plainant and defendant came before the justices, but the attorney for the former being unable to attend, the said Jane Flower, the complainant, applied for her case to be adjourned to the then next petty sessions. This application the defendant opposed, and refused his consent thereto except upon payment of the costs of the day. She thereupon, acting upon the advice of the clerk of her attorney, withdrew the summons and intimated her intention of taking out another, returnable at such time as would be convenient for her attorney to attend. A few minutes after the said summons was withdrawn the complainant and the clerk to her attorney applied for another summons to issue, and urged the issue thereof immediately, on the grounds that the defendant had then stated to them his intention of going away to avoid service. This application was made to Morton Edward Buller, Esq., one other of the said justices attending the said petty sessions,

the said William Masefield not being then in attendance; and the said M. E. Buller thereupon issued his summons to the defendant, returnable on the 25th April, and reciting that application had that day been made to him by the said Jane Flower. On the said 25th April the complainant and defendant, and their attorneys duly appeared; and the justices then present, having heard the evidence offered on the part of the complainant, as also of the defendant, were fully satisfied that the defendant was the father of the complainant's child, and therefore made the said order now in question. A series of summonses having been issued against the defendant, the justices believed they might consider the summons signed by the said M. E. Buller as a summons issued upon the original information; and being perfectly satisfied that the defendant was the father of the said child, made the order as and from the date of the application to the said William Masefield, instead of the date of the application to the said M. E. Buller.

On the 24th Oct. 1872, after the issue of the rule for the *certiorari*, the complainant by her attorney gave notice to the defendant that she claimed to be entitled to be paid by him in respect of the order in bastardy in question from the 11th April 1871 only; and she thereby abandoned all and every claim against him for the maintenance of the bastard child, the subject of the said order in bastardy, prior to the said 11th April 1871.

McMahon now applied, on behalf of the said Jane Flower the complainant, to amend the said order by inserting the 11th April 1871 as the date of the application, and the time from which payment by the defendant was ordered to be made, instead of the 11th Aug. 1870, the date therein mentioned. By 12 & 13 Vict. c. 45, s. 7:

> If upon the return to any writ of *certiorari* any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices, making such order or giving such judgment, to have authorised the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed.

In the case of *Reg.* v. *Higham* (7 E. & B. 557) this court amended a bastardy order under this section by striking out a statement that the defendant appeared by attorney, and held it to be good as if made upon an unopposed summons. They also amended other omissions and mistakes. [COCKBURN, C.J.—This was a mistake of the justices as to their jurisdiction, not in any way their clerk's mistake of fact. QUAIN, J.—How can you distinguish this from *Reg.* v. *Cridland*, in the same volume?] There is no authority for limiting the interpretation of this power of amendment so as to exclude the present case. [COCKBURN, C.J.—You are asking to amend the judgment itself.]

Kemplay, Q. C., appeared for the defendant, but was not heard.

The COURT (Cockburn, C.J., Blackburn, and Quain, JJ.) refused to allow the amendment applied for.

Order of justices quashed.

Attorney for complainant, *H. Tyrrell*, for *E.* and *A. Tennant*, Hanley, Staffordshire.

Attorney for defendant, *F. Wm. Blake*, for *B. H. Smallwood*, Newport, Salop.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and H. F. POOLEY, Esqrs., Barristers-at-Law.

Wednesday, Nov. 13, 1872.

REGISTRATION APPEAL.

COOKE (app.) *v.* BUTLER (resp.)

County occupation franchise—Rateable value—Duty of revising barrister—Representation of the People Act 1867 (30 *&* 31 *Vict. c.* 102), *sect.* 6, *sub-sect.* 2. *In dealing with a claim to a county vote as a* 12*l. occupier, the revising barrister is not bound by the rated value appearing on the rate book, but may take evidence and judge for himself as to whether the "rateable value" of the premises, in respect of which the claim is made, is* 12*l. or not.*

ON appeal from the revising barrister for the county of Bedford, the following case was stated:

At a court held on the 28th Sept. 1872, at Luton, in the county of Bedford, before &c., John Hubbard, of, &c., whose name had not been placed by the overseers on the list of persons entitled to vote as owner or tenant of lands and tenements within the said parish of Luton, of the rateable value of 12*l.* or upwards, claimed to have his name inserted in the said list as being the occupier of premises of the rateable value of 12*l.* or upwards.

It was proved or admitted that the said John Hubbard, being of full age, and not subject to any legal incapacity, had occupied for a sufficient time on the 31st July last the said premises, and that he paid an annual rent of 14*l.*, which it was proved was a fair rent for the same premises; that he was the occupier thereof on the 31st July last, and had been such occupier for twelve months immediately preceding; that he had been duly rated, and paid all poor rates in respect of the premises; and that the premises were in an improving neighbourhood.

It was also admitted that the premises of the said John Hubbard were not rated at a lower rate than similar premises occupied by other persons in the said parish.

It appeared from the poor-rate book that the gross estimated rental of the premises was there stated to be 14*l.* 9*s.*, and the rateable value 11*l.* 12*s.* 6*d.*

It was objected by the said appellant that inasmuch as the premises were stated in the poor rate book to be of the rateable value of 11*l.* 12*s.* 6*d.* only, and the respondent had paid rates upon that assessment, the respondent was not entitled to be registered as a voter in respect thereof.

I held that the property was of the real rateable value of 12*l.*, and allowed the claim, and inserted the name on the said list. If the court shall be of opinion that the claim should not have been allowed, the name is to be struck out of the list.

Gorst, for the appellant.—The question arises on the construction of the words "rateable value" in sect. 6, sub-sect. 2, of the Representation of the People Act 1867, and it is whether the revising barrister is *bound*, in estimating the value, by what appears in the rate book, or whether he is at liberty to decide for himself as to the rateable value of premises. If he is bound by the rate book, then "rateable value" means nothing more than "rated value." This appeal is made in order to settle the law on this point, as some barristers have held themselves concluded by the rate book, while others have taken evidence and judged for

themselves. [BRETT, J.—The question is whether the words "rateable value" in this section mean anything more than the same words in the Act of 1832. Under the old Act, revising barristers always held themselves at liberty to judge for themselves.]

Bulwer, Q.C., for the respondent, was not called upon.

BOVILL, C.J.—I am of opinion that this matter was correctly decided by the revising barrister. The words of the Act are "of the rateable valueof 12*l.*" There is, of course, a distinction between lands of the rateable value of 12*l.* and lands rated at 12*l.*, and the words of the Act are not open to be construed as equivalent to "rated at 12*l.*" I think, therefore, notwithstanding the opinion of Mr. Davis, that the revising barrister was right. It is said that some revising barristers refuse to receive evidence of the real value of lands, and treat the rate book as conclusive of their value. I am, however, of opinion that that is wrong.

BRETT, J.—Here the 6th section says that persons occupying lands, &c., of the rateable value of 12*l.* shall, under certain conditions, be entitled to be registered. The question is whether that means the rateable value in point of fact, or the value appearing in the rate book, which, for the purpose of raising the point, we must assume not to be the real rateable value. To uphold the latter proposition, we must say that "of the rateable value of 12*l.*" means the same as "rated at 12*l.*" But in the next sub-sect. it is said, "and has . . . been rated," &c. It thus appears that the Legislature was fully alive to the distinction, and the distinction is a real one. It seems to me to be contrary to every rule of construction to say that these words mean "rated at 12*l.*" Whether it would be better or not to take the rate book as conclusive, is a question of politics, not of law, though, for my own part, I should not be disposed to concur in making the right to the franchise depend on the overseers, or throw into their hands the power of disfranchising a man possessed of the requisite amount of property.

GROVE and DENMAN, JJ., concurred.

Appeal dismissed.

Attorney for appellants, *A. Saunders.*

Attorneys for respondents, *Williams* and *James.*

Friday, Nov. 15, 1872.

REGISTRATION APPEAL.

BESWICK (app.) *v.* ALKER (resp.)

County vote—Freehold land and pew rents—Parsonage house—Land held therewith—Sect. 24 *of* 2 *Will.* 4, *c.* 45.

A., the minister of St. M. Church, within the parliamentary borough of P., claimed a county vote in respect of freehold land and pew rents. No profit accrued to him from the land, but he was entitled to the rent of certain pews in the church on the land, which pews were let by the churchwardens. The rent of the pews exceeded 100*l. per annum. A. occupied the parsonage house, belonging to him as minister of St. M., which house was also within the borough of P., and in respect of which he had acquired the right to vote for the borough of P.*

Held, that A.'s estate in the freehold land and pew rents was not an estate in land occupied by him, together with the parsonage house, so as to disentitle him to a county vote in respect thereof under sect. 24 *of The Representation of the People Act* 1832 *(*2 *Will.* 4, *c.* 45).

ON appeal from the decision of the revising barrister for North-West Lancashire, the following case was stated:—

At a court holden, &c., the appellant duly objected to the name of the respondent being retained on the list of persons entitled to vote in the election of members of Parliament for the said division in respect of property situate in the township of Preston.

The qualification of the respondent was set out in the register as follows:

Alker, Geo., Lisbon Hall, Fishwick. Freehold land and pew rents. St. Mary's Church, St. Mary's-street. The respondent is minister of St. Mary's Church, which is situated within the parliamentary borough of Preston. No profit has accrued to him, or is likely to accrue, from the above-named land; but under the "sentence of consecration" of the said church, he is entitled to the rents of certain pews and sittings which are let by the churchwardens according to a certain scale, which scale the churchwardens for the time being, may, with the consent of the bishop, alter from time to time as occasion may require; and after deducting yearly two several sums of 8*l.* 15*s.* and 5*l.*, for the services of the church, the said churchwardens pay the residue of such pew rents to the minister for the time being of the said church, to be received by him for his own absolute use and benefit by way of stipend. The sum which the respondent has so received from the above pew rents has always exceeded 100*l.* in the year.

The house mentioned on the register as the respondent's place of abode, is the parsonage house of the minister of St. Mary's, and the respondent occupies, and is rated for it, and in respect of it, has acquired the right to vote for the borough of Preston.

It was objected that the said house was part of his benefice, which benefice could not be divided, so that any part of it could confer on the respondent the right to vote for the said division, and that therefore his name should be expunged from the said register.

I decided that the respondent was entitled to have his name retained on the said register.

If a court should be of opinion that my decision was right, the respondent's name is to remain on the register; if the court is of opinion that my decision was wrong, his name is to be struck off.

Leofric Temple, Q.C. for the appellant.—No doubt, were it not for the fact that the respondent occupies the parsonage house, he would be entitled to vote for the freehold land and pew rents. But the question is, whether his occupation of the house, the land, and the pew rents, is not so much one occupation as to disentitle him, under sect. 24 of the Act of 1832. He holds them all under one title. *Capell* v. *The Overseers of Aston* (8 C. B. 1) and *Barton* v. *The Same* (8 C. B. 7) are authorities for the appellant. Though the facts there were just the reverse of what they are here, the reasoning of Wilde, C.J., is conclusive to show that the respondent could not sever what he held as minister of the church, so as to get the borough vote in respect of part, and the county vote in respect of another part.

Gorst, for the respondent, was not called upon.

BOVILL, C.J.—The question in this case is not as to the right of the respondent to vote for the

county, but the objection, and the only objection to his vote, must rest on the construction to be placed on the 24th section of the Reform Act of 1832. On the statements in the case, I am of opinion that the respondent is not brought within the terms of that section. There is nothing to show that he is in the occupation of anything except the land which appears to be of no value. It is contended by the appellant that he is in the occupation of the pew rents; but if he is, the pew rents are not occupied with the parsonage house. Mr. Temple has contended that the respondent is in the occupation of the pews themselves; but there is no such statement in the case. The pews are occupied either by the churchwardens or the lessees. I cannot see any foundation for Mr. Temple's argument to bring the respondent within the terms of the 24th section. The precise nature of the respondent's right to the pew rents does not appear. The only question raised by the case is as to the true construction of the 24th section, which on the facts as stated has no application to the case.

BRETT, J.—It appears to me very difficult to get at the real facts of the case; but, as it seems to me, it must be taken to be stated that the claimant had such a freehold interest in respect of the pew rents as entitled him to a county vote, unless the fact of his occupation of the parsonage house, and of his being registered as an elector for the borough in respect thereof, brings him within the terms of the 24th section of the Act of 1832. He claims a vote for the county in respect of a freehold interest out of which he gets rents. We do not know the real facts as to the pew rents. The only way in which the claimant can have a county vote in respect of them, is that under the Act of Parliament by which the pew rents are collected, they may be considered as a charge on the land, or that he has a freehold interest in the church, the profit of which is represented by the rents. At any rate, the claimant is a clergyman, who must be considered as having a freehold interest in the church, and a freehold interest in the parsonage house which he occupies. He has claimed a county vote in respect of his freehold interest in the church; and his claim is objected to, not on the ground that he occupies the church, but on the ground that he occupies the parsonage house. Sect. 27 of the Act of 1832 says that a man shall not have a county vote in respect of his freehold interest in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself, or in any land occupied by himself with any house, &c. The case does not say that the claimant occupies the church; his claim in respect of the church must be taken to be a claim in respect of a freehold interest. Then it is said that he occupies the church and the house under one title. But if he could claim a vote for the borough in respect of the occupation of the church, it would be as the occupier of a "building." That would be a different qualification to that conferred by the parsonage house. I think the correct way of describing the state of facts is to say that the claimant occupies the house, and that he has the freehold in the church, which he does not occupy. Here are two distinct qualifications, just as much so as if a man has a freehold estate in a lot of houses within a borough under one title and occupies one and lets the rest. A man in such a case would have a vote for the borough in respect of the house he occupied and a county vote in respect of the others. That is just this case. On these grounds I think the revising barrister was quite right, and that this appeal must be dismissed.

GROVE, J.—I am of the same opinion. All I need add is, that I do not see how it can be said that the claimant occupies the pew rents or the land; or supposing that he does, how he can be said to occupy it together with the parsonage house.

DENMAN, J.—I am of the same opinion. I do not think the occupation of the house is connected with the right to the pew rents, and there is no other question before us. *Decision affirmed.*

Attorneys for appellant, *Griffith* and *Brownlow*.
Attorneys for respondent, *Kimber* and *Ellis*.

Friday, Nov. 15, 1872.

REGISTRATION APPEAL.

LITTLE (app.) v. THE OVERSEERS OF PENRITH (resp.)

Rating — Question whether rated or not — And whether described or not—Insufficient description —6 Vict. c. 18 s. 75.

G. A. was in all respects duly qualified as a county elector as joint occupier of premises with his brother, T. A., of the requisite value, if he could be said to be rated in respect of the premises and to be described on the rate-book. It appeared that some time ago N. A. had occupied the premises in question, carrying on business there, and being duly rated for the house. Some years ago he took two of his sons, the above-named G. A. & T. A. (he having several other sons), into partnership and into joint occupation of the premises. He then requested the overseer to change the rating to "N. A. and Sons," and the firm of "N. A. and Sons" had ever since remained on the rate-book as the occupiers of the premises. Some years subsequently N. A. retired from the business, leaving it to G. A. and T. A., who had since carried on the business and occupied the premises. Application had been made during that period from time to time to G. A. and T. A. for payment of the rate, and one or other of the brothers had always paid them, and taken a receipt as paid by "N. A. and Sons."

Held that G. A. was rated, and that the inaccurate or insufficient description was curable under 6 Vict. c. 18 s. 75.

ON appeal from the revising barrister for East Cumberland, the following case was stated:

At a court holden, &c., objection was duly made to the name of George Arnison being retained on the list of voters for the said parish. The facts of the case were as follows:—The name of George Arnison appeared upon the list in the following form:—

PARISH OF PENRITH.

Voters as Occupiers of Rateable Value of £12.

Christian Name and Surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street.
Arnison, George	Burrowgate, Penrith.	Joint occupier of house and shop of the rateable value of £30 and upwards.	Devonshire-street.

1. The said George Arnison had a right to have his name retained upon the said list, provided the

court should be of opinion that under the following circumstances the said George Arnison was duly rated in respect of the premises occupied by him within the meaning of 30 & 31 Vict. c. 102, sect. 6, sub-sect. 3.

2. The premises in question are described in the rate-book as follows:

Name of Occupier.	Name of Owner.	Description of Property Rated.	Name or Situation of Property.	Gross Estimated Rental.	Rateable Value.
				£ s. d.	£ s. d.
N. Arnison and Sons.	Nathan Arnison.	House and shop.	Burrowgate.	105 0 0	89 5 0

3. N. Arnison means Nathan Arnison. He is alive and was formerly the sole occupier of the premises, where he carried on the business of a draper. He subsequently took two of his sons, the above-mentioned George Arnison and Thomas Arnison into partnership, and the business was carried on under the name of "N. Arnison and Sons." Nathan Arnison has retired from business some years ago, and, ever since his retirement, the business has been carried on by the above-mentioned two sons, under the name of "N. Arnison and Sons."

4. The said two sons are now the sole occupiers.

5. Nathan Arnison has three other sons; they do not occupy the premises in question, nor do they carry on business with the two above-mentioned.

6. For the last five years, when the rates have been called for, they have been paid by one or other of the two (George Arnison or Thomas Arnison), and a receipt given for them as received from "N. Arnison and Sons."

7. With the consent of both parties, I received the statement of the overseer, and it is as follows: The overseer stated that when he came into office fifteen years ago, "N. Arnison" was solely rated for the premises in question. About seven years ago, the said N. Arnison requested him to alter the rating to "N. Arnison and Sons," but gave no names, and this rating has remained "N. Arnison and Sons" ever since.

8. I decided that as the said George Arnison was not named in the rate-book, otherwise than as above appears, he was not duly rated in respect of the premises occupied by him, within the meaning of 30 & 31 Vict. c. 102, s. 6, sub-sect. 3.

9. The name of one other person was objected to under similar circumstances.

10. I expunged the name of the said George Arnison and the said other person from the said list.

If the court should be of opinion that I was wrong, the name of the said George Arnison and of the said other person will be restored to the said list.

Campbell Foster for the appellant.—The appellant claims the franchise under sects. 6 and 27 of the Representation of the People Act 1867. By sect. 59 of 30 & 31 Vict. c. 102, sect. 75 of 6 Vict. c. 18, is made applicable to the present case, and the claimant being actually rated and described, (though insufficiently) in the rate-book, is entitled under that section to have the insufficient description rectified. Some description is given of him, for under the partnership name each partner is described. The remarks of Erle, J. in *Moss* v. *Litchfield* (14 L. J. 56, C.P.) are applicable.

The respondents did not appear.

BOVILL, C.J.—George Arnison occupied a house and premises jointly with Thomas Arnison. The two brothers carried on business there, and the name of the firm was "N. Arnison and Sons." There was no Nathan Arnison in the firm or in the occupation of the premises; but the two sons occupied the house, and carried on business there under the name of N. Arnison and Sons. On turning to the rate-book we find that N. Arnison and Sons were there rated in respect of the house, and the question now arises whether under that appellation the overseers intended to rate the persons who actually occupied the premises and carried on business there. It appears that the rates were in point of fact paid from time to time by one or the other of the brothers. The case seems to me just the same as it would be in the case of any other mercantile house—say that of Messrs. Child and Co. A house is occupied by Messrs. Child and Co., and if the name of the firm were entered on the rate-book as the occupiers, we should conclude that the overseers meant thereby to rate the persons occupying the premises and carrying on business there, and that they so rated them not knowing the names of the members of the firm. If that is so, whom must we consider to be described under the name of "N. Arnison and Sons?" I think the persons carrying on business under that name. In *Moss* v. *The Overseers of St. Mary, Litchfield* (14 L. J. 56, C. P.) the question raised was different to that raised by the present case; but the observation of Erle, J., was pertinent, that "if a partnership firm is charged in the rate, each partner is intended to be charged." I think, therefore, the revising barrister was wrong, and that his decision must be reversed. Whether the appellant was described in the rate-book sufficiently to enable the overseers to enforce payment by him is not in question and need not be determined.

KEATING, J.—I am of the same opinion. I must confess I had some doubt upon the case in the course of the argument, but I now think the case falls within the 75th section of 6 Vict. c. 18. It appears that N. Arnison was first rated. He then took his sons into partnership, and, on the occasion of his doing so, went to the overseer and requested him to change the name of the occupier in the rate book. He did not mention the names of his sons, and it does not appear whether or no he had any reason for so doing. But it does appear that, after N. Arnison retired from the business, the rates were called for, and the two existing partners paid them. Under these circumstances, I come to the conclusion that the overseer intended, under the name of "N. Arnison and Sons," to rate the partners who occupied the premises and carried on business there. Undoubtedly, the description was not an accurate one, and I do not express any opinion as to whether or not payment of the rate might have been enforced, but I think the 75th section was just intended to meet a case where the rating is not precisely accurate, but where there has been a rating. The case is by no means free from doubt, but that is the conclusion at which I have arrived.

BRETT, J.—The appellant here, if entitled to a vote at all, is entitled under sect. 6 of The Representation of the People Act 1867, and, under sub-

sect. 3 of that section, it is necessary to show that he has been rated to all the rates made in respect of the premises so occupied by him. On turning to the rate-book, we find a description of the persons who are rated in respect of the house occupied by the appellant, and the question is, whether that description is sufficient to show that the appellant is rated. That it is an accurate description cannot be maintained. But then it is said that the want of accuracy may be cured by sect. 75 of 6 Vict. c. 18. That section is, no doubt, made applicable to the new occupation franchise in counties, and the question, therefore, is whether the present case falls within the 75th section. It has before been remarked, that sect. 75 is somewhat singularly drawn, as the earlier part of the latter half of the section seems to apply (if the person has been *bonâ fide* called upon to pay the rate, and has *bonâ fide* paid) though the occupier has never been rated at all. But the proviso at the end of the section, "any misnomer, or inaccurate, or insufficient description in any rate of the person so occupying or of the premises occupied notwithstanding," seems to assume that some description has been given of the person in the rate-book, though the description is inaccurate or insufficient, and the name a misnomer. It assumes, therefore, that there has been an intention to rate the person occupying. It follows, therefore, to bring the present appellant within the provisions of the 75th section, that he must be shown, not only to have paid the rates, but to have been in fact rated, and that there has been an attempt to describe him in the rate-book. We must, therefore, first inquire, whether it is shown that there was an intention to rate the claimant, and an attempt made to describe him in the rate-book. It appears that at first N. Arnison, the father, was solely rated, and, when he was so, was properly described. He then took his two sons into partnership, and when he did so, he went to the overseer and requested him to make a charge in the rate book to "N. Arnison and Sons." There can be no meaning in what he did, unless he meant to have his sons put in the rate. The evidence before the revising barrister as to the next material point (which was not only that the father meant the appellant and his other son to be rated, but that he gave instructions to that effect to the overseer who acted upon them), was that the overseer made the alteration as requested by N. Arnison, and from that time received the rates from, and gave a receipt to, the firm of N. Arnison and Sons. I think these circumstances show that in point of fact there was an intention to rate not only the father, but also any sons of his who might be members of the firm, even though their names were not in the rate-book. That is sufficient to show that the appellant was in point of fact rated. Then arises the question, whether any description is given of him, though an inaccurate one. I think that "N. Arnison and Sons" is a description of all the persons comprising that firm, if intended to be so. There was then both the intention to rate, and a description though inaccurate and insufficient, and consequently sect 75 applies. It seems to me, that what weighed most on the mind of the revising barrister was, not so much that there was no intention to rate the appellant, as that he was not found at all in the rate-book. But I think if under the name of the firm it was intended to include the appellant, and to describe him in those terms, the revising barrister was wrong in thinking that the appellant was not described at all. The decision must be reversed.

GROVE, J.—I am of the same opinion. First of all I joined with my brother Keating in entertaining doubts upon the point, and should have liked to have heard counsel on the other side. The doubt that I had was whether it could be said that there was a misnomer or an inaccurate or insufficient description, when there was no description at all; and, secondly, whether the sons were really described at all. But, on reflection, I think there is some description of the sons. Then, if we once get that, the 75th section becomes applicable. I express no opinion as to the sufficiency of the description for the purposes of enforcing payment of the rate; nor can I think the intention of the overseer the sole guide in the matter. I think there was a description, which, though not sufficient, is cured by the 75th section. The revising barrister probably thought that as the appellant was not named, he could not be said to be described, and therefore sect. 75 could not apply.

Decision reversed.

Attorneys for appellants, *Johnstone* and *Co.*, for *Harrison* and *Little*, Penrith.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs., Barristers-at-Law.

Thursday, Nov. 21, 1872.

HILTON *v.* ANKESSON.

Fences—Non-liability to repair—Straying of cattle from defects of—Distress damage feasant.

An owner or occupier of lands, though bound to take care that his cattle do not wander from his own land, and stray upon the land of another, is under no legal obligation to put up or maintain a fence so as to prevent the cattle of his neighbour straying upon his land: such an obligation can only be founded upon a statutory obligation, or some agreement or covenant.

The plaintiff was the occupier of a field, which was separated from a field in the occupation of the defendant by a hedge or fence. In consequence of this fence being out of repair, the plaintiff's cattle strayed into the field of the defendant, and were seized by him as a distress damage feasant. Upon an action brought by the plaintiff for this seizure of the cattle, the pleadings raised the issue of whether or not the defendant was bound to repair the hedge through which the cattle escaped, and the only evidence of liability consisted in the practice for fifty years and upwards, of the defendant and his predecessors to repair such hedge:

Held, that this was in itself no proof of such liability.

THIS was a rule calling upon the defendant to show cause why the nonsuit should not be set aside, and a new trial be had, upon the ground that there was evidence to go to the jury of the defendant's obligation to repair the fence, and evidence to go to the jury to support the plaintiff's case.

The declaration was for trespass and illegally impounding the plaintiff's cattle. The defendant pleaded (second plea) that he seized the cattle as for a distress damage feasant. To this the plaintiff replied (second replication) to the second plea that before the time when the said cattle were so as

aforesaid in the close of the defendant, the plaintiff was possessed of a close contiguous and next adjoining the said close of the defendant, and the defendant and all other tenants and occupiers of the last-mentioned close for the time being from time to time whereof the memory of man is not to the contrary, have repaired, and of right ought to repair, the hedges and fences between the last-mentioned close and the said close of the plaintiff as often as need hath been and required in order that cattle being feeding and depasturing in those closes respectively might not err or escape out of the one into the other of them through the defects of the said hedges and fences, and because the said hedges and fences between the said closes of the defendant and the plaintiff, before and at the time when, &c., were ruinous and in decay for want of needful repair thereof, the said cattle then lawfully being and depasturing in the said close of the plaintiff a little before the time when, &c., erred and strayed out of the last-mentioned close into the close of the defendant through the defects in the said hedges and fences between the said closes, and on that occasion were in the said close in which, &c., until the defendant of his own wrong, and before the plaintiff had notice of the premises and could remove the said cattle, committed the trespass in the declaration mentioned.

The case was tried before Bramwell, B. at the Lewes Assizes. The facts of the trespass and seizure were admitted, and the only question was, as to whether or not the defendant was liable to repair a certain hedge which separated his field from that of the plaintiff, and through the want of repair of which hedge the plaintiff's cattle strayed into the field of the defendant. In support of the plaintiff's case the plaintiff was called, but he had only lived in the farm a few months, and could give no material evidence upon the point; but a Mr. Greenfield who was a former occupier, and also the steward of the landlord, were called, and they proved that the occupier of the defendant's farm had from time to time for fifty years done what repars were necessary, and Mr. Greenfield upon being asked why he had done so? replied because he thought that every man was bound to keep his hedges in repair. Both the witnesses however failed to show any legal obligation upon the occupier to do the repairs. Upon this, the learned judge directed a nonsuit with leave to move to set it aside. A rule having been accordingly obtained.

Parry, Serjt., and *Joyce*, showed cause.—There was no evidence adduced on the part of the plaintiff to show any obligation on the part of the defendant to keep up or repair the hedge separating the two fields. The law is very clear, and was fully considered in *Boyle* v. *Tamlyn* (6 B. & C. 329). The marginal note there is, "Where the owner of two adjoining closes (A. and B.), separated by a fence and gate which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant: Held, that the latter was not bound to repair the gate unless he or his vendor had made some specific bargain with the plaintiff to that effect, and that the doing of occasional repairs was not evidence of such bargain." In his judgment in that case Bayley, J., says: "There can be no doubt that the general rule of law is that a man is only bound to take care that his cattle do not wander from his own land and trespass upon the land of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive unless express words be introduced into the deed of conveyance for that purpose." In the present case there was no evidence whatever to show a legal liability on the part of the defendant to repair the hedge, and the fact that he and his predecessors were in the habit of doing so was no evidence of an obligation. It was the duty, therefore, of the plaintiff to see that his cattle did not escape from his own land on to that of another.

Hawkins, Q.C. and *Grantham*, in support of the rule. It was entirely a question for the jury. The defendant and his predecessors having always repaired the hedge, it was a fair inference to draw that they were under some legal obligation to do so. Mr. Greenfield, who occupied before the defendant, stated that he believed he was liable to repair the fence. Where it is necessary for the safe keeping of cattle that there should be a fence, it might properly be assumed from the conduct of the parties that there is a legal liability to repair; if otherwise, it would be necessary that each occupier of adjoining fields should have a separate hedge. They cited *Singleton* v. *Williamson* (31 L. J. 17, Ex.).

KELLY, C.B.—I am of opinion that the nonsuit was right, and that the judge was not justified in leaving any of the facts in the case as evidence of a liability to repair. A liability to repair a fence can only be created by Act of Parliament, or some agreement or covenant which will constitute a binding contract between the parties. Undoubtedly, there may be evidence of such an agreement or covenant by the acts of the parties, as where a person is called upon to repair, and he has repaired accordingly; in such a case, although the evidence would be by no means conclusive, it would still be evidence for the consideration of the jury. But there is no such fact here. The evidence is simply this, that the defendant had kept his land fenced. That, however, was no evidence of a liability to repair. If a man chooses to surround his land with a fence, he may pull the fence down again at any time. He may erect a fence to prevent his cattle from straying upon the property of his neighbours. That which he had a right to set up he has a right to pull down; and no matter how long he has had it up or repaired it, that affords no evidence of a legal liability to repair it. It would really be alarming if the law were otherwise—if a person who once set up a fence were compelled to keep it up. In this case I cannot see a particle of evidence of the liability of the defendant to repair the hedge; and the learned judge was quite right in so holding.

CHANNELL, B.—I also am of opinion that this rule should be discharged. The question is whether there was a fence which the defendant was liable to repair? I really cannot see that there is any evidence whatever of any such liability. It certainly seems that for fifty years

at least the fences were kept up by the defendant and his predecessors; but they were kept up for his own purposes, and not for the sake of his neighbours; and it is argued that such repairs are evidence of an obligation to repair, but no such legal obligation is to be inferred from such acts of repairing.

PIGOTT, B.—I am of the same opinion that there was no evidence of a liability on the part of the defendant to repair the fence. When the rule was moved I understood that there were additional facts, such as that the defendant had repaired the fence, when it was not necessary that he should have done so for his own purposes, but now it is quite clear that that was not so. It was certainly necessary that some evidence should have been given of the obligation to repair, such as that he had been called upon by his neighbour to repair, and he had repaired accordingly.

BRAMWELL, B.—I continue of the same opinion that I entertained at the trial. It is quite clear that there is no obligation to fence land that has not been fenced before. Well, if a party is not bound to fence, he may take down any fence that he may have put up, or he may let it fall down. It is said, however, that his repairing the fence is evidence that he is bound repair it; but as he puts it up for his own purposes he may surely take it down again. Again, it is said that the witness said he thought he was bound to repair his fence, and, therefore, he did repair it. This, however, shows no obligation to repair. There was no requisition to repair, and no repairing in consequence. To hold that a man who erects a fence, and repairs it from time to time, is bound always to continue it, would involve a serious state of things.

Rule discharged.

Attorney for the plaintiff, *Langham.*
Attorneys for the defendant, *Lewis* and *Lewis.*

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

ERROR FROM THE EXCHEQUER.

Tuesday, June 25, 1872.

(Before WILLES, BYLES, BLACKBURN, KEATING, MELLOR, LUSH, and BRETT, JJ.)

WHITECHURCH AND OTHERS *v.* THE EAST LONDON RAILWAY COMPANY.

Poor rate—Parochial rate—Railway company—Rating of lands taken by railway company under compulsory powers—Liability of company to make good deficiency in rate by reason of lands being so taken—East London Railway Act 1865 (28 *Vict. c. li., s.* 128)—*Lands Clauses Consolidation Act* 1845 (8 *Vict. c.* 18, *s.* 133).

The defendants, under the powers of their special Act (28 *Vict. cap. li.*) *had taken lands in several parishes for the purpose of constructing several lines of railway thereon, one of the railways* (*No.* 1) *passed through* (*amongst other parishes*) *the parish of R., of which the plaintiffs are the overseers.*

Under sect. 128 *of their said Act, the defendants are liable to make good the deficiency in the rating of any parish in which they shall have taken rateable property for the purpose of their railway, by the reason of their having so taken it, until the railway or the works thereof are completed, and assessed or liable to be assessed to such rates.*

By the interpretation clause of the said Act, the expression, "the railways," means, "the railways, stations, works, &c., or any or either of them, or any part thereof by this Act authorised."

The portion of railway No. 1, *which lies within the parish of R., was completed, and had been let by defendants to and was worked by the London and Brighton Railway Company, who had opened it for traffic. The rest of railway No.* 1, *in other parishes, was not completed, but was in course of construction by the defendants. On other lands, in other parishes also taken by them, the defendants were constructing, but had not constructed, the remaining railways authorised by their Act.*

The majority of the Court of Exchequer (*Kelly, C.B., and Bramwell and Channell, BB.*), *dissentiente, Martin, B.*) *held* (*distinguishing* Reg. *v.* The Metropolitan District Railway Company *in the Q.B.*), *that the liability of the defendants to make good the deficiency in the rates, under sect.* 128, *ceased as soon as the portion of "the railway and works thereof" that was situated within the plaintiff's parish, was completed and opened for traffic, as the same then became rateable property, and "liable to be assessed."*

Held, in error from that decision, by the majority of the Court of Exchequer Chamber (*Willes, Keating, Lush, and Brett, JJ.*) *reversing the decision of the Court below, that the liability of the Railway Company under sect.* 128, *to make good the deficiency in the poor's-rate of the parish of R. would not cease until the whole of the railway authorised by the Act had been completed.*

Held, contra, by Blackburn and Mellor, JJ. (*dissenting from the decision of the Queen's Bench in* Reg. *v.* The Metropolitan District Railway Company) *that the decision of the majority of the court below was right, and should be affirmed.*

Byles, J. gave no judgment.

Reg. *v.* The Metropolitan District Railway Company (*L. Rep.* 6 *Q. B.* 608; 40 *L. J.* 113, *M.C.*) *discussed and commented on.*

THIS was error brought by the plaintiffs upon the judgment of the majority of the Court of Exchequer, deciding in favour of the defendants, upon the following

SPECIAL CASE.

1. The plaintiffs are the churchwardens and overseers of the poor of the parish of St. Mary, Rotherhithe, and are duly empowered and entitled to make and receive, within and in respect of the said parish, the poors rate, and paving and general purposes rate, lighting rate, and sewers rate, respectively.

2. The defendants are the East London Railway Company, incorporated by the East London Railway Act 1865 (28 & 29 Vict. c. li., Local and Personal), a printed copy of which Act accompanies and is to be taken as forming part of this case.

3. The said company are possessed of and use lands for the purposes of the said Act. The land taken by the company in the parishes of Deptford and Rotherhithe, have been appropriated to and form the completed railway and stations herein mentioned, and the land taken by the company in other parishes is actually being used for the purposes of constructing the uncompleted portions of the unfinished railways.

4. Clause 22 specifies the railways which the company are authorised to make, and which said

railways when completed are to be called "The East London Railway," referred to in the said Act. They are therein described as railway No. 1, railway No. 2, railway No. 3, railway No. 4, railway No. 5, railway No. 6, and railway No. 7. Railway No. 1 is the principal line, and is to commence in Bethnal-green, and terminate at New Cross, Deptford, passing in its course through the Thames Tunnel, and through, amongst others, the parish of St. Mary, Rotherhithe.

6. As much of railway No. 1 as is within the parishes of Rotherhithe and Deptiord is complete, and also the stations thereof. So much of the railway No. 1 as is within the parish of Wapping is also nearly finished. The completed part aforesaid is let to the London, Brighton, and South Coast Railway Company, under an agreement dated 17th Nov. 1869, confirmed by 33 & 34 Vict. c. 4. That company opened the said completed portion of railway No. 1 for traffic in Dec. 1869, and have ever since occupied and worked it.

7. The whole of the railway No. 4 is also completed, and is let to, and worked by, the Brighton Company, under the said agreements; but railways No. 2, No, 3, No. 5, No. 6, and No. 7, are commenced, but not completed.

8. Clause 128 of the said East London Railway Act provides that "If and while the company are possessed under this Act of any lands assessed or liable to be assessed, to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall, from time to time, *until the railways or the works thereof are completed and assessed, or liable to be assessed*, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railway or works, and the deficiency shall be computed according to the rental at which those lands, with any buildings thereon, are now rated;" and, accordingly, pursuant to such clause, the defendants, whilst they were constructing their railway within the plaintiff's said parish, paid to the plaintiffs the deficiency of rates in their parish; but after that portion of the railway from the New Cross station to Wapping was completed the defendants considered it *liable to be assessed* within the meaning of the said clause, and refused to pay to the plaintiffs, as by them required, any further sum for deficiency of rates within their parish under that section.

9. Concurrently with the defendants' said refusal to pay, the said Brighton Company claimed of the plaintiffs to be rated in respect of the said completed portion of railway within their (the plaintiffs') said parish as the sole occupiers thereof, upon the true gross and rateable value thereof; and they, the said Brighton Company, were afterwards rated by the plaintiffs in the rate made by them on the 13th April 1870 upon the sum of 1181*l.* 15*s.* rateable value, which rate was based upon the same rentals as those in respect of which the defendants had paid rates during the construction of the said portion of railway No. 1. The said Brighton Company, however, objected to such rating, alleging that the true rateable value of the portion of the railway within the plaintiffs' said parish was 150*l.*; and they accordingly claimed, as sole occupiers thereof, to be assessed at that sum in lieu of the sum of 1181*l.* 15*s.*, the amount at which the property, on the site of which the railway had been constructed, was originally assessed.

10. The plaintiffs did not collect the said rate from the Brighton Company, being advised that they were in error in rating them, and contended that the defendants were and are liable under the said clause 128 of the said East London Railway Act, to make good the deficiency in the assessment for rates notwithstanding that so much of the said railway which is, as before stated, completed within the plaintiffs' parish, and is occupied and used by the Brighton Company under the said agreement for the purposes therein mentioned.

11. The deficiency in the assessment of rates made by the plaintiffs in their said parish on the 13th April and 5th Oct. 1870 amounts, in the whole, to 310*l.* 4*s.* 3*d.*

12. The question for the opinion of the court is whether the defendants are liable to pay the said deficiency. If the court is of opinion that they are, then the judgment is to be entered for the plaintiffs for the said sum of 310*l.* 4*s.* 3*d.*, with costs of suit. But if the court is of a contrary opinion, the judgment is to be entered for the defendants.

The case was argued in the court below in Easter Term, when the majority of that court (Kelly, C.B., and Bramwell, and Cleasby, BB., Martin, B., *dissentiente*) held (distinguishing the case of *Reg.* v. *The Metropolitan District Railway Company* in the Queen's Bench, L. Rep. 6 Q. B. 608; 40 L. J. 113, M.C.) that the liability of the defendants ceased as soon as the portion of the railway and works thereof that was situated in the plaintiffs' parish was completed and opened for traffic, and had thereby become rateable property, and gave judgment in favour of the defendants accordingly. Martin, B., holding, on the contrary, in favour of the plaintiffs, that the case in the Queen's Bench was directly in point, and governed the present case. (See report of the case below, *ante*, p. 476; L. Rep. 7 Ex. 248; 41 L. J. 168, Ex.; *Ibid.* 123 M.C. The plaintiffs thereupon brought error to this court.

The plaintiffs' points for argument: First, that the defendants are not liable to be rated by the plaintiffs in respect of any portion of their railway or the works thereof until the completion of their whole line of railway and the works thereof, which, by the East London Railway Act 1865, they are authorised to construct, and to be called "The East London Railway;" secondly, that the defendants are not liable to be rated by the plaintiffs in respect of the completed portion of railway (No. 1) not mentioned in the special case until, at least, the completion, in accordance with the said East London Railway Act, of the whole of the said railway No. 1 and the works thereof; thirdly, That the London, Brighton, and South Coast Railway Company could not legally claim to be rated, nor had the plaintiffs any legal right, nor are they bound to rate the said London, Brighton, and South Coast Railway Company in respect of that portion of the railway No. 1, of which the said company took the management and working; and that, at all events, the plaintiffs not having collected the rate made, are entitled to have recourse to the defendants; fourthly, That for the foregoing reasons the defendants are liable and bound to make good to the plaintiffs, as provided by sect. 128 of the said Act, the deficiency in the assessment of rates referred to in the special case.

The defendants' points for argument: First, that as the defendants have completed the rail-

way and stations in St. Mary, Rotherhithe, such railway and stations are *liable to be assessed* at their true rateable value, and that the East London Railway Company are therefore not liable to make good the deficiency in the rates under sect. 128 of the East London Railway Act 1865; secondly, that as the plaintiffs, after the completion of the railway and stations in the said parish, in fact assessed the London, Brighton, and South Coast Railway Company in respect of such railway and stations as the occupiers thereof, such railway and stations were "*completed and assessed*" within the meaning of the said section; and that the said East London Railway Company are not, therefore, liable to make good the deficiency in the rates under that section; thirdly, that under the circumstances mentioned in the special case, the defendants are not now liable to make good the deficiency in the rates, but that the London, Brighton, and South Coast Railway Company ought to be rated and assessed in the ordinary way in respect of the said railway and stations as the beneficial occupiers thereof.

Prentice, Q.C. (with him was *Morgan Howard*) argued for the appellants, the plaintiffs.

Sir *J. B. Karslake*, Q.C. (with him was *Poland*) argued for the respondents, the defendants.

Prentice, Q.C. replied.

The same arguments were urged on both sides as in the court below, and the same cases were cited, namely:

Reg. v. *The Metropolitan District Railway Company*, L. Rep. 6 Q.B. 608; 40 L. J. 113, M.C.;
Wheeler and others v. *The Metropolitan Board of Works*, 29 L. T. Rep. N. S. 848; 38 L. J. 165, Ex; L. Rep. 4 Ex. 303;
The Metropolitan Board of Works v. *West Ham*, L. Rep. 6 Q.B. 193; 23 L. T. Rep. N. S. 490;
Reg. v. *The Metropolitan Board of Works*, 19 L. T. Rep. N. S. 348; L. Rep. 4 Q.B. 15; 38 L. J. 24, M.C.
The Mayor, &c., of London v. *St. Andrew's, Holborn*, 16 L. T. Rep. N. S. 665; L. Rep. 2 C.P. 574; 36 L. J. 292, C.P.

The COURT, after consulting together for some time at the conclusion of the argument, were divided in opinion, and delivered separate judgments, *seriatim*, as follows:

BRETT, J.—After the best consideration that I have been able to give to this case, I have come to the conclusion that the judgment of the majority of the court below ought to be reversed. The question for our consideration is whether the liability of the defendants' company, under their Act of Parliament, the East London Railway Act 1865 (28 & 29 Vict. c. li), s. 128, has ceased, and, if not, when it is to cease. Now, the answer to these questions depends upon the construction to be given to sect. 128, and whether or not the words "in the parish" are to be read in as if they had been originally inserted in that section after the words "until the railway or the roads thereof;" and I am of opinion that, as the Legislature has not thought proper to insert those words in the section in question, they should not to be so read in. True it is that cases might exist in which we might, of necessity almost, be compelled to construe an enactment similar to the present one as though, by implication, it contained these words; but such a construction should, I think, only be put upon a statute when the court feels itself driven to the conclusion that it was the real intention of the Legislature that such a construction should be put upon the words used. Reasons have been given by the learned counsel on both sides; on the one hand, why the words in question here should be taken to be inserted, and on the other hand why they should not. The learned counsel for the defendants (the respondents) contended that, as soon as any portion of the line of railway was completed, and anything put upon the land liable to be rated, then such portion of the railway should be treated in the same way as any other property liable to be assessed, and that it should be taken in substitution for the land, whether having buildings thereon or not, which the company had appropriated for the purposes of the railway, and that thereupon the special liability of the company under sect. 128, should at once cease. Then, again, upon the other side, it was urged by the learned counsel for the parochial authorities that, until *the whole* of the contemplated line of railway has been completed and opened for traffic, the full value of the land to be used as a railway is not and cannot be completely developed. Now both these reasons seem to me to be pretty equally balanced, and to afford a reasonable argument on the one hand in favour of the defendants (the respondents), and for holding that the words in question should be taken as inserted in the section, and, on the other, for our adopting the view urged by the appellants (the plaintiffs) that the company's liability, under sect. 128, is to continue until the whole line of railway is completed. I am, however, of opinion that the construction contended for by the appellants is the right one, and that these words must not be read in as though they had been originally inserted in the section, and the equal balance between the two opposing views is, I think, an additional reason for coming to that conclusion. The argument in favour of the view contended for by the appellants is confirmed, I think, by a reference to the interpretation clauses in the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c 18), and the Railway Clauses Consolidation Act 1845 (8 & 9 Vict. c 20). By sect. 133 of the first-named Act the promoters of any undertaking under the Act are to make good the deficiency in the assessment for poor's rate, by reason of lands having been taken by them under the Act, "until the works shall be completed and assessed to such poor's rate," and by the interpretation clause (sect. 2) the expression "the works" is to mean "the works of whatever nature which shall by the special Act be authorised to be constructed;" and in the latter of the above mentioned Acts, by the interpretation clause the expression "the railway" shall mean "the railway and works by the special Act mentioned to be constructed." Now, I see nothing inconsistent in our reading the section in the present Act in conformity with the interpretation clauses in the two Acts to which I have just referred. I think, therefore, that the completion of "the railway or the works thereof" alluded to in sect. 128 means the substantial completion of *the whole* undertaking, and that the liability of the defendants will not cease until *the whole* line of railway is *substantially* completed as a railway, and that it is not meant that this liability is to continue for ever, if it should happen that a mere spur or a trifling strip or loop of the line should be left unfinished at the expiration of the limited five years, as Sir J. Karslake has argued would be the effect if the construction of the section contended for by the appellants were to be adopted. When such

substantial completion is effected, the liability of the defendants, under this section, will cease, but not until then. I think that the decision of the majority of the Court of Exchequer was wrong, and should be reversed, and that we should in this case agree with the decision of the Court of Queen's Bench in *Reg.* v. *The Metropolitan District Railway Company*.

LUSH, J.—After having paid every attention to the arguments which have been addressed to the court on behalf of the defendants, I adhere to the opinion which I expressed and the decision which I came to in the case of *Reg.* v. *The Metropolitan District Railway Company*, in the Queen's Bench, and which is relied on by the learned counsel for the appellants in the present case. The practice in such matters is for estimates of the value of the land required for the purposes of the line, and of the probable or expected profits or earnings of the line when completed, to be laid before the Parliamentary committee which has under its consideration the particular railway Bill which it is proposed to pass; and the object of the Legislature in enacting, as it has done, in sect. 128 in the present Act, is that the parishes through which the intended line is to pass shall not, in consequence of such land being taken for the purposes of the railway, be losers while the line is in course of construction, and until it is completed, and the parish be enabled to have the benefit of the full rateable value of the completed line. The words of the section in question (sect. 128 of the East London Railway Act 1865) are as follows: (His Lordship read the section). Now I think that the expression "the railway or the works thereof" in that section, does not mean the portion of the railway which runs through any particular parish, but that it means *the whole* undertaking, the entire scheme of railway communication authorised by the Act. That, to my mind, is the natural and true meaning and construction of sect. 128. There are other clauses in the Act, too, which, I think, confirm this view. It appears from the Act that other parishes in the district have obtained the insertion in the Act of clauses or provisions specially guarding and protecting their interests in this respect. Thus, by sect. 75, the rights, powers, authorities, and privileges of the vestry of the parish of St. Matthew, Bethnal Green, are expressly saved and protected. So with respect to the parish of St. Leonards, Shoreditch, by sect. 77 the railway company, from the time of their taking any lands, &c., in that parish for the purposes of the railway, until the said railway shall be assessed and rated to such rates, are to be assessed and rated for such lands, &c., in the same amount as such lands were rated prior to the Act, and are to make good to and in aid of such parish all such rates as aforesaid. And by sect. 109 the company taking lands, &c., in the Whitechapel district, are to be liable to make good the deficiency in the rates "until any works to be constructed under the Act in that district are so far completed as to be assessed or liable to be assessed to an amount equal to or greater than the aggregate amount of the gross rateable value of the same lands, &c., for the twelve months preceding the passing of the Act." Now this 109th section seems more favourable to that parish than sect. 128 is to the parish in question. I agree that if sect. 128 stood alone it might be capable of the construction put upon it by Sir John Karslake, but upon reviewing the Act as a whole, there can be no doubt that the intention of the Legislature was to save the parishes from loss, and therefore I think that that construction of the section is to be adopted which best carries out that intention. The judgment of the court below, should, in my opinion, be reversed.

MELLOR, J.—I am of opinion that the judgment of the majority of the court below ought to be affirmed. The railway company is to be rated according to its earnings. It is now *capable* of being worked, and is in fact at this moment worked as a railway in the parish. I have always understood the rule as to rating such property to be, that if a railway in any parish is capable of being worked, and is worked, it becomes liable at law to be assessed to the poor's rate of the parish in which it lies. Sect. 128, I think, affords abundant reason for the decision of the court below. By that section the inhabitants of the parish have obtained that which the Legislature had in contemplation in passing it, and as soon as the parish can be indemnified against loss by the rating of the railway, the company becomes assessable to the rate in the usual way, and this special liability under sect. 128 ceases. I confess that I draw a conclusion from the several clauses referred to by my brother Lush somewhat different from that at which he has arrived. The object, as it seems to me, of sect. 128 was simply to make good any deficiency there might appear to be in the rates of the several parishes through which the line of railway passed, whilst the land in such parishes respectively was not of any assessable value; but surely as soon as the line of railway in any p rticular parish is completed and in working order, and is actually, as in this case, worked and profits are being earned, and it is capable of being assessed, there is no wrong or injustice done in rating it in the usual and ordinary manner. It seems to me that if the judgment of the Court of Queen's Bench in *Reg.* v. *The Metropolitan District Railway Company* be correct, the several provisions in the clauses referred to by my brother Lush are quite unnecessary; and they rather, I think, detract from the force of the judgment in that case. There is now in this parish a "railway" or a part of a railway, and "the works thereof," liable, in my opinion, to be assessed. The judgment of the majority of the court below was right, and ought to be affirmed.

KEATING J.—When I consider the variety of the opinions which have been expressed upon the construction of this section, I cannot but feel some diffidence in the matter, yet I confess that I see no reason to change or depart from the opinion which I expressed in the case in the Queen's Bench (*Reg.* v. *The Metropolitan District Railway Company*) which has been so much discussed before us to-day. The words of the section which we have to consider in the present case are not more obscure than those of the section which were discussed in that case. The object of the Act of Parliament now before us is clear; namely, to effect a communication or connection between the lines of railway on the two sides (the north and the south) of the river Thames by means of the Thames Tunnel. Now this object would not be effected by making and working a fragment of a line of railway only, but by the carrying to completion the whole scheme. Of necessity, an injury is at first inflicted upon a parish by the constructing of a line of

railway through it, in that, by the appropriation of rateable land (and it may be land with buildings on it) to the purposes of the line, the value of the rateable property in the parish is for the time diminished. It is only a reasonable proposition, therefore, and it is the meaning of the Legislature, that the railway company, who take the land for their own purposes, should make good the deficiency thus caused in the rates, and they should not, I think, escape from that statutory liability until the making of the railway, as intended by the Legislature, is completed. The section in question here imposes that liability upon the respondents, and the question is, up to what time and how long, are they to be bound to make good the deficiency so caused in the poor's rate assessment? I think the answer to that question, founded upon a reasonable construction of the statute, is that they shall be liable until they have done that which they undertook to do, and have provided, not a fragment of a railway merely but, *the whole* line of railway contemplated and authorised by their Act of Parliament. That seems to me to be a reasonable view of the matter on which the Legislature has, in my opinion, expressed its meaning very clearly; and I think that a contrary view can only be entertained by doing violence to the language of the Act of Parliament. The words are, "until the railway or the works thereof are completed," &c. Now, what did the Legislature mean by those words? It has been suggested, and I own somewhat ingeniously, on the part of the defendants, that they meant to impose this burden upon the railway company only until the portion of the line of railway *in the particular parish* was completed, but if they had so meant, why did they not in terms expressly say so? The section speaks of the *completion* of the railway; it must be completed before it can be assessed. The word "railway" there means the entire scheme of railways authorised by the Act, and the completion referred to means the completion of that whole scheme. Although the interpretation clause in this Act may not be quite so clear as that in the case of *Reg.* v. *The Metropolitan District Railway Company*, I see nothing in it which opposes the conclusion at which I have arrived. Suppose the section had said "until the *whole* of the railway mentioned in the Act were completed," &c., there could then have been no possible doubt. Then why should not the section be, as it ought I think to be, so read? It would be more in harmony with the rest of the Act, and more in accordance with the intention of the Legislature so to read it. I speak with much diffidence, but I confess I think that the view entertained to the contrary, is more ingenious than sound. I am of opinion that the judgment of the Court of Queen's Bench in *Reg.* v. *The Metropolitan District Railway Company* was right, and that that of the majority of the Court of Exchequer in the present case was wrong, and should therefore be reversed.

BLACKBURN, J.—I think that the judgment of the Court of Exchequer in this case is wrong in the sense that it did not follow the decision of the Court of Queen's Bench in *Reg.* v. *the Metropolitan District Railway Company*, and then come up here to be reversed. But the case is now before us; and sitting here as a court of error, we are not bound to take either case as binding upon us. I think that the decision of the Court of Queen's Bench in that case was wrong, and that the judgment of the majority of the Court of Exchequer, though wrong in the sense which I have mentioned, was otherwise right, and should be affirmed. The Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) contains a clause very similar to sect. 128 here. That Act (by sect. 133) enacts that the promoters of the undertaking, on becoming possessed under the Act of lands charged with land tax or liable to be assessed to the poor's rate, shall be liable to make good the deficiency in the said assessments "until *the works* shall be completed and assessed," &c., and the word "*works*" there, to which some of my learned brethren attach importance, are explained in the interpretation clause (sect. 12) to mean "the works of whatever nature which shall by the special Act be authorised to be executed." So again in the Railway Clauses Consolidation Act 1845 (8 Vict. c. 20), the interpretation clause says that "the expression the railway shall mean the railway and works by the special Act authorised to be constructed." These several enactments should be construed upon similar principles. Poor rates are assessed and the occupiers are rated according to the yearly value of the land—that is to say, according to the amount of rent which it will let at from year to year. Now when a railway company under the provisions of this Act of Parliament appropriates land for the purpose of constructing a line of railway upon it, there ceases for a time to be a beneficial occupation of such land, and the manifest intention of the Legislature in sect. 128, and other similar enactments, is that in such cases the inhabitants of the parish through which the line of railway runs, shall be compensated for, or indemnified against, loss by reason of the land so appropriated by the railway company remaining for a time unprofitable and incapable of assessment. The interpretation clause is not, I think, of importance. I think that sect. 128 here, where it says, "until the railway or the works thereof are completed," means, until that portion of the rail or works which lay within a particular parish is completed, and does not mean until the completion of the *whole* line of railway and works authorised by the Act. When such a portion is completed, the railway so far, is in working order and fit to be opened for purposes of traffic, and is therefore capable of being assessed; the inhabitants then will, to the extent of the portion of the railway completed, be re-imbursed, and the liability of the company under this section ceases *pro tanto*, and the land in which this portion of railway has been made, is then liable to be rated in the ordinary and usual manner. The words "liable to be assessed" are mere surplusage, for as soon as there is a valuable occupation the land must, on the request of any ratepayer, be assessed. If the construction contended for by the learned counsel for the appellants should be held to be correct, and the expressions in sect. 128 should be held to mean "until the entire scheme of railway communication authorised by the Act be completed," then the railway might continue liable to this burden for ever unless the whole of the works included in that scheme were completed within the five years limited by the 131st section, and if ever so small a portion of the line should remain unfinished at the expiration of that period, the operation of the 128th section might continue to exist indefinitely. The interpretation clause, sect. 4, has not, as I have

before said, much bearing on the construction of sect. 128, but at any rate it is not antagonistic to the construction which I have put upon this latter section; and, indeed, so far as it goes, it is rather in favour of it, for the word "railways" may, I think, under that clause (sect. 4) be taken to mean any part of the railways authorised by the Act. I think, therefore, for the above reasons, that the judgment of the majority of the court below was right, and should be affirmed.

BYLES, J.—Having been absent during a considerable portion of the argument, I think I ought to give no opinion on the matter.

WILLES, J.—This is no doubt a question of much nicety, but we have to construe the words as they appear before us in the section. Now I apprehend it to be a clear and well established rule of grammatical construction and of reasoning, that an indefinite and general expression is to be taken to have a universal application. Therefore the words "railway and works thereof," ought *primâ facie* to be taken to mean *the whole* "railway," and *the whole* "works thereof," authorised by the Act. We may well suppose, in the first place, that the word "railway" here used was intended to bear, and have put upon it, its ordinary meaning. No doubt there occur instances in the statute where it must be taken to mean not the *whole* but a portion only of the contemplated works; but it will be seen that in these instances the context necessitates that the meaning should be so restricted. I look therefore to see if there is anything in the statute or the context in the present case, which renders it necessary to cut down the general word "*railway*" to mean a portion or fragment of the railway, and which obliges us to read in to the section the words "*in the parish*," as it has been suggested we ought to do. I confess I fail to see anything of the sort. I attach no importance to the interpretation clause (sect. 4), but I do to sect. 22, which last named section shows, I think, that the company are bound to complete *the whole* of the works in the several parishes therein specified. Reading sects. 22 and 128 together, I think the plain and fair construction of them is that the whole and entire scheme of railways authorised by the Act must be completed before the liability of the company to make good the deficiency in the rates can cease. (His Lordship read sect. 128 and proceeded.) Now if the company take the land and do not make or complete the whole line of railway upon it, they have still rendered themselves liable to the liability and burden imposed by sect. 128. When the Bill is before Parliament, witnesses are called by the promoters to state the advantages which are expected to be derived by the public from the construction of the line; and it must be assumed that it was intended by the Legislature that the railway should be completed, and that the company should be liable to make good the deficiency for an indefinite time if it took land for the purpose of the railway, but did not construct it. It has been suggested that it is unjust to oblige the company to make compensation to the parish for the depreciation in value of its rated property, but I confess that I see no hardship or injustice in such a proceeding at all, and it strikes me as being nothing but just that the parish should be compensated for the burden which the diminishing the rateable property in the parish, and the consequent increase in the amount of the rates assessed, has cast upon it. I am content to abide by the words which the Legislature has used, without adding to or subtracting from them. It may, as Martin, B., said, in the case of a very long line of railway, be unreasonable; nevertheless we must follow the words of the statute. The Legislature has said that *the whole* system of railways must be completed before the company's liability can cease, and no question of inconvenience can be taken into account. Here, however, as a matter of fact, we are dealing with a short line. I think that the decision of the Court of Queen's Bench in *Reg.* v. *The Metropolitan District Railway Company* was right; and that the judgment of the majority of the Court of Exchequer in the present case was wrong, and ought to be reversed.

Judgment reversed.

Attorneys for the appellants (plaintiffs), *Hanks, Willmott,* and *Stokes*, 101, High-street, Southwark, S.E.

Attorneys for the respondents (defendants), *Wilson, Bristows,* and *Carpmael*, 1, Copthall-buildings, E.C., and 22, Parliament-street, Westminster, S.W.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PEAT, Esqrs., Barristers-at-Law.

Nov. 4 *and* 5, 1872.

(Before the LORDS JUSTICES.)

CLOWES *v.* THE STAFFORDSHIRE POTTERIES WATERWORKS COMPANY.

Public company—Abuse of parliamentary powers—Consequential damage—Remedy—Compensation—Injunction—Waterworks Clauses Act 1847, *s.* 6.

The special Act of a Waterworks Company, with which was incorporated the Waterworks Clauses Act 1847, *empowered them to take the waters of certain springs which flowed into a river on the banks of which certain dyeing works and mills were situate, but restricted the quantity of water to be taken till the company should have made a compensation reservoir. And the Act contained an express reservation of the rights of the owners and occupiers of any lands, mills, and works to the use of the waters of the springs or river, except so far as provided by the Act. The company constructed a compensation reservoir, which was recognised as sufficient by a subsequent Act giving them further powers. The owners of the dyeing works, finding that the effect of the reservoir was to render the water as it flowed out of it into the river turbid and muddy, and unfit for the purposes of the dyeing works, filed a bill against the company to restrain them from permitting the water of the river to remain in its turbid and muddy condition:*

Held (reversing the decision of Malins, V.C.), that their Act gave the company no power to foul the water of the river, and that, as the injury complained of was not one which their Act authorised them to commit, the plaintiff's remedy was not under the compensation clauses of the Waterworks Act 1847, *but that the plaintiff was entitled to an injunction restraining the company from so storing or discharging the water of the reservoir as to foul the water of the river to the injury of the plaintiff.*

THIS was an appeal from a decision of Malins, V.C.

The Staffordshire Potteries Waterworks Company was incorporated by an Act of Parliament,

passed in 1847 (10 & 11 Vict. c. 114), for the purpose of supplying with water the town of Newcastle-under-Lyme, and several townships and places adjoining thereto. This Act empowered the company to construct waterworks, and to take and use for the purposes of their undertaking the waters of certain springs and streams specified in the Act, the 32nd section of which recited that the water flowing or issuing from the springs and streams thereinbefore mentioned, and which was thereby authorised to be taken and diverted for the purposes of the Act, or some of it then flowed into the river Churnet, and was then employed in driving, or assisting to drive, the machinery of certain mills situate on the river Churnet, and provided that in lieu of the water which should or might be abstracted for the purposes of the undertaking, the company should and were thereby empowered and required to construct, and should for ever after uphold and maintain, in a certain place called the Deep Hays Valley, a compensation reservoir of sufficient dimensions and extent to contain twenty millions of cubic feet of water at the least, with sufficient embankments, waste weirs, water courses, discharge pipes, gauges and other works, for the purpose of retaining flood waters and other waters, and for discharging the same so and in such manner as that the supply of water in the river would be increased and rendered more uniform.

This Act was repealed by an Act passed in 1853 (16 & 17 Vict. c. 198), whereby the company were re-incorporated with enlarged powers.

The 4th section of the Act of 1853 provided that the clauses contained in the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 15) with respect to the supply of water to be furnished by the undertakers should be incorporated with and form part of this Act, save only that the company should not be bound to lay on at any time the supply of water for houses to any top story not being at least 20ft. below the service reservoir from whence the supply was taken.

It was also provided that, except where otherwise provided in this Act, the Lands Clauses Consolidation Act 1845 should be incorporated with and form part of the Act.

The 26th section empowered the company to make and maintain certain works, and to take and use certain streams and waters, provided that the maximum quantity of water to be abstracted by the company for the purposes of their undertaking should not exceed 1,500,000 imperial gallons in a day of twenty-four hours, until an additional compensation reservoir or additional compensation reservoirs should have been made completed and certified as thereinafter mentioned, provided also that after such completion and certificate the maximum quantity of water to be abstracted for the purposes of the undertaking should not in any event exceed 3,000,000 imperial gallons in a day of twenty-four hours.

The 54th section provided that before the company should abstract or take from the springs or streams specified in the Act, or from any other sources or tributary streams of the river Churnet, a greater quantity of water than 1,500,000 imperial gallons in any one day, the company should, and were thereby required, within four years from the passing of this Act to construct for the use and benefit of the owners and occupiers of the said mills such additional compensation reservoir or reservoirs, with proper embankments, waste weirs, watercourses, discharge pipes, gauges, and other works, as should together, with the existing reservoirs in Deep Hayes Valley, be capable of constantly discharging into the river Churnet such quantity of water as should be equal to the maximum quantity of water required to be taken by the company, exclusive of the ordinary flow of the Deep Hayes stream, and of the stream or streams on which the additional reservoir or reservoirs should be constructed; and that such additional reservoir or reservoirs should as to the capacity and sufficiency thereof, be made and completed to the satisfaction of an engineer to be appointed by the owners and occupiers of the mills, who, upon the completion thereof to his satisfaction, should give a certificate in writing of such completion, and should certify that such additional reservoir or reservoirs, together with the then existing reservoir, were capable of constantly discharging, by way of compensation, and in addition to the ordinary flow of the streams upon which the same should have been respectively constructed, a quantity of water equal to the maximum quantity of water so required to be taken by the company.

The 56th section provided that the company should for ever thereafter maintain for the use and benefit of the owners and occupiers for the time being of the said mills, the said existing reservoir, and such additional compensation reservoir or reservoirs as should be constructed and certified as aforesaid with proper gauges for measuring the flow of water therefrom.

The 62nd section provided that for the purpose of constructing the said additional compensation reservoir or reservoirs, and the works connected therewith, it should be lawful for the company to purchase and acquire, with the consent of the owners and occupiers thereof, any land which might be necessary, not exceeding eighty acres, in addition to the lands authorised to be acquired by this Act, or by the Acts incorporated therewith.

The 72nd section provided that "nothing in this Act contained shall be construed to affect, diminish, abridge, prejudice, or alter in any manner whatsoever any right which, before the passing of this Act, the owners, lessees, and occupiers of any lands, canals, mills, and works, or of any of the springs or streams authorised to be taken or used for the purposes of this Act, had or have possessed or enjoyed, or might lawfully have, possess, or enjoy, to the use of the waters of the said springs or streams, or of the tributary waters, springs, or streams flowing into the same, except so far as is provided and declared in and by this Act.

In 1861 an Act (24 & 25 Vict. c. 146) was passed to enable the company to extend its works. It recited the Act of 1853, and that the company had constructed at or near Tittesworth, in the parish of Leek, in the county of Stafford, a reservoir intended to constitute and be used as an additional compensation reservoir for the use and benefit of the owners and occupiers of the Churnet Mills, as required by the Act of 1853, but such reservoir had not been certified as required by that Act, and that it was expedient that the same should be constituted a compensation reservoir as thereinafter provided. And the 27th section of the Act provided that the present Deep Hayes and Tittesworth Reservoirs should, from and after the passing of this Act, be compensation reservoirs, and the same

and the gauges, and other works connected with the same respectively, should for ever be maintained by the company for the protection and benefit of the owners of certain canals, and the owners and occupiers from time to time of the Churnet Mills.

The 6th section of the Waterworks Clauses Act 1847 provides that where, by their special Act, the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners or occupiers thereof, they shall in exercising the powers so given to them, be subject to the provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act 1845; and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands or streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith; and except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the Lands Clauses Consolidation Act 1845 for determining questions of compensation with regard to lands re-leased or taken under the provisions thereof, and all the provisions of the said last-mentioned Act shall be applicable to determine the amount of any such compensation, and to enforce payment or other satisfaction thereof.

Miss Ann Clowes, the plaintiff in this suit, was tenant for life of certain dye works on the river Churnet, a little to the north of the town of Leek. These dye works were in the occupation of her tenants, Messrs. Hammersley, who had for upwards of thirty years carried on in them the business of silk-dyers.

The bill alleged that the plaintiff and her predecessors had always had and enjoyed the right to use the water of the river Churnet uninjured, for the purposes of dyeing, and that pure soft water was absolutely necessary for the purpose of washing and dyeing silk; that up to the time of the construction of the Tittesworth reservoir the water of the river Churnet had been remarkable for its great purity and softness, and the Churnet, being a mountain stream, it used to rise quickly after heavy rains, and as quickly subside upon their cessation, and although the water was discoloured more or less according to the quantity of rain which it received, such discoloration never continued for more than one or two days after the subsidence of the flood, all mud and other matter brought down from the hills being completely carried away by the force of the flood itself; that immediately after the completion of the Tittesworth reservoir the plaintiff's tenants found that the works of the defendants had a most injurious effect upon the water of the river Churnet, which, instead of regaining its purity in one or two days after a flood, as it formerly used to do, continued in a filthy and muddy state for periods varying from ten to fourteen days, and sometimes longer, and was in fact in a more impure condition on the eighth or tenth day after rain than on any of the days preceding; that this impure condition of the water continued; that complaints had been made to the company, who had admitted the plaintiff's right and promised to provide a remedy, but that no sufficient remedy had been provided, and the plaintiff's tenants had threatened to quit the works, and that it would be difficult to relet them on such advantageous terms. And the bill prayed that the defendant might be restrained by injunction from permitting the water of the river Churnet to remain any longer in its present muddy or turbid condition, and might be ordered to take all necessary and proper measures for restoring the said water to the condition in which it was prior to the construction of the Tittesworth reservoir, and that in the event of the defendants failing to adopt effective measures for preventing the continuance of the nuisance complained of, proper damages might be awarded to the plaintiff for the injury sustained by her by reason of such continuance.

The defendants by their answer alleged that the reservoir of which the plaintiff complained, and all their works had been constructed and erected under and pursuant to the powers of their several Acts of Parliament, and the Acts incorporated therewith, and they submitted that if the case set up by the plaintiffs were well founded in fact, her only remedy would be a claim for damages under the statutes, and that she was not entitled to any relief in equity.

The Vice-Chancellor held (see 27 L. T. Rep. N. S. 298) that, independently of the question whether the inquiry arose from the exercise by the defendants of their Parliamentary powers, the plaintiff had not sustained such an amount of damage as entitled her to the interference of a court of equity, and that if the plaintiff had sustained any damage, it was capable of compensation by an action at law; but that as the damage complained of had arisen from the exercise by the defendants of their Parliamentary powers, the remedy must be sought under the 68th section of the Lands Clauses Consolidation Act 1845.

From this decision the plaintiff appealed.

Pearson, Q.C. and *Montague Cookson*, for the appellant.—The 6th section of the Waterworks Clauses Act 1847 does not apply to this case; it relates to compensation for persons injuriously affected by the construction or maintenance of the works; we do not complain of the manner in which the works have been constructed, but that the company does not cleanse the reservoir under the provisions of its Acts, and consequently sends down to our works mud and water instead of pure water. The fouling of the water is not the necessary result of the exercise of the company's parliamentary powers, the Act giving no power to foul the water; the fouling of the water is, therefore, an illegal act, and we are entitled to an injunction restraining the company from doing so. We ought to have relief in this court, for if we are sent to law, we shall be obliged to bring an action every time the injury arises. They cited

The Directors of the Hammersmith and City Railway Company v. *Brand*, 21 L. T. Rep. N. S. 238; L. Rep. 4 E. & I. 171;

Broadbent v. *The Imperial Gas Company*, 7 De G. M. & G. 436; 7 H. L. Cas. 600;

Crossley v. *Lightowler*, 16 L. T. Rep. N. S. 438; L. Rep. 2 Ch. 478;

The Attorney-General v. *Gee*, 23 L. T Rep. N. S. 299; L. Rep. 10 Eq. 131;
The Attorney-General v. *The Visitors of Colney Hatch Lunatic Asylum*, 19 L. T. Rep. N. S. 708; L. Rep. 4 Ch. 146.

Lord Justice MELLISH referred to
Isenberg v. *The East India House Estate Company*, 9 L. T. Rep. N. S. 625,

Cotton, Q.C. and *Speed*, for the respondents.—The fouling of the water is the result of the exercise of our parliamentary powers, and it is well settled that where the injury complained of is one arising from works executed according to an Act of Parliament, the remedy is under the statute only. *The East and West India Docks and Birmingham Junction Railway* v. *Gattke* (3 Mac. & G. 155) shows that the words "injuriously affected" in the 68th section of the Lands Clauses Consolidation Act, comprehend cases of injury independent of taking land, and are not limited to damage sustained by persons whose lands, or a part of whose lands are taken used or indirectly interfered with, and the right to compensation extends to and may be asserted in respect of consequential damage. It is true that that case does not agree with *The London and North-Western Railway Company* v. *Smith* (1 Mac. & G. 216) which it must be taken to have overruled. If the plaintiff has suffered any damage at all, she has been "injuriously affected" by the exercise of our parliamentary powers within the meaning of the 6th section of the Waterworks Clauses Act 1847, and she can have compensation only under the provisions of that section. [Lord Justice MELLISH.—Is she to have compensation from time to time, or once for all?] The Tittesworth Reservoir has been recognised by the Act of 1861, as such an additional compensation reservoir as was required by the Act of 1853, and, that being so, the plaintiff can have no right to interfere with it. They also referred to
Lawrence v. *The Great Northern Railway Company*, 16 Q. B. 643.

Without calling for a reply,

Lord Justice MELLISH said.—The plaintiff in this case is the tenant for life of certain dyeing mills, situate on the river Churnet, and the suit is brought to restrain the defendants, the Staffordshire Potteries Waterworks Company, from fouling the stream, which fouling is said to be injurious to the plaintiff in respect of the dye-works. The general case that is made by the bill is that before the defendant's reservoir was made, although it is true that the river Churnet did not always send down water sufficiently pure for the dye-works, but that from time to time there were floods in the stream, and that when a flood occurred it usually took two, three, or four days before the water became clear, yet, according to the allegations contained in the bill, and they appear to me to be proved by a considerable body of evidence, the result and effect of making the reservoir in the way in which it has been made, and the user of it in the way in which it has been used, is that the water which used only to be disturbed for two or three days, is now in the case of a flood disturbed for a very much longer time, and also that at other times when there has been no rain or flood at all, if the reservoir is low, the water comes down in a muddy state, so as seriously to affect the plaintiff's works. The Vice-Chancellor has dismissed the bill upon two grounds. First, he has come to the conclusion that the complaint is a frivolous one, and that the damage is not sufficient to entitle the plaintiff to maintain a suit in this court. Secondly, he has come to the conclusion that the remedy, if any, is not by action or by suit, but under the compensation clauses of the Waterworks Clauses Act. I think it would be better that I should first consider what the Vice-Chancellor treated in his judgment as the second point, namely, whether the remedy in this case is by action at law, or whether it is under the compensation clauses of the Act. In the first place, if this reservoir could have been made without the authority of an Act of Parliament, and the effect of it had been such as it is proved in this case to be, there can be no doubt at all that the occupier, at any rate, of the dye works would be entitled to maintain an action at law on account of the fouling of the stream. So far, I do not understand that it is disputed by the defendants. That being so, of course the right to maintain that action at law must continue, unless it has been taken away by the Acts of Parliament, and the burden of showing that it has been taken away by the Acts of Parliament rests, beyond all question, upon the defendants, because if a public company or any individual obtain an Act of Parliament which they say enables them to take away the common law rights of an individual person, they are bound to show that it does so with sufficient clearness. It is their business to see, if they intend to affect the rights of the public, that their Act of Parliament is framed in such a way that the courts can have no reasonable doubt that that is the effect of them. That being so, the simple question now is, whether according to the true construction of the two Acts of Parliament, the one of 1853 and the other of 1861, taken together, the right to foul the water is given to the defendants. By the 26th section of the Act of 1853 there is a general power given to make the works. It provides "that it shall be lawful for the company, subject to the provisions of this Act, to make and maintain the said works hereby authorised in the line and according to the levels defined on the sections and upon the lands delineated on the said plans and described in the said book of reference, and to enter upon, take, and use such of the lands, streams, and waters mentioned in the said plans and books of reference as shall be necessary for that purpose, or to agree for a lease of such lands and streams, and to take therefrom such water as the company may require for the purpose of this Act and the said incorporated Acts; provided that the maximum quantity of water to be abstracted by the company for the purposes of the said undertaking shall not exceed 1,500,000 imperial gallons in a day of twenty-four hours, until an additional compensation reservoir or additional compensation reservoirs shall have been made, completed, and certified, as hereinafter mentioned; provided also, that after such completion and certificate the maximum quantity of water to be abstracted for the purposes of the said undertaking shall not in any event exceed 3,000,000 imperial gallons in a day of twenty-four hours." In that section, no doubt, a power is given to make the reservoir in question, which is the compensation reservoir mentioned in that section, but it is to be observed that this reservoir is not made for the purpose of supplying them with water to be used in the town, but it is a condition precedent to their being entitled to take the waters of the different streams. If they do not make the reservoir, or cannot make the reservoir, the simple

consequence is that then they cannot take the water beyond the limited quantity which is mentioned in this section. It is also to be observed, that although to a certain extent compulsory powers are given, and lands are delineated on the plans which they are entitled compulsorily to affect, yet they are not given any compulsory power for the purchasing of land for this reservoir. If it had so happened that no owner of lands on the stream were willing to sell them the lands, they could not have made the reservoir at all, and the simple consequence then would have been that they would not have been entitled to take the additional quantity of water. If it had remained there, if there had been nothing beyond that section, it would have been extremely doubtful indeed, whether any compulsory powers at all were given with reference to that section. If no compulsory powers were given for the purpose of purchasing land upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons who have rights in the nature of easements over the land purchased by the company. But the case does not at all stop simply with that section. The next section which is material, is the 54th, which is in fact a repetition of what is said in the 26th as to the making of the reservoir. [His Lordship read the 54th section of the Act, and then continued:] That section simply carries out what was mentioned in the 26th section. There is another section which appears to me to be very material in the determination of this question, namely, the 72nd section of the Act. [His Lordship read the 72nd section.] Now the plaintiff and the other owners of these mills, and the occupiers of these mills, beyond all question, did enjoy before the passing of the Act, the right of using the water of the Churnet in its natural purity for the purpose of dyeing. They had that right beyond all question. Then does not the 72nd section preserve it? It appears to me that beyond all question it does. What is the object of inserting such a section as this? It was said that it means nothing, that it simply reserves what would have been implied even if it had not been there, and possibly to a great extent that may be so. I am not at all certain whether, even if this section had not been there, the construction would not have been the same. But the section is put in to save all doubt. There might possibly have been a question, if the section had not been there, whether the rights of persons were not incidentally affected, and then to save that doubt, and prevent any persons whose advisers might be afraid that their rights might incidentally be affected by this Act of Parliament from being obliged to come when the Act is before Parliament and before the committees for the purpose of getting express clauses for their protection. To save all disputes that might arise in that way this sort of section is inserted in order that the advisers of all such persons may be able to say to them: "You are perfectly safe; you need not go before the committees of the House of Commons or the House of Lords to get a clause for your express protection, for no power is given to take away any right that you possess." The scheme of the Act appears to me to be simply this. The waters of the streams are to be taken, and therefore it necessarily follows that they will be greatly diminished in quantity. Therefore, as respects the millowners who used the stream for power, and are interested in the quantity of water which comes down the stream, their rights might be affected *qua* the quantity, and therefore they are to be compensated in kind. But as respects any other person who may have an interest in the stream, any riparian proprietor who may use the water, anybody who may be interested in its purity, because he uses it for manufacturing purposes — as respects all those persons, we, the promoters of this scheme, we, the waterworks company, undertake that we do not affect their rights at all. That appears to me to be the bargain upon which the Act of Parliament was obtained, and in my opinion, the court ought to hold persons to these bargains, because otherwise a clause of this kind deceives people. They are prevented from coming and asserting their rights. Suppose that in the clause giving them power to make this reservoir they had expressly inserted the words: "and that the company shall be at liberty, so far as they find it convenient, to foul the water as much as they may find it convenient for the purpose of making and working their reservoir," would not the plaintiff and the owners of these mills, if they had seen such a clause, or heard there was such a clause to be inserted in the Act of Parliament, have come directly, and would not a clause have been inserted as a matter of course for their protection? Because, it is not the practice of Parliament, I apprehend, to take away these water rights, at any rate except in cases of extreme necessity. The ordinary practice when these Acts are obtained, because it is always possible to be done, is to compensate people in kind. It is very difficult to compensate in money, and Parliament does not intend to destroy the manufacturing value of streams. Therefore clauses are inserted to preserve the general rights which persons have, and which engineers seem to have, generally speaking, not much difficulty in enabling them to do. That appears to me, therefore, to be the scheme of this Act of Parliament. Then with respect to the second Act, namely, the Act of 1861, it was strongly relied upon, because it was said that, whatever might be the effect of the Act of 1853, the Act of 1861 recognised the reservoir as a complete reservoir, which had been properly made, and therefore no person can, after the passing of that Act, legally assert that there is any imperfection in the making, or, indeed, as it is contended, in the working of the reservoir. I am of opinion that that Act had not that effect. The object of it was simply to regulate the rights between the millowners and the company, and the effect of the clause in question (sect. 27), as it appears to me, simply is that it is a legislative recognition that the reservoir is a sufficient compliance with the obligations which the previous Act had imposed upon the company as between them and the millowners for the purpose of furnishing the quantity of water which was necessary for their purposes. The language of the Act is this: [His Lordship read the 27th section of the Act of 1861.] Then it goes on in several sections to give the millowners the control of the reservoir for the purpose of sending out the water from the reservoir into the stream when they require it. The control of the reservoir having been thus given to the millowners, the 34th section of the Act provides that "the com-

pany may draw and let off the water of either of the present compensation reservoirs when and as often as it shall be requisite for the purpose of repairing or cleansing the same or any part thereof, or for any other necessary purpose, the company doing as little damage as possible, and using all reasonable despatch in reinstating the reservoir, and during the work permitting the stream to flow freely down the Churnet, provided that unless in case of absolute necessity the water shall not be drawn off by the company, from more than one compensation reservoir at the same time." Therefore that section plainly contemplates that the reservoir will from time to time require to be cleansed, and that it will require to be emptied. There are two reservoirs and they are not to be empty both at the same time; and there is a power given to the company which appears to me to be to a considerable extent a recognition that it was never contemplated that the water was to be as dirty as the company chose to make it. Therefore I am of opinion that it would be wrong to construe this Act of 1861 as affecting what certainly the committees, when they passed it, never supposed they would do, namely, to take away the rights of persons which had been preserved by the previous Act. Those persons were not before Parliament; they had no occasion to go before Parliament, because they had no reason to assume that their rights would be affected in any way. In construing an Act of Parliament obtained by a company, I think it would be wrong to construe it as incidentally taking away rights which had been expressly reserved under a previous Act. Therefore I am of opinion that these Acts of Parliament did not give the defendants any right to foul the water so as to be injurious to the plaintiff. That being so, an action at law would have been maintainable. Then comes the only other question in this case, which I will deal with shortly. The Lord Justice may perhaps say more clearly what the rule of this court would be. But I cannot conceive that, an action at law being maintainable, relief is not to be had in this court. If this case had happened before Sir John Rolt's Act or Lord Cairns' Act, I presume that the ordinary course would have been that, a bill having been filed, an action would have been sent to be tried at law. The action having been tried, nominal damages would have been obtained, and the plaintiff would have come back to this court for his injunction. Would this court have sent him away and said that he should bring action after action instead of having his remedy by injunction? I cannot think that would have been so. The Vice-Chancellor said that, if the plaintiff could recover at all, he thought she would get greater damages at law than would be sufficient to put up a gauge, and that that would be a sufficient compensation. But with submission to the Vice-Chancellor the plaintiff would not get at law a sum sufficient to put up a gauge. She would only get in the first instance, in all probability, nominal damages, because in this sort of case you cannot prove specific damage, and there is no evidence here of specific damage, and upon the evidence, the plaintiff would get in the first instance only 40*s*. damages. Then she would have to bring a second action, and what she would get in the second action would be the actual damage which she proved that she had sustained between the time she brought the first action, and the time she brought the second action. Then she would bring a third action, and she would get as damages the actual damage which she could prove that she had sustained in the interval between the time of bringing the second and third actions. It is because it is a most inconvenient mode to leave the rights of parties to be determined in that way, and it was impossible to leave them to be determined in that way, that this court has always given relief in these cases. In my opinion, therefore, the plaintiff is entitled to have a declaration that the Acts of Parliament have not given the defendants any right to foul the water to her damage, and that she should have an injunction to prevent any such damage in future.

Lord Justice JAMES.—I entirely concur in the view which has been expressed by the Lord Justice as to the legal construction of the Acts of Parliament, and as to the legal right of the plaintiff and the legal liability of the defendants. That being so, and the legal right being, as it seems to me, quite clear, the only question is whether it is of such character as to induce this court to grant an injunction. I am of opinion that this is pre-eminently a case for an application to this court for an injunction upon two grounds, to one of which the Lord Justice has referred—the absolute necessity of preventing a continued series of actions which would be the sole result if we remitted the plaintiff to what used to be called the other side of Westminster Hall. Beyond that, it has always been the practice of this court, and one of the main duties of this court, to take care that public bodies who obtain authorities under Act of Parliament do not use the powers of their Acts so as to affect the rights of other persons, to confine them carefully to the exercise of their powers so as not to affect or injure other persons. The Vice-Chancellor indeed expressed an opinion that this was a trivial damage, and that the courts ought not to encourage such cases to be brought before them. I myself, of course, should be very loth indeed to encourage parties to come here upon a mere technical legal right, but it is impossible, as it seems to me, to read what has taken place between these parties without seeing that, if there was a legal foundation for it, there has been a very substantial ground of complaint recognised by the defendants and their agents, who have during all the years that have elapsed used their efforts to avoid or mitigate that damage which has been complained of. After that, it seems to me, with all deference to the Vice-Chancellor, that it is impossible to hold that this is a case of a person who merely comes into this court for the purpose of vexation and oppression, availing himself of some technical right which he has under an Act of Parliament, That being so, I am of opinion that the injunction is really a matter of course, and I propose, if the Lord Justice agrees with me, to declare, following out the judgment he has been good enough to pronounce as to the legal construction, that the provisions of the Acts of Parliament mentioned in the pleadings for storing and discharging the water in and from the reservoir of the defendants, did not legalise the fouling of the stream below the reservoir. Then there will be an injunction to restrain the defendants from so storing and discharging the water as to foul the water to the damage and injury of the owners and occupiers of the plaintiff's dye works in the bill mentioned.

Then the injunction will be suspended for six months with liberty to apply to this court if that time be found insufficient for making the necessary works. Of course it will follow that the Vice-Chancellor's decree will be discharged and the defendants will be ordered to pay the costs of the suit, and to repay any costs they may have been paid by the plaintiff.

Solicitors for the appellant, *Milne, Riddle,* and *Mellor,* agents for *Hacker* and *Allen,* Leek.

Solicitor for the respondents, *J. Raw,* agent for *Llewellyn,* Tunstall.

Nov. 5, 7, 8, 11, *and* 14, 1872.

(Before the LORD CHANCELLOR (Selborne.)

GAUNT *v.* FYNNEY.

*Nuisance — Noise — Vibration — Light — Delay — Damages—*21 *&* 22 *Vict. c.* 27, *s.* 2.

The defendant in Jan. 1865 *erected a steam-engine in a shed adjoining the stable belonging to the plaintiffs, by which the stable was rendered unfit for horses, and some inconvenience occasioned in the plaintiffs' dwelling-house. No complaint was made by the plaintiffs until June* 1870.

Held (affirming the decision of the Master of the Rolls), that an injunction could not be granted under the circumstances to restrain the defendant from working the engine.

A nuisance by noise, supposing malice to be out of the question, is a question of degree. It is not every occasional and accidental noise more loud or harsh than usual, that will entitle a plaintiff to an injunction where the general case of "habitual nuisance" is not satisfactorily proved.

Bill dismissed.

THIS was an appeal from a decree of the Master of the Rolls (reported *ante,* p. 441). A full statement of the facts and arguments will be found in the judgment of the Lord Chancellor.

Sir *R. Baggallay,* Q. C. *Anderson,* Q. C. and *Rowcliffe,* for the plaintiffs, relied upon:

Hindley v. *Fmery,* 13 L. T. Rep. N. S. 272; L. Rep. 1 Eq. 52;
Durell v. *Pritchard,* L. Rep. 1 Ch. App. 244;
Cooke v. *Forbes,* 17 L. T. Rep. N. S. 371; L. Rep. 5 Eq. 166;
Goldsmith v. *Tunbridge Wells Commissioners,* 14 L. T. Rep. N. S. 154; L. Rep. 1 Ch. App. 349;
Yates v. *Jack,* 14 L. T. Rep. N. S. 151; L. Rep. 1 Ch. App. 295;
Dent v. *Auction Mart Company,* L. Rep. 2 Eq. 238; 14 L. T. Rep. N. S. 827;
Saville v. *Kilner,* 26 L. T. Rep. N. S. 277;
Joyce on Injunctions, p. 201.

The *Solicitor-General* and *Fry,* Q. C. for the defendant, referred to

Curriers' Company v. *Corbett,* 12 L. T. Rep. N. S. 169; on app. 13 L. T. Rep. N. S. 154;
Robson v. *Whittingham,* L. Rep. 1 Ch. App. 442; 13 L. T. Rep. N. S. 730;
Clarke v. *Clark,* L. Rep. 1 Ch. App. 16; 13 L. T. Rep. N. S. 482;
St. Helen's Smelting Company v. *Tipping,* 12 L. T. Rep. N. S. 776; 11 H. L. Cas. 642, 650;
Crump v. *Lambert,* L. Rep. 3 Eq. 409; 17 L. T. Rep. N. S. 133;
Soltau v. *Du Held,* 2 Sim. N. S. 133.

The LORD CHANCELLOR (Selborne).—The plaintiffs, who are unmarried ladies living at Leek in Staffordshire, ask for an injunction (with damages) to restrain an alleged nuisance by noise and vibration, and to restrain alleged trespasses by enroachment on land and obstruction of light. The Master of the Rolls has made a decree refusing an injunction, but granting an inquiry as to damages, from which decree both parties appeal. Leek is a town in which the silk manufacture is carried on. The plaintiffs' house faces a street, called Derby Street, to the south, and has a garden of some size to the north; with two stables to the east, separate from the house and from each other. Eastward and southward of the nearer of these stables (called the old stable), which is about nineteen yards from the house and garden, is a silk mill belonging to, and worked by, the defendant. The plaintiffs state that the defendant was formerly in the employment of the plaintiffs' father, who was a mill-owner carrying on the silk manufacture in part of the buildings now occupied by the defendant. The defendant states that the plaintiffs' father (from whom they derive their title) deliberately placed his house (the same house in which the plaintiffs now live) close to the mill. The mill has, however, been much enlarged, by the addition of new buildings, since that time. Down to the winter of 1864-5, it was worked by hand-power; and a narrow strip of land between the northern part of it and the eastern wall of the plaintiffs' old stable remained unbuilt upon. In that winter the defendant caused this intervening space to be covered over, and erected a small steam-engine of about 4-horse power in the chamber so formed, connecting this engine by proper gearing with the machinery in the mill, which from that time forward was worked by steam. The plaintiffs made no complaint of any annoyance till the summer of 1870; and they were in the habit of keeping three or more horses or ponies in the old stable, till the end of Oct. in that year. I consider it to be admitted upon the plaintiffs' pleadings, and established by their evidence, that there was no nuisance from noise or vibration, either to the house, or to the garden, or to the stables, prior to the end of May, or the beginning of June 1870. But the plaintiffs allege that the defendant's mill then began to be worked with such a degree of noise as to become after that time a serious nuisance; that they remonstrated, and received promises of redress; but that nothing was effectually done to remedy the evil; and that in and after Oct. 1870 the noise and vibration increased daily, destroying, or materially diminishing, the comfort, salubrity, and value of their house and garden, and rendering the old stable unsafe and unfit for horses; in consequence of which their horses were removed from it at the end of Oct. or the beginning of Nov. 1870. The bill was filed on the 28th Nov. 1870. The question of trespass has emerged during the progress of the controversy, but this rests on distinct grounds, and must be separately considered. The case, thus made, is met by the defendant with a general denial of the material facts alleged. He says that no changes have been made in his engine or machinery since Jan. 1865, except some which were made in 1870 to meet (as far as possible) the plaintiffs' objections; that the manner of working them has been throughout, both in kind and in degree, the same; that there has been no increase, either of noise or vibration; that the state of things of which the plaintiffs now complain is a mere continuation of that which existed without complaint during the five preceding years, and which is admitted not to have then constituted a nuisance. In these statements he is supported by the evidence of every

witness in the cause who has any knowledge of the interior working of the mill. [His Lordship then referred to the evidence.] If the defendant's evidence is believed, the plaintiffs' case fails. The burden of proof as to this part of the case rests wholly on the plaintiffs. The Scotch law has a phrase which in cases of this nature may well admit of a negative, as well as of a positive, application. It forbids a man to use his own rights "*in emulationem vicini.*" Neighbours everywhere (and certainly in a manufacturing town) ought not to be extreme or unreasonable, either in the exercise of their own rights or in the restriction of the rights of each other. The ruling approved by the House of Lords in the *St. Helen's Smelting Company's* case that "the law does not regard trifling inconveniences," and that "everything is to be looked at from a reasonable point of view," and the observations of Lord Cranworth seem to be particularly applicable to such a case as the present. [His Lordship then read passages from the report, 11 H. L. Cas. 650.] There may, of course, be such a thing as a legal nuisance from noise in a manufacturing or other populous town, of which the case of *Soltau* v. *Du Held* (2 Sim. N. S. 133) is an example. But a nuisance of this kind is much more difficult to prove than when the injury complained of is the demonstrable effect of a visible or tangible cause; as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works over land or houses, producing deleterious physical changes which science can trace and explain. A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party wall next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things to offend against the law must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable. I am far from saying that there may not be cases in which the owner of a house very near a mill in a manufacturing town may be entitled to protection against noises resulting from the introduction into the mill of new machinery, or of new modes and processes of working. But in every case of this kind it ought to be clearly made out that the mill-owner has exceeded his rights. When there has been no introduction of new machinery, and nothing new in the manner of working—when everything within the mill has gone on without change in the usual and accustomed course of the manufacturer's business—a plaintiff undertaking to prove that at and after a definitive time the noise from the mill, admitted to have been previously lawful and harmless, became excessive and noxious, imposes upon himself (to say the least) an arduous task. And how have the plaintiffs acquitted themselves of this burden? I see no reason to doubt that they, and their servants and friends who were witnesses in this case (several of whom have not been cross-examined) do themselves believe that the considerable increase of noise of which they speak has really taken place, and are persuaded *that this* noise is a serious nuisance. But it is not *impossible* that this should be the case, and yet *that the* witnesses for the defendants (none of whom have been cross-examined) should be believed. Those who compare the noise which they hear to-day with the noise which they heard months or years ago, are witnesses (within certain limits) to impressions upon the mind, rather than to facts. Those who speak of the manner in which the engine and machinery have been worked, and the business of the mill carried on, speak of facts, and not of impressions on the mind. Mr. Fry made a happy use in part of his argument of a passage in a recent work upon mental science (*a*) which (treating of the influence of the mind upon the sense of hearing) says "that the thought uppermost in the mind, the predominant idea or expectation, makes a real sensation from without assume a different character." Every one must have had some experience of the truth of this statement; a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance originating within himself sounds which at other times would have been passively heard, and not regarded. In the present case, I have no doubt that a real "whirring sound," such as the plaintiffs' witnesses describe, did proceed from the machinery in the mill when at work, at all times before as well as after the erection of the steam-engine in 1864-5. I have no doubt that this sound (and also the sound of the steam-engine after its erection) was often, if not always, perceptible in the plaintiffs' garden, and in some of the rooms of their house, especially when the windows were open; I have no doubt that it was louder and more audible at some times, and when the wind was in particular quarters, than at other times, and other states of the wind. I have no doubt that it must always have been more or less heard in the old stable, where the heads of the horses, as they stood in their stalls, were turned towards the wall (described as a thin wall), on the other side of which the engine was fixed; and where there was a small window which but for its being closed by certain boards would have opened directly into the engine room itself. But all this is admitted to have gone on from Jan. 1865 to June 1870 without amounting to a nuisance. In June 1870 a sudden noise had alarmed the servants of the plaintiffs, and since that time the plaintiffs had entertained the idea of some danger from the boiler used by the defendant. From this time forth the engine and its noises were to the plaintiffs a permanent source of irritation and uneasiness. [His Lordship then examined the evidence on both sides as to the house, and as to the effect of the noise and vibration on the horses in the stable.] Witnesses for the plaintiffs have stated that on one occasion the horse of a visitor when put in the stable was so terrified that it had to be removed; but this evidence does not make a powerful impression on my mind. The case of *Cooke* v. *Forbes* (L. Rep. 5 Eq. 166) shows that it is not every occasional and accidental noise which might frighten a horse in a stable on a particular day that will entitle a plaintiff to an injunction, if the general case or habitual nuisance alleged in the bill is not satisfactorily proved. His Lordship came to the conclusion that no sufficient case was made out, and that the bill, so far as it sought relief on the ground of nuisance, must be dismissed. As to the

(*a*) Tuke, Influence of the Mind on the Body, p. 47.

trespass, it appeared that part of the defendant's engine-house overhung the plinth of one of the plaintiffs' walls. The defendant, however, disputed the right of the plaintiffs to the plinth, a question which he could not then determine. It was enough to dispose of that, that the defendant had been in possession for more than five years without remonstrance on the plaintiffs' part. A bill for an ejectment by way of mandatory injunction could not be supported under these circumstances, and that part of the bill must also be dismissed. His Lordship continued: There is left only one more question; that of the obstruction of the window in the plaintiffs' old stable by the boards placed against it, and also by the roof of the defendant's engine-room. As to this, I have felt some embarrassment. On the one hand, it seems to me that an unlawful obstruction by the defendant of an ancient, though not very valuable, light of the plaintiffs has been established. On the other hand, this obstruction took place nearly six years before the bill was filed, under the very eyes of the plaintiffs or their servants, who can never have gone into the stable without perceiving it; and the light does not appear to have been for any practical purpose missed or wanted since its obstruction. A bill for an injunction in such a case would (I think) before the passing of Lord Cairns' Act, have been dismissed, and the plaintiffs would have been left to their remedy at law. Since that Act, if the bill were not dismissed, I should certainly agree with the Master of the Rolls in thinking the case one for an inquiry as to damages, and not for an injunction. But, finding myself obliged to leave the plaintiffs to their legal remedy (if any) as to the other matters complained of, and being of opinion that the obstruction of light is so connected with the other alleged trespass as to make it possible that some injustice might be done if damages as to the light were given here, and the plaintiffs at the same time left in possession of all their legal remedies as to the plinth of their wall and the disputed slip of land, I have come to the conclusion that the bill ought to be altogether dismissed, without prejudice to any action which the plaintiffs may be advised to bring. The costs of the suit will follow the event; the plaintiffs' appeal petition will be dismissed with costs. There will be no costs of the defendant's appeal; but the deposit will be returned.

Solicitors for the plaintiffs, *Gregory, Rowcliffe,* and *Rawle.*

Solicitors for the defendant, *Milne, Riddle,* and *Mellor.*

V.C. MALINS' COURT.

Reported by G. I. F. COOKE, T. H. CARSON, and F. GOULD, Esqrs., Barristers-at-Law.

Thursday, Nov. 14, 1872.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE *v.* WOODWARD.

Private Act—Towns Improvement Clauses Act 1847, *s.* 68—*Public Health Act* 1848, *s.* 2—*Local Government Act* 1858, *s.* 35—*Whether "house" includes "church"—Laches of corporation in exercising their parliamentary powers.*

The corporation of F. had by their private Act, with which the Towns Improvement Clauses Act 1847 *was mainly incorporated, power in case where the width of a street was less than* 40*ft. to prescribe the line within which any house to be built or rebuilt should be erected, on compensating the owner if his house was set back.*

Land having been conveyed to W., the vicar of F., for building a church, he first erected a temporary wooden structure. After some years he pulled it down and began to build a permanent church still on the land conveyed.

The church so to be erected would abut upon a street averaging 32*ft. in width.*

The corporation prescribed a line within which the defendant should build, but the formal prescription was not made until some weeks after the foundations were laid.

The proposed church would at one corner abut 6*ft. beyond the prescribed line. There was no evidence to show that land could not be taken from the other side of the street if necessary, to widen it.*

Held, that a church was a house within the meaning of the Acts, and that the defendant W. was the owner to whom compensation would be paid, but that as the corporation had in the opinion of the court unreasonably exercised their strict power, and had prescribed the boundary line after the building was begun, the court would not restrain W. from continuing his building.

MOTION for injunction.

This was a motion on behalf of the Corporation of Folkestone to restrain the defendant, the Rev. Matthew Woodward, who is the perpetual curate of the parish of Folkestone, from erecting a church so as to project at one corner beyond a line prescribed by the corporation under the powers of the Folkestone Improvement Act 1855.

By the Folkestone Improvement Act 1855, with which the Towns Improvement Clauses Act 1847, was mainly incorporated it was enacted as follows:

Sect. 50:

In every case where the width of any street shall not be 40ft., it shall be lawful for the corporation, whenever it shall appear to them expedient, to prescribe the line in which any house to be hereafter built or taken down for the purpose of being rebuilt or altered shall be erected, and the same shall be erected in accordance therewith, and the corporation shall pay or tender compensation to the owner or other person immediately interested in such house for any loss or damage he may sustain in consequence of his house being set back. . . . .

By an indenture dated the 10th July 1865, Benjamin John Andrews granted a piece of land in Folkestone, bounded on the north by the Dover-road, and on the south by St. Michael's-terrace, to the defendant and his successors perpetual curates of the parish of Folkestone for ever, for the purpose of there being erected thereon a church for the parishioners of Folkestone. Shortly after the date of this indenture, the defendant erected upon this piece of land a wooden building, which was used as a temporary church. In the month of May or June 1872, the defendant pulled down the temporary building in order to erect a permanent church, which would stand nearly on the site of the old temporary building, but a little in advance of it, though still upon the defendant's land conveyed by the indenture above mentioned.

On the 17th June 1872, it was resolved by the corporation, "that the width of the several roads upon which the proposed new church of St. Michael will abut, must be of not less width than 40ft. inclusive of the footways."

The bill stated that such resolution was forth-

with brought to the notice of the defendant, but that, notwithstanding the resolution, his builders commenced putting in the foundations of the said permanent building. At this time the width of Dover-road averaged 32ft.

On the 5th Aug. 1872, the corporation prescribed the line in which any building thereafter built or taken down for the purpose of being rebuilt or altered, should be erected on the Dover-road frontage, and transmitted a copy of a plan showing the prescribed line so far as it affected the defendant's property to the defendant on the 6th Aug. 1872.

On the 21st Aug. 1872, the defendant informed the plaintiffs that he had obtained counsel's opinion that he had a right to build the proposed church in whatever position he thought fit upon his property.

The plaintiffs accordingly filed a bill on the 3rd Oct. 1872, stating the above facts, and that the proposed new building would at one corner on the north side project six feet over the prescribed building line. It also stated that the plaintiffs were and always had been willing to make compensation to the defendant for loss or damage by reason of his building being set back, and prayed an injunction to restrain him from building within the prescribed line.

The plaintiffs now moved for an injunction to restrain the defendant according to the prayer of the bill as above stated.

Ffooks, Q. C. and *Ince* in support of the motion, referred to section 50 of the Act above set out. The corporation have power to prescribe the line of building, and in this case they think it right to exercise the power. Dover-road is an existing street, being the old highway. The word "house," includes a church, as appears by the interpretation clause in the Public Health Act 1848. In the Towns Improvement Clauses Act 1847, sect. 68, the words are "house or building," and sects. 109, 110, show that "houses" and "buildings" are used as synonymous terms, and that by a building a church is meant. The object of the Folkestone Improvement Act 1855 was to improve the town by widening the streets. This projection will cause inconvenience in the use of the street. Even if we give up our own Act, we have the power we contend for under the Local Government Act 1855, by virtue of the Public Health Act 1872.

Glasse, Q. C. and *Bedwell*, for the defendant.—The 50th section of the Folkestone Improvement Act 1847, does not apply to a church taken down to be rebuilt. If we chose to leave off building the corporation could not touch the land, as their power is to take possession on compensating the owner. There is no owner here; the defendant is not owner. *Angell* v. *Vestry of Paddington* (L. Rep. 3 Q. B. 714) decides that commisioners for building a church are not owners. The definition of owner is the same in The Towns Improvement Clauses Act 1847, and the Public Health Act 1848. The foundations were put in in June. The line of building was not prescribed until the 5th of Aug. The resolution passed in April was not a prescription. The corporation can take a part of the land from the other side of the road, if a width of 40ft. is necessary.

Ffooks, Q. C., was called upon to reply only on the question of the laches of the corporation.

The VICE-CHANCELLOR said that it was not, and could not be, disputed that the corporation were a governing body, and that they had the power of prescribing the boundary line of new buildings. It had been argued for the defendant that this power did not apply in the case of a church; if that were so, then, wherever the church was erected, the corporation would have no power even if it were to be built entirely across the road. That could not be the meaning of the Acts. Although in The Towns Improvement Clauses Act 1847, the word house did not in terms include a church, he was of opinion he should have to hold it included under the term house in the 35th section of The Local Government Act 1855. He was of opinion that, upon the old and new Acts, a church was a building within the Acts. It had been argued that neither the defendant nor any one associated with him was an owner to whom the compensation provided for could be paid, and the case of *Angell* v. *Vestry of Paddington* had been cited in support of the argument, but that case was decided with reference to liability for taxation and did not apply to the present case. The corporation had passed a resolution on the 17th June, but it did not appear that they told the defendant at that time that they should require any of his land. They had the power of prescribing the line beyond which the building was not to extend, but he had not heard any evidence to show that they could not have a width of 40ft. for the street without taking any of this land. He thought that if the defendant was allowed to build up to the limit of his land there would still be room for a width of 40ft., as there were no buildings on the opposite side. In all cases of powers vested in a corporation, the court could not control their exercise of discretion where the powers were not fraudulently or corruptly exercised. He thought the corporation had taken an extreme view, seeing that public convenience might be met by a road of 23ft. or 24ft. in width. However, they had the power to insist on 40ft., but the ground on which he put his decision was that the corporation acting strictly must be treated strictly. The defendant was not doing any wrong in commencing his building. The parliamentary power was not exercised until the 5th Aug., when he had progressed with his building. There was no evidence that the defendant was building beyond other buildings already existing. As the corporation were exercising their power unreasonably, it was too late on the 5th Aug. for them to interfere. *Motion refused with costs.*

Solicitors for the plaintiffs, *Talbot* and *Tasker*, for *Harrison*, Folkestone.

Solicitors for the defendant, *Tanqueray Willaume*, and *Hanbury*.

V.C. WICKENS' COURT.

Reported by EDWARD WINSLOW and HENRY GODEFROI, Esqrs. Barristers-at-Law.

Thursday, Nov. 7, 1872.

FORBES v. ECCLESIASTICAL COMMISSIONERS FOR ENGLAND.

51 *Geo.* 3, *c.* 115, *s.* 2—*Ecclesiastical Commissioners—Grant by of waste land—Common rights—Village green—Demurrer.*

The Act of 51 *Geo.* 3, *c.* 115, *does not empower the lord of the manor to discharge commonable lands from common or customary rights not strictly*

manorial, as e.g., the right of parishoners to their village green.

THIS was a demurrer.

The bill was filed by the plaintiff on behalf of himself and all other the inhabitants of the parish of St. Mary Extra, Hants, in order to restrain the defendants from granting a portion of the common land belonging to the parish, for the purposes of a burial ground.

The defendants were the Ecclesiastical Commissioners, who were the lords of the manor, and the vicar of the parish. The land in question was within the manor of Bitterne, and was known as Pear Tree Green; and the bill alleged that there had been, from time immemorial, a custom for all the inhabitants of the parish to enjoy the right of using the green for air, exercise, amusement, recreation, and all lawful village sports, games, and pastimes. In the year 1812 an Act (52 Geo. 3, c. 127) was passed, authorising the inclosure of lands in the parish of St. Mary Extra and the adjacent parish of Stoneham, called Bitterne Common. The Act recited that the Bishop of Winchester was lord of the manor of Bitterne; and by the 23rd section the commissioners were required to set apart one-sixteenth part of the waste lands to the Bishop of Winchester and his successors, in lieu of compensation for the waste lands. By the 25th section the commissioners were further directed to divide the residue of Bitterne Common, Weston Common, Weston Marsh, and all other waste lands between lands thereby intended to be divided, allotted, and inclosed in the parishes of Stoneham and St. Mary Extra (except Pear Tree Green, which consisted of 13a. 3r. 8p.) between the several owners and proprietors.

In 1846 a small portion of Pear Tree Green was annexed to the burial ground of Jesus Chapel, and inclosed for that purpose. In 1867 the necessity for providing more burial ground for the parish of St. Mary Extra being strongly felt by the parishioners, they appointed a committee to consider the best means of carrying out the object; and in June 1871 the committee made their report, recommending the purchase of a certain piece of ground of two and a half acres, which the owner was willing to sell for 50*l*. At a vestry meeting of the parishioners, held on the 15th of the same month to consider the matter, it appeared that a gentleman in the neighbourhood had agreed to give the 50*l*. required, and a resolution was passed that the offer should be accepted.

The resolution, however, was opposed by a few of the parishioners, who applied to the commissioners for leave to enlarge the present burial ground by a further enclosure of about an acre and three quarters of Pear Tree Green. In opposition to this application a memorial was prepared and presented to the defendants by other persons opposed to further encroachments on the green, and this was signed by the principal ratepayers and inhabitants of the parish. The commissioners at first refused to comply with the application; but ultimately the bishop having advised that a portion of Pear Tree Green should be enclosed as a burial ground, the commissioners assented.

A good deal of correspondence between the plaintiff and defendants followed on the subject, and eventually this bill was filed praying that it might be declared that the plaintiff and the other inhabitants of St. Mary Extra were entitled to the right to use the whole of the piece of ground remaining unenclosed and known as Pear Tree Green for enjoyment, exercise, amusement, recreation, and for all lawful village sports, games, and pastimes; and that the grant which the defendants, the Ecclesiastical Commissioners, had made for the purpose of enclosure as aforesaid, was wholly void, and that the defendants were not entitled, nor were any of them, under the authority of the Act of 51 Geo. 3, c. 115, or otherwise, authorised to make any enclosure of any part of the said green or in any way to interfere with the said right of the plaintiff and the other inhabitants of the said parish.

That the defendants and every of them, their and every of their agents and servants might be restrained by the order and injunction of the court, from enclosing or granting, or purporting to grant, any authority to enclose any part of the said Pear Tree Green remaining unenclosed, or from in any way interfering with the enjoyment by the plaintiff and the other inhabitants of the parish of St. Mary Extra, of the rights to which they should be entitled as aforesaid.

To this bill the defendant, the vicar of the parish, demurred, for want of equity.

The defendants mainly relied on the provisions of 51 Geo. 3, c. 115.(*a*)

The defendants further relied on the 17th section of 52 Geo. 3, c. 127, which empowers the lord of the manor to extinguish commonable rights.

The plaintiff, on the other hand, maintained that the provisions of 51 Geo. 3, c. 115, were not intended to extend to the case of a village green so as to enable the lord of the manor to disregard and override the customary rights of recreation which might exist thereon; and he submitted that the defendants could not, under the authority of the Act (especially having regard to the subsequent Act of 52 Geo. 3, c. 127), inclose any part of the common so as to destroy or interfere with

(*a*) Sect. 2. It shall be lawful for any person or persons bodies politic or corporate, seised of or entitled to the entire and absolute fee simple of any manor, by deed under the hand and seal, or hands and seals of any such person or persons, and under the seal or seals of any such body or bodies politic or corporate, and enrolled in the Court of Chancery in grant for the rector, vicar, or other ministers of any parish church, and his successors, any parcel or parcels of land not exceeding in the whole the quantity of five statute acres, parcel of the waste of such manor, and lying within the parish where such church or chapel shall be, or shall be intended to be erected, or within any extra parochial district, wherein any such chapel shall be, or shall be intended to be, erected for the purpose of erecting thereon, or enlarging any such church or chapel, or for a churchyard or burying ground, or enlarging a churchyard or burying ground for such parish or extra parochial place, or for a glebe for the rector, vicar, curate, or other minister of any such church or chapel to erect a mansion, house, or other buildings thereon, or make other conveniences for the residence of such rector, vicar, curate, or other minister, freed and absolutely discharged of and from all rights of common thereon, and any statute prohibiting any alienation in mortmain, or other statute, law, or custom to the contrary notwithstanding: Provided always, that no grant whatsoever shall be made of any land whatsoever for any of the purposes authorised by this Act, unless the church or chapel for the benefit whereof, or the minister whereof such grant shall be made, shall be a parochial church or chapel for the service of the United Church of England and Ireland, duly authorised by law, or a church or chapel duly consecrated for the service of such church, erected or to be erected for such purpose by and with the license and consent of the ordinary of the diocese wherein the same shall be.

the customary rights to which the inhabitants were entitled.

Dickinson, Q. C. and *Chitty*, for the demurrer.

Lindley, Q. C. and *Maidlow*, for the plaintiff, referred to

Dyce v. *Hay*, 1 Macq. 305;
Abbott v. *Wheatley*, 1 Levinz, 176.

Graham Hastings, for the Ecclesiastical Commissioners.

Chitty in reply.

The VICE-CHANCELLOR.—The question raised by this demurrer is very simple, but at the same time very important. It is whether the commissioners, who are also lords of the manor, have power under the Act of 51 Geo. 3, c. 115, to discharge commonable lands, not only from ordinary rights, but also from customary rights, which strictly are not manorial. To hold that they have would be to put a forced construction on the Act, and as it were, by a sidewind, to sanction an invasion of the rights of the inhabitants of the parish. I am of opinion that the words of the statute are capable of receiving a perfectly satisfactory interpretation without applying to the custom claimed on behalf of the plaintiff. I must, therefore, hold that the lords of the manor have no power to destroy this custom, if it exists as alleged in the bill. The demurrer must therefore be overruled.

Solicitors for the plaintiff, *Lee* and *Best*.

Solicitors for the defendants, *Shum* and *Crossman*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Tuesday, Nov. 26, 1872.

MOORE v. METROPOLITAN RAILWAY COMPANY.

False imprisonment—Implied authority to officer of a railway company to give a passenger in charge—8 Vict. c. 20, ss. 103, 104.

Plaintiff had taken a third-class return ticket from Notting Hill Gate to the Mansion House, and he was told by the station-master that, by the rules of the company, he might, if he liked, return from Moorgate-street instead of from the Mansion House. He availed himself of this privilege as far as Edgware-road, three stations short of that from which his return ticket was taken. Here upon giving up the second half of his ticket, the collector demanded 2d. extra payment. The plaintiff offered to pay under protest the sum demanded, if a receipt were given him. This was refused, and the ticket collector, acting under the advice of the station inspector, a railway official, caused the plaintiff to be taken to a police-station. Upon the facts the magistrate dismissed the charge, and in an action for false imprisonment the plaintiff was nonsuited on the ground that no evidence of express authority from the defendants to the inspector having been given, the defendants were not responsible for his mistake of law in taking the plaintiff into custody.

Held, upon a rule for a new trial, that there was evidence for a jury that the inspector was authorised by the company to exercise a discretion, which, by mistake, might include such an act as this, and the company might be liable for such a mistake.

THIS action was tried in Middlesex before Lush, J., who nonsuited the plaintiff. (See report of the case at Nisi Prius, 25 L. T. Rep. N. S. 951.)

The declaration stated that the defendants assaulted the plaintiff, and gave him into custody to a policeman, and compelled him to go to a police station, and be kept in prison for a long time, until he could procure bail for his appearance before a police magistrate, and thereupon compelled the plaintiff to appear the next morning before the said magistrate upon a charge by the defendants therein and theretofore made, namely, that he the said plaintiff, being a passenger on the defendants' railway, had refused, on arriving at Edgware-road Station, to deliver up his ticket and to pay his legal fare, and thereby had defrauded the company of twopence. Whereby the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business, and from providing for his family by his personal care and attention, and incurred great expense, to wit, 5*l.* for procuring the said bail as aforesaid, and otherwise in procuring his liberation and discharge from the said imprisonment.

The defendants pleaded not guilty.

It appeared that plaintiff had taken a third class return ticket from the Notting-hill-gate station to the Mansion-house, and the station master told him that by the rules of the company he might if he liked return from Moorgate-street instead of from the Mansion-house. He availed himself of this privilege as far as the Edgware-road, three stations short of that from which his return ticket was taken. Here, upon giving up the second half of his ticket, the collector demanded 2*d.* extra payment. The plaintiff offered to pay under protest the sum demanded, if a receipt were given him. This was refused, and the ticket collector, acting under the advice of the station inspector, a railway official, caused the plaintiff to be taken to a police station. The only three offences for which sects. 103 and 104 of the Railway Clauses Consolidation Act 1845, provide detention are, first, "If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof:" Secondly, "if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof:" Thirdly, "if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage." The magistrate dismissed the charge made in the name of the company against the plaintiff. The defendants argued, and the judge at the trial held, that no evidence of express authority from the defendants to the inspector having been given, the defendants were not responsible for his mistake of law in taking the plaintiff into custody.

A rule had been obtained calling upon the defendants to show cause why the nonsuit entered at the trial should not be set aside, and a new trial had on the ground of misdirection, in that the defendants were liable for the false imprisonment by their officials of the plaintiff under sects. 103, 104, 108, 109, 110, and 154 of 8 & 9 Vict. c. 20, and upon the facts proved upon the trial.

M. Chambers, Q.C. showed cause.—Here the

station inspector acted in opposition to the law, and such a proceeding was not authorised by the defendants. A similar case was *Poulton* v. *The London and South Western Railway Company* (L. Rep. 2 Q.B. 534; 17 L. T. Rep. N. S. 11), in which the plaintiff having taken a horse to an agricultural show by the defendants' railway, was entitled, under arrangements advertised by the defendants, to take the horse back free of charge on production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and plaintiff having taken a ticket for himself, proceeded by the same train. At the end of the journey the station master demanded payment for the horse, and the plaintiff refusing to pay, was detained in custody by two policemen, under the orders of the station master, until it was ascertained by telegraph that all was right. An action having been brought against the defendants for false imprisonment, it was held that a railway company has power to apprehend a person travelling on the railway without having paid his own fare, but has power only to detain the goods for nonpayment of the carriage; consequently, as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station master to detain the plaintiff on this assumption, and they were therefore not liable for this act of the station master. On this ground the court distinguished the case from *Goff* v. *The Great Northern Railway Company* (3 E. & E. 672) and others mentioned in the argument. In *Goff* v. *The Great Northern Railway Company*, the evidence for plaintiff showed that he, having travelled on defendants' line with a return ticket from L. to W. and back, at the end of the return journey gave up to defendant's ticket collector at the L. station the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendants' paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the inspector, "I think you had better take him; but first you had better obtain the concurrence of the secretary." The inspector thereupon left, but returned shortly afterwards (whether or not having obtained the secretary's concurrence did not appear), when he directed a police constable, also in defendants' pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, plaintiff's story proving true, dismissed the complaint. Held, in an action against the company for false imprisonment, that the conduct of all defendants' other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff; and that the verdict of 50*l.* found for the plaintiff should stand. There the defendants' officer made a mistake of fact in not believing the plaintiff's story, and the court considered his authority went so far as to exercise a discretion in such a matter; but here the officer acted illegally, without mistake of fact, and therefore the defendants, having given him no authority so to do, ought not to be liable. Railway companies hire their servants to do lawful acts only, and they have no implied authority to make an illegal arrest; this is the effect of

> *Allen* v. *The London and South-Western Railway Company*, L. Rep. 6 Q. B. 65; 23 L. T. Rep. N. S. 612; *Roe* v. *Birkenhead, &c., Railway Company*, 7 Ex. 36; *Edwards* v. *London and North-Western Railway Company*, L. Rep. 5 C. P. 445; 22 L. T. Rep. N. S. 656.

Lewis Glyn appeared for the plaintiff to support the rule, but was not heard.

BLACKBURN, J.—We need not trouble counsel for the plaintiff, for when the facts are seen we find them clearly governed by the decision in *Goff* v. *The Great Northern Railway Company*. My brother Lush therefore made a mistake at the trial, and should have allowed the evidence to go to the jury. The principle of *Goff* v. *The Great Northern Railway Company* has never been deviated from in cases which have been since decided. "In determining whether (p. 678) there should have been a nonsuit or not, we must say, whether, assuming all that was stated to be accurate, it afforded evidence on which the jury might properly find that the imprisonment was the act of some person acting within the scope of an authority conferred on him by the defendants." The court then proceeded to apply the principles laid down by the Exchequer Chamber in *Giles* v. *The Taff Vale Railway Company* (2 E. & B. 822) concerning the evidence of authority to deal with goods, and concluded that there was in that case evidence of authority which ought to have been submitted to the jury. "By stat. 8 Vict. c. 20 ss. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and power is given to all officers and servants on behalf of the company to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the company must decide whether they will submit to what they believe to be an imposition, or use this summary power for their protection: and as, from the nature of the case, the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, we think it a reasonable inference that, in the conduct of their business, the company have on the spot officers with authority to determine, without the delay attending on convening the directors, whether the servants of the company shall or shall not, on the company's behalf, apprehend a person accused of this offence. We think that the company would have a right to blame those officers if they did not, on their behalf, apprehend a person, if it seemed a fit case; and, if so, the company must be answerable if, in the exercise of their discretion, these officers, on their behalf, apprehend an innocent person. The company ought to have a person of prudence to act in the capacity of station inspector, and, if he makes a mistake, the company ought to be responsible. Further, if a person in a responsible position is acting as if with authority from his employers to do what he is about, that is some evidence of his having been trusted with the authority he assumes." Applying these principles to the

present case, the plaintiff had a ticket which entitled him to go on by a train of the defendants to the Notting Hill Gate Station. He, however, stopped three stations short at Edgware-road; if this were done with any intention to defraud the company, it would have been a plausible proceeding on the part of an agent of the company, if he determined to give the plaintiff in charge under the first head of the 103rd section; as to whether the company's agent was justified in this instance in considering the plaintiff entertained an intention to defraud, that was a question of fact within the discretion which such an agent is employed to exercise. Mr. Chambers argued that the authority conferred by the company upon its officers to give a passenger in charge under this section, existed only when the passenger actually broke the law, but in that case no action of this kind against a company could ever succeed. It is upon the ground that authority must be conferred by the company upon some officer to exercise a discretion in enforcing section 104, that the company should be liable for any improper use of that discretion. The case of *Poulton* v. *The London and South Western Railway Company* was relied upon by the defendants, but it will be found upon investigation that the decision there is not opposed to this; for there was no ground whatever for the station master's supposing he had any authority to give a passenger in charge because his goods, with which he was travelling, had not been paid for. In the present case, and also in *Goff* v. *The Great Northern Railway Company*, the officer's authority included the exercise of this discretion, and I think the present case is within the decision of the court in *Goff* v. *The Great Northern Railway Company*. It has been said that this is a hard case upon the company, but it would be surely harder upon the individuals who were victims, if a company could evade liability by ignoring the authority of their officers whenever those officers made a mistake. I say nothing about section 154, because I think sections 103 and 104 show that the plaintiff ought not to have been nonsuited; and I think that what was done by the station inspector was an act which the jury might infer was within the authority conferred upon him by the company.

MELLOR, J.—I am of the same opinion. I am satisfied there was evidence in this case for a jury to find that the inspector had authority to exercise a discretion which might by mistake result in this arrest. If there were no pretence for an officer's supposing a passenger guilty of a breach of the statute, the company might not be liable for his improper proceeding; but the case of *Poulton* v. *London and South-Western Railway Company* is clearly distinguishable from the present, which, I think, is included in the principle established by *Goff* v. *The Great Northern Railway Company*.

LUSH, J.—I also am of opinion that the view I took of this case at the trial was erroneous; I cannot now distinguish the facts from those of *Goff* v. *The Great Northern Railway Company*.

Rule absolute.

Attorney for plaintiff, *W. Walters*.
Attorney for defendants, *Burchells*.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and H. F. POOLEY, Esqrs., Barristers-at-Law.

Wednesday, Nov. 20, 1872.

REGISTRATION APPEAL.

SIMEY (app.) v. MARSHALL (resp.).

Equitable freehold — 30 & 31 *Vict. c.* 102, *s.* 5, *sub-sect.* 1—*Freehold tenement*—8 *Hen.* 6, *c.* 7—*Hospital, younger brother of*—*His estate in the lands belonging to the hospital.*

J. B. claimed a county vote in respect of freehold land, freehold coal mines, freehold rentcharges, or ground rent. The claimant was one of the younger brethren of a hospital, the master and ancient brethren of which were a corporation seised of freehold lands and tenements within the county. By the constitution of the hospital it was provided that there were to be a certain number of younger brethren, possessed of certain qualifications as to age, character and property, who were to be appointed by the master, and removable for certain faults by the bishop of the diocese. The lands of the hospital, the legal estate in which was in the corporation, were to be under the direction and management of the master, who was to receive and keep account of the revenues thereof, and in the first place pay thereout the land-tax, &c., and all outgoings affecting the same; and after that carry to his own account one-third of the net residue, then pay 25l. to each of the ancient brethren, and 40l. to the chaplain for his salary, and, after making these payments, was to divide the residue between the younger brethren of the hospital in equal shares, yet so, nevertheless, that no younger brother should receive more than 25l. a year. The number of the younger brethren, at the time of the claim being made, was twenty-three. The number might be raised by the authorities of the hospital, but in point of fact it never had been raised so as to reduce the share of each younger brother below 24l. per annum.

Held, that the claimant was not entitled to vote in respect of his rights as a younger brother, he having no estate, legal or equitable, in the lands belonging to the hospital; and his right to receive the annual payment, being not a free tenement, but only a right to a certain share of money in the hands of the master.

ON appeal from the revising barrister for the northern division of the county of Durham, the following case was stated:—

At a court, &c., holden, &c., James Bennett was duly objected to as a voter for the said division.

The claim of the said James Bennett was in the following form:—

Bennet, James	Powell's Court, Gateshead.	Freehold land, freehold coal mines, freehold rent-charges or ground rent.	Friars Goose Farm, chemical works, and adjacent land, Claxton Farm, Cemetery Road, Claxton Quarry, and adjacent land under Friars Goose Estate issuing out of freehold land, King James street, Gateshead.

The following facts were established by the evidence:—

1. The hospital of King James in Gateshead has existed from time immemorial. Its founder is

unknown, and the foundation charter has long been lost.

2. By a refoundation charter dated 4th Jan. 1610, King James the First incorporated the hospital, which then consisted of one master, and three brethren by the title of "The Hospital of King James at Gateshead."

The charter provides that the rector of Gateshead should for ever be the master of the hospital; that there should be three poor and needy men, bachelors or widowers advanced in life, sustained, maintained, and relieved in the hospital, who should be called the brethren, and should remain, be sustained, and relieved during their natural lives. The charter provides that when and so often as it should happen that any of the brethren should die or be removed from the hospital for any cause prescribed by the ordinances, provisions, and constitutions of the hospital, or in any other manner whatsoever, should be removed from the hospital, or should withdraw of his own accord, that then the master should within fourteen days nominate and place in actual possession any other fit person. The charter further provides that the Bishop of Durham and his successors should from time to time revise the ancient statutes, laws, ordinances, and constitutions of the hospital, and make such good, fit, and wholesome statutes in writing concerning the government and direction of the master and brethren as should not be contrary or repugnant to law. And by the charter, the hospital, with the garden and other lands (the greater part of which still belong to the hospital) were granted to the master and brethren and their successors, to have, hold, and enjoy the same, to the sole and proper benefit and use of the master and brethren and their successors, in free, pure, and perpetual frankalmoign for ever. It was also provided that after the death of the then master his successors should have and enjoy for their own use and benefit one full third part of the rents, revenues, and profits of all and singular the lands, tenements, and hereditaments thereby granted to the hospital, and the brethren and their successors should have and enjoy for their own use and maintenance the other two parts of such rents, revenues, and profits.

3. An Act of Parliament (which is to form part of this case) was passed in 51 Geo. 3 (1811), for enabling the master and brethren of the hospital to grant leases, and to enable the Bishop of Durham to make statutes and ordinances for the government of the hospital. This Act recited the refoundation charter, and that the master and brethren were seised of certain lands in Gateshead (which are specified in the schedule thereto) and that the Bishop of Durham was the patron of the mastership of the hospital, as annexed to the rectory of Gateshead, and that the master of the hospital had the appointment of the brethren in case of vacancy. It also recites that no statutes or ordinances of any kind were then known, and in respect that the estate of the said hospital was capable of considerable improvement, it was also expedient that statutes should be made for the government of the hospital, and that the benefits of the hospital should be extended to a greater number of poor aged men in furtherance of the benevolent intentions of the founder thereof. The Act then, after giving a power of leasing to the master and brethren, proceeds to enact that the Bishop of Durham may from time to time by writing under his hand make and establish such good, convenient, and wholesome statutes, laws, ordinances, and constitutions, as well concerning the Divine service to be performed in the hospital and the allowance to be made for the same, as touching the government and direction of the master and brethren, and providing for the repairs of the estate of the hospital, as also for increasing the number of the poor and aged brethren, and such statutes, laws, ordinances, and constitutions from time to time to revise, alter, and amend, so as the same be not contrary either to the laws of the realm or to the charter, except as to the increase of the number of the brethren. And it further enacts that all such brethren as should be from time to time added as aforesaid, should be named appointed, and admitted, and from time to time for ever be filled up in the same manner as is prescribed by the charter for naming, appointing, and admitting the three ancient brethren, and all such additional brethren should be called "the younger brethren," and should not be deemed or taken to constitute any part of the said body corporate—provided that nothing in the Act should authorise the making of any statute which should reduce or lessen the income of the then present master and three brethren from the rents and profits of the estates belonging to the hospital, but that they should during their lives receive for their shares of the future rents and profits of the estates, as much as they then actually received from such rents and profits, and that the shares of the younger brethren should always be less than the shares of the master and the three ancient brethren.

4. The schedule to this Act includes the whole of the lands which still belong to the hospital, and in respect of which the chaplain and the younger brethren claim to vote.

5. On the 17th Oct. 1811, Shute (Barrington) Bishop of Durham, made certain statutes and ordinances, under the power contained in the Act of Parliament, by which it is ordered (amongst other things) that in addition to three ancient brethren, who, together with the master, then constituted the corporate body, there should be ten younger brethren who should be entitled to the advantages after mentioned; that no person should be capable of being appointed one of the younger brethren except single men, of the age of fifty-six and upwards, not possessing more means than 20*l.* per annum, of unexceptionable life and conversstion, regular attenders of the Church of England, and frequenters of the Holy Sacrament; that the brethren should attend divine service regularly when opportunity offers, and should be sober, discreet, and regular in life and conversation; that in case of one or more of the brethren being guilty of drunkenness or any other immorality, the master should certify the same to the bishop, who should proceed, either by himself or by the Archdeacon of Durham, or by other clergymen of the diocese, to examine into the circumstances of the case, and should either remove him from the hospital or subject him to such lesser punishment as he should think fit; that the brethren should from time to time be appointed by the master; that such younger brethren as should reside within a convenient distance of the chapel, should have proper seats prepared and set apart for their accommodation, and should regularly attend divine service, except when prevented by illness or other lawful impediment admitted by the master; that for performance

of Divine Service and preaching in the chapel, a chaplain should be appointed by the master with the approbation of the bishop; that the estates of the hospital should be under the direction and management of the master who should receive and keep account of the revenues thereof, and should in the first place pay thereout the land tax, tithes, repairs, and all other outgoings affecting the same, and, after that is done, the master shall carry one-third part of the net rents and revenues of the hospital estates to his own account, and should then pay 25*l.* to each of the three ancient brethren, and 40*l.* to the chaplain for his salary, and after making these payments, the master should, on the 24th Dec. in every year, divide the residue of the said net rents and revenues between the younger brethren of the hospital in equal shares and proportions, yet so nevertheless that no younger brother should take under such division more than 25*l.*, the sum directed to be paid to each of the ancient brethren.

6. On the 9th Oct. 1849, Edward (Maltby), Lord Bishop of Durham, made further statutes under the Act of Parliament, by which it was ordained (amongst other things), that to the ten younger brethren ordered to be appointed by the statute of 1811, should be added two more as soon as the funds would admit, that the master should have power from time to time to advance to the younger brethren such sums as the state of the revenues might appear to him to allow. And that he should, on or before the 25th March in each year, distribute the surplus among them, reserving a balance in his hands not exceeding 60*l.* to meet the current expenses, provided that the shares of the younger brethren should always be less than the shares of the master, and the three ancient brethren, and that the chaplain should receive for his services the annual salary of 70*l.*

7. By a statute made 8th Oct. 1867, by Charles (Baring) Bishop of Durham, four more younger brethren were added to the twelve theretofore existing, and by another statute of the same bishop, made 2nd April 1869, other six younger brethren were added. A subsequent statute of the same bishop has since added one other younger brother, the total number at the time being thus twenty-three. Copies of all the said statutes made by the said bishops of Durham are to form part of this case.

8. The claimant, James Bennett, and twenty-two other persons, viz., William Bishoprick, Robert Bone, William Clark, James Cumming, George Gladson, William Starkey Haswell, John Hetherington, James Hogg, John Hunter, William Hull, James Macannis, Hugh Moore, James Newton, George Nicholson, John Potts, William Renwick, George Stevenson, Richard Surties, Thomas Hepple Watson, John Whittle, Zachariah Williamson, and James Young have been duly appointed, and now are the younger brethren of the said hospital. There is no written form of appointment of a younger brother, such an appointment being made by the master entering his name and the date of his appointment in the roll kept by him.

9. No instance of dismissal of a brother has ever been known.

10. The number of younger brethren has never been increased so as to reduce their respective shares below 24*l.* per annum, and in fact the share of each younger brother of the net rents and revenues of the hospital estates has ever since the Act of 1811 amounted to upwards of 24*l.* per annum (which sum as well as the chaplain's stipend of 70*l.* per annum has been regularly paid to them by the master).

11. There is no hospital building at present in existence and neither the chaplain nor any of the brethren actually occupies any part of the property belonging to the hospital.

12. Upon these facts it was contended by the objector that the amount of the annual payment to the claimant could never exceed 25*l.*, and might be less if the bishop should think fit to increase the number of younger brethren; that the claimant together with the other younger brethren was not entitled to the surplus of the lands and tenements in question, or of the rents and profits thereof, after providing for the one-third share of the master, the payments to the ancient brethren and the chaplain's salary, but that after deducting the master's share, and paying the 25*l.* apiece to the three ancient brethren, the chaplain's salary, and the claimant and the other younger brethren the 25*l.*, or such lesser sum as for the time being they should be entitled to, the surplus of the rents and profits must be set aside for any additional younger brethren that might be appointed, and that, consequently, the claimant could not be considered as part owner of the said lands and tenements, or as having an estate at law or in equity therein. It was also contended that the sum payable to the claimant was not a rentcharge, both because it was of uncertain amount and liable to be varied, and because such sum was not a charge upon the said lands and tenements.

13. On the other hand, it was contended for the claimant that inasmuch as the whole surplus of the rents and profits of the lands and tenements, after deducting the master's third part and the payments to the ancient brethren and the chaplain's salary, must be divided amongst a certain class, viz., the younger brethren, of which class the claimant was one, the circumstance of the number of such class being liable to be increased, and possibly the payment to each person of that class being liable to be diminished, did not prevent the whole class, although varying in number from time to time, being equitable owners of and having an equitable estate in the said lands and tenements, that as the present amount of the payment to each younger brother was above 5*l.* a year, he was entitled as having an equitable estate for life in the said lands and tenements to be registered as a voter. Also that if not having such equitable estate in the said lands and tenements, the claimant had a rentcharge or such an interest in the nature of rentcharge thereon as to entitle him to be registered as a voter.

14. I was of opinion that inasmuch as the claimant and the other younger brethren were not necessarily entitled to the whole surplus (after paying to the ancient brethren and chaplain the sums aforesaid) of the net two-thirds of the rents and revenues of the hospital estates, but were only each entitled to receive thereout an annual payment never exceeding 25*l.* per annum, they had not an equitable estate in the said lands and tenements. I also was of opinion that the amount of the payment to the claimant not being a fixed and certain charge upon the said lands and tenements, was not a rentcharge, I therefore disallowed the claim, and struck the claimant's name out of the list of claimants.

If the court be of opinion that the claimant was entitled to be registered as a voter, either as the owner of an equitable estate in the said lands and tenements, or as being entitled to a rentcharge of the requisite amount issuing out of the same, then the claimant's name is to be restored. If entitled in respect of a rentcharge only, then the name of the hospital is to be inserted in the fourth column as owner of the said lands and tenements.

Shield for the appellant. — The appellant is entitled to the county franchise under the Act of 1867 (30 & 31 Vict. c. 102), sect. 5, sub-sect. 1; or, secondly, under the 8 Hen. 6, c. 7. He had an equitable estate for life in land of 5*l.* yearly value. He was only removable for certain causes, and that not by the person who appointed him. There were no hospital buildings, and this case is not like those where a claim has been made in respect of a room or rooms in a hospital. It is a claim in respect of an interest in lands, out of the profits of which the hospital is supported. The estate of the claimant is not of an eleemosynary character. Each of the younger brethren is the equitable owner of that fraction of the net surplus rents and profits which is denominated by their number. The younger brethren are tenants in common. They have an equitable estate in the whole lands of the hospital, subject to a charge in favour of the master and ancient brethren. [BRETT, J.—Can you maintain that the corporation aggregate hold the whole of the land in trust for the younger brethren?] They hold the whole in trust to pay themselves a fixed proportion and give the younger brethren the residue. [BRETT, J.—In that case have they not also an equitable estate? *Manisty*, Q. C. cited *Steele* v. *Bosworth* (Hop. & Phil. 106).] The distinction between that case and this is, that there there is no disposition of the surplus. The younger brethren are entitled to the whole of the surplus, provided the share of each does not exceed 25*l.* If it does exceed that sum, the number of younger brethren is increased, until the whole of the surplus can be divided between them. If the younger brethren are not entitled to the whole surplus, then and only then can they be described as having a mere right to a sum of money payable out of it. There is also this distinction, that there was something intermediate between the persons holding the legal estate and the claimants. *Roberts* v. *Perceval* (Hop. & Phil. 121) is an authority for the claimant. Secondly, the claimant is entitled under 8 Hen. 6 c. 7. The younger brethren have a legal estate in a tenement *i.e.*, in a sum of money issuing out of land. They have a rentcharge: (*Rex* v. *The Inhabitants of Tolpuddle*, 4 T. Rep. 671.) They have a right to be paid a variable sum of money issuing out of the lands. This is a payment for which a distress is an appropriate remedy. [BRETT, J.—Can you say the claimant has a rentcharge, when the sum is fluctuating?] The sum is capable of being made certain, and that is sufficient. You may also describe their interest as an annuity charged on the land. This point was not raised in *Steele* v. *Bosworth*. [BOVILL, C.J.—Can you call a money payment to be made out of certain surplus rents, if there is any surplus, a tenement?] He cited also

Reg. v. *Westbrook*, 10 Q. B. 178;
Robinson v. *Ainge*, 19 L. T. Rep. N. S. 644; H. & C. 198;
Ashmore v. *Lees*, 1 Lutw. 367; 2 C. B. 21.

Manisty, Q. C. (*Crompton* with him) for the respondent, was not called upon.

BOVILL, C.J.—By the constitution of this hospital the legal estate in the lands belonging to the hospital, was in the corporation, and the direction and management of them was vested in the master, who, according to the fifth paragraph of the case, was to receive and keep account of the revenues thereof, and in the first place pay, &c. [His Lordship here read the remainder of the fifth paragraph.] Upon the terms of that constitution, it appears to me that the younger brethren were entitled only to an equitable right to a share of money which might form a surplus, after the portion allotted to the master, the ancient brethren, and the chaplain, had been paid. I think the facts are even stronger than they were in *Steele* v. *Bosworth*, against the vote. It is difficult to make out what description of estate or interest any of the younger brethren had in land, and Mr. Shield has been unable to define it. It is difficult to say in the case of the ancient brethren, and still more so in the case of the younger brethren. The latter are entitled to an interest in certain money but not to an interest in land. If that is so, it is clear that, under the constitution of the hospital, they have neither a legal nor an equitable estate in land, or in any rent, or in anything in the nature of rent issuing out of land. I think the case is governed by *Steele* v. *Bosworth*, that the revising barrister was quite right, and that his decision must be affirmed.

KEATING, J.—I am of the same opinion. Numerous cases have arisen on the sort of question raised here, and the question has always been whether the claimant could make out that he had an equitable interest with respect to any portion of the proceeds of real estate, fixing it to any portion of the estate legal or equitable. In the present instance, there is a total absence of any defined portion either of the estate or of the proceeds thereof. The first payments were to be made by the master to himself, the ancient brethren, and the chaplain, and, after these were made, the surplus was to be divided among the younger brethren so as the share of one should not exceed £25 per annum. I do not think we could say, without overruling *Steele* v. *Bosworth*, that this was a qualification. The two cases are very similar as to their facts. The same remark applies here as there, as to the surplus not being disposed of; as, if in the present case a surplus remained after paying the younger brethren £25 each, the master would retain it in his hands. In *Steele* v. *Bosworth* it was decided that the claimant was not entitled to an equitable interest in land, but only to a money payment. The same remark applies here. The claimant had nothing more, so that *Steele* v. *Bosworth* is a direct authority against him. It is said that the claimant's interest is a rentcharge issuing out of land. But it is a fluctuating sum. Supposing the claimant wanted to distrain for his money, what would he distrain for? He has not a rentcharge, and his claim fails on this ground also. The claimant has nothing more than the claimant in *Steele* v. *Bosworth* had, viz., an equitable right to a money payment.

BRETT, J.—The claimant in this case claims a county vote in respect of a freehold interest in land, and he is bound to show that he has such a freehold interest of either a legal or an equitable nature. It is not pretended that he has any legal estate; we then

question remains whether he has any estate in equity. He must show that he has an equitable interest either in the whole estates of the hospital as tenant in common with other persons, or else in some specific portion of them capable of separation from the rest. Can it now be said that the claimant is equitable tenant in common of the whole lands of the hospital? If he is, the corporation has no beneficial interest at all. Is he equitable tenant in common with the master? If he is, the master can have no interest at all. Has he an equitable interest as tenant in common in any specific land? Mr. Shield is obliged to say that whatever interest he has is in the whole of the lands, and that the interest of the master is a charge upon his interest. It is impossible to maintain that. If, then, the claimant has an equitable interest at all in this land, what is it? I am sure I cannot say. The claimant is not entitled to any money payment which can be said to issue out of any specific part of the land. He is entitled to a share in certain money after certain sums have been paid, and even then he is not entitled to the whole surplus absolutely, as if the surplus amounts to such a sum that his share would exceed 25*l.*, he still would not get more than that sum, but the excess would remain in the hands of the master. Under these circumstances, I think *Steele* v. *Bosworth* is a direct authority against the claim. Then it is said that the claimant has a free tenement, so as to be entitled under 8 Hen. 6, c. 7. When Mr. Shield is asked to define it, he says it is rentcharge. I may remark first, that if the claimant is entitled only to a money payment out of money in the hands of another, it does not issue out of land at all secondly, the amount to which the claimant is entitled is a fluctuating sum, and so no distress could be levied for it, and so the statute which gives a distress as a remedy in all cases of rentcharge shows that this is not a rentcharge. The claimant, therefore, has neither a legal nor an equitable estate in the land, nor has he a free tenement so as to entitle him to a vote.

GROVE, J.—I am of the same opinion.

Decision affirmed.

Attorney for appellant, *Hicken.*

Attorney for repondent, *Rogerson* and *Ford.*

END OF VOL. VII.